

**Docket No. 46742**

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

**EMPLOYERS RESOURCE MANAGEMENT COMPANY, an Idaho Corporation,**

Plaintiff/Appellant,

-vs-

**TOM KEALEY, in his capacity as Director of the IDAHO DEPARTMENT OF COMMERCE,**

Defendant/Respondent.

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**APPELLANT'S REPLY BRIEF**

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Appeal from the District Court of the Fourth Judicial District Court  
for Ada County, State of Idaho

The Honorable Samuel Hoagland, District Judge Presiding

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## **I. INTRODUCTION**

What is interesting, and telling, about the Response Brief (Resp. Br) of Respondent/Defendant Idaho Department of Commerce (“Department”) is that half of it is taken up with extolling the virtues of the Idaho Reimbursement and Incentive Act (“IRIA”), which is completely irrelevant to the constitutional issues presented to this Court. When the Brief finally gets around to the real issues, the unconstitutional limitation on judicial review and the unconstitutional delegation of legislative power, it is unable to rebut the arguments set out in Appellant’s opening Brief. Appellant Employers’ Resource Management Company (“ERMC”) submits that the IRIA is unconstitutional and however meritorious the policy behind the Act, the Court should find it to be unconstitutional.

As ERMC stated in its Opening Brief, it recognizes that courts presume the constitutionality of statutes and that it bears the burden of showing the invalidity of the IRIA. *See State v. Delling*, 152 Idaho 122, 267 P.3d 709 (2011). This Court, however, also recognizes that it has the obligation to uphold the state constitution by striking down legislative actions that go too far. *See, e.g., Village of Moyie Springs v. Aurora Manufacturing Co.*, 82 Idaho 337, 348, 353 P.2d 767, 778 (1960). ERMC submits that the Legislature went too far with the IRIA and violated the constitutional separation of powers by granting the Department of Commerce Economic Advisory Committee (EAC) and the Department improper judicial power and legislative power.

## **II. THE IRIA IS UNCONSTITUTIONAL AS IT LIMITS JUDICIAL REVIEW**

The Department’s response to ERMC’s argument regarding the IRIA’s intrusion into the judiciary’s power misconstrues ERMC’s argument and appears to misunderstand this Court’s

previous decision. First of all, ERMC does not argue that this Court has already decided the merits of this argument in its prior opinion, *Employers Resource Management Co. v. Ronk*, 162 Idaho 774, 71 n.3, 405 P.3d 33, 40 n.3 (2017). Rather, ERMC observed that several members of the Court on their own during oral argument on the standing issue had raised concerns with the IRIA's limitations on judicial review of Department/EAC decisions. It is interesting that the Department's brief argues both (a) that this Court in its earlier decision did not deal with the substantive merits of ERMC's argument regarding judicial review and (b) that this Court did in fact decide the substantive issue that competitors could challenge the EAC's decision to approve an application for tax credits despite the language of the statute. The Department cannot have it both ways and presumably this Court cannot revise the language of a statute.

Neither does ERMC attempt to argue that all administrative agency decisions must be treated as "contested cases" or that agencies are always required to make findings of fact. Instead, ERMC has pointed out the fact that the IRIA has made EAC's decisions virtually non-reviewable and thus insulated the agency from judicial review. It therefore gives "such finality to the determinations made by the administrative agency thereunder that property and constitutional rights of citizens may be conclusively determined without right to adequate judicial review," *State v. Concrete Processors*, 85 Idaho 277, 282, 370 P.2d 89, 94 (1963), and therefore violates the Constitution.

As discussed in detail in ERMC's opening brief and in the Department's brief, the IRIA simply contains a list of items that an applicant must discuss. The Legislature does not inform or restrict the agency as to what weight any specific factor should bear. The language of the Act provides that the Director of the Department simply ensures that the application discusses each of those factors and then forwards the application to the Economic Advisory Council which is

“given broad discretion to approve or deny applications for the IRIA tax credit.” *Ronk*, 162 Idaho at 776, 405 P.3d at 35. Under the IRIA, the EAC is not required to explain to anyone, including the Director, how it reached its decision on the application or why it approved or denied the application. It is not required to make findings of fact. Its consideration of an application is not treated as a contested proceeding. There is no administrative appeal under the relevant IDAPA rules.

The statute does provide that “an aggrieved applicant” can seek judicial review. Idaho Code § 67-4739 (2). Of course, the question remains: if only “an aggrieved applicant” is entitled to seek judicial review, and there is no contested case nor findings of fact and no limitations on what the EAC can consider or whether or how the statutory list of factors should be weighed, how can there be realistic judicial review? How can a court find that any denial of an application is arbitrary or capricious or an abuse of discretion under the Administrative Procedure Act when the statute does not limit the EAC's discretion and there is no record to determine whether a denial was arbitrary or capricious.

Perhaps more importantly, the statute attempts to restrict the courts' power of judicial review except as to aggrieved applicants. The IRIA does not allow for judicial review by a competitor of an approved applicant. The IRIA specifically excludes judicial review for anyone other than an “aggrieved applicant.” While this Court's earlier opinion does allow a competitor such as ERMC to challenge the constitutionality of the entire statute because that statute “unlevels the playing field,” there is no mechanism in the statute by which a competitor could challenge the specific action of the Department and the EAC in granting a tax credit to a competitor.

Thus, judicial review of all of the decisions of the EAC under the IRIA is effectively eliminated, in violation of the Idaho Constitution. The Department's entire argument regarding judicial review, either for aggrieved applicants or concerned competitors, rests on the fallacy that there is anything to review under the statute. To the contrary, the EAC is a "black hole" both in terms of any standards that it must comply with and in terms of the visibility of its process. The Department argues that it has a variety of factors that it must consider (although not "weigh") when it considers what applications to provide to the EAC. It is telling to note that the Department does not attempt to suggest how the EAC deals with the applications it receives from the Department. The EAC does not issue findings of fact. It does not announce the basis for its decisions. It does not appear to keep records of any deliberation that occurs regarding applications. It does not explain why it denied the one application, even though the Department had approved submission of that application to the EAC, presumably representing that all of the statutory factors had been included in the application. There are simply no standards that the EAC has to comply with and no basis on which a court could exercise judicial review. As discussed below, the Act allows unfettered discretion not subject to judicial review.

### **III. THE LEGISLATURE IMPROPERLY DELEGATED AUTHORITY TO THE DEPARTMENT AND THE EAC**

In *Gundy v. United States* (U.S. Supreme Court June 20, 2019, No. 17-6086), several members of the United States Supreme Court indicated a willingness to reconsider the "administrative state" under the non-delegation of legislative powers provisions of the United States Constitution. ERMC in this case does not ask this Court to delve into the legal and philosophical complexities of the general topic but simply asks this Court to recognize that the IRIA violates the Idaho Constitution by delegating to the EAC the practical ability to grant tax credits/subsidies. While there is a strong Idaho constitutional concern with the delegation of

legislative powers in all matters, that concern is exacerbated when the topic is that of taxation and particularly the allowance of exemptions. Idaho Constitution, Article 3, Section 1; Article VII, Section 5 (“all taxes shall be uniform upon the same class of subjects [but] the legislature may allow such exemptions from taxation from time to time as shall seem necessary and just”). This plenary authority of the Legislature is nondelegable.

While the United States Supreme Court's decisions regarding federal separation of powers doctrine are not controlling, its decisions may help to illustrate the topic. As far back as 1928, the Court considered whether a statutory delegation is constitutional and agreed that it may be, but only as long as Congress “lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.” *J.W. Hampton, Jr., and Co. v. United States*, 276 U.S. 394, 409 (1928). The constitutional question is answered by review of the statute to see what instructions it provides. *Woodland v. American Trucking Associations, Inc.*, 531 U.S. 457, 473 (2001). Chief Justice John Marshall explained in 1892 that Congress may not “delegate ... powers which are strictly and exclusively legislative.” *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892). In *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the United States Supreme Court struck down a statute for violating the separation of powers. That statute transferred to the executive branch the power to approve codes of fair competition but offered no meaningful guidance. Justice Cardozo commented in a concurrence that “this is delegation running riot.” *Id.* at 553 (concurring opinion).

So too in this case of the IRIA is there “delegation running riot,” as there are no meaningful standards to guide the EAC’s exercise of authority. The EAC is not implementing the law but is making law without the necessity to conform to an intelligible principle mandated

by the Legislature. Thus the Idaho constitutional principle of separation of powers has been violated.

**A. The Statutory Scheme.**

The IRIA is not a situation where the Legislature supplies a clear statement of legislative policy and then authorizes the Department of Commerce to focus on the details. Instead, the IRIA sets up a process by which the non-elected EAC appears to have almost boundless discretion without judicial review or legislative oversight to determine which entities get a tax credit that may amount to (and has amounted to) millions of dollars in savings that can be used to reduce that entity's overhead in contrast to non-favored entities. It therefore, as this Court previously observed, "unlevels the playing field." *Ronk*, supra at 781, 405 P.3d at 40. The situation appears to be the very essence of what the separation of powers is designed to prohibit.

The EAC does not simply find facts or fill in the details of a legislative enactment. To the contrary, applications are submitted to it, they are processed in the EAC "black hole," a decision is made and the EAC then "instructs" the Director of the Department to enter into an agreement with the applicant. There is no oversight of the EAC's decision-making by the Director or the Legislature, and as discussed above there is no oversight by the judiciary either.

The Department's response appears to be that the EAC has no real power because the Director has already determined what applications will come before the EAC. If the EAC does nothing substantively, then why does it even exist? If the EAC does not have any discretion, then why is there a need for the creation of this entity simply to rubber stamp the applications permitted by the Director? If the EAC has no power, then why does the IRIA provide that if the EAC approves the application, it shall "instruct" the Director to enter into an agreement and the Director has no option except to do so? And, alternatively, if the EAC is designed to limit the

discretion of the Director, how can the Director retain the absolute power to determine what applications the EAC will consider?

**B. The Department's Process.**

The Department describes a five-layer review process the Department has implemented to ensure systematic review of applications. (Resp. Br. 10-14). However, this process was not created by the IRIA or the IDAPA rules governing the IRIA.

The first layer described by the Department requires the Department's Grants & Contracts Manager ("GCM") to review the application for compliance and conduct an economic impact analysis. (Resp. Br. 10). Reviewing the application for compliance is the only step required by the Act. I.C. § 67-4739. The economic impact analysis is a procedure originated by the Department. IDAPA 28.04.01.152.07.

The Legislature directs the Director to submit the application to the EAC for review after ensuring an application meets all the requirements. I.C. § 67-4739. At this point, however, the Department without legislative direction sends the application through an additional layer of review that considers additional criteria beyond those laid out by the Legislature. (Resp. Br. 11). Next, the Department conducts a third layer of review and assigns a recommended TRI term and percentage. (*Id.* at 11-12). The Department claims that at this point that it has completed the "first fact-finding task the legislature delegated to it: determining the lowest tax credit necessary to incentivize job creation in Idaho." (*Id.* at 12). However, the Legislature did not direct the Department to determine the lowest tax credit necessary prior to submitting an application to the EAC for review nor direct the EAC to consider the lowest tax credit necessary.

In fact, the Legislature directs the Department to determine the lowest tax credit necessary to incentivize job creation after reviewing the applicant's annual report. I.C. § 67-

4741. Therefore, the Department is not directed to determine this amount until *after* the EAC has approved the application and the Director has entered into an Agreement with the applicant. I.C. §§ 67-4739, 67-4740, 67-4741(3)(a). In practice, the Department apparently has determined the TRI term and percentage prior to submitting the application to the EAC and includes these as terms of the incentive agreement with the applicant. (Resp. Br. 13). Tax credits are then issued to the applicant according to the credit percentages and length specified in the incentive agreement, rather than determining the lowest tax credit necessary annually after review of the applicant's annual report, as is contemplated by the IRIA. I.C. § 67-4741; IDAPA 28.04.01.210.

The Department also claims that the EAC's approval or denial of an application is a determination of whether the Department has identified the lowest incentive necessary. (Resp. Br. 25). However, the Legislature only directed the EAC to review the application for purposes of approving or denying an application. I.C. § 67-4739. Since the EAC is not required to consider the lowest incentive necessary when approving or denying an application, its approval cannot be considered a determination that the lowest incentive necessary was identified.

With respect to the EAC's discretion to approve or deny applications, the Department states that the EAC may not deviate from the terms of reimbursement recommended by the Director and cannot set or alter the terms of any credit. (Resp. Br. 13). These restrictions, however, are not stated in either the Act or the Department rules. In fact, under the statute the EAC is only required to consider the application in deciding whether to approve or deny a tax incentive under the IRIA. I.C. § 67-4739. If the application is approved by the EAC the Legislature instructs the Director to enter into an agreement with the applicant under the terms of the EAC's approval in addition to the terms required by the Legislature. I.C. §§ 67-4739, 67-

4740. Therefore, the EAC does set terms for reimbursement and the Legislature requires the Director to use these terms when entering the incentive agreement with the applicant.

The Department does not merely ascertain the existence of facts or conditions upon which a tax incentive becomes operative. The Legislature did not provide guidance on how to weigh the factors listed in the legislation or provide any other limits to the EAC's discretion to approve or deny applications. Because the constitutional standards for delegation of legislative authority have not been met, the IRIA is unconstitutional.

#### **IV. IT IS IRRELEVANT IF THE POLICY IS BENEFICIAL IF THE STATUTE IS UNCONSTITUTIONAL**

The Department spends a good portion of its brief arguing that the Legislature made a wise policy or political choice in creating certain tax credits. It argues that the policy has "greatly benefited Idaho as a whole" and helped Idaho "compete in the national and global market place." (Resp. Br. at 2).

ERMC did not bring this lawsuit to debate the merits of these tax credits, although the Court may wish to take note that there is some incongruity in the fact that the state is taxing ERMC to fund tax credits for an out-of-state competitor, which creates an unlevel playing field.

Instead, ERMC is challenging the procedure and the process by which tax credits are arbitrarily awarded and the process by which the judiciary is excluded from exercising its constitutional obligation to review governmental decision-making. It is not the decisions per se that emerge from the black hole of the EAC process; it is the arbitrary and mysterious process that is effectively shielded from judicial review that is the issue before this Court.

The drafters of the Idaho Constitution wished to restrain the arbitrary exercise of governmental power. That is why they implemented limitations on each branch of government and provided for the separation of powers. That is why the decision-making process as well as

the decisions that emerge from that process must not be arbitrary or capricious and must be subject to review by the judiciary. The IRIA fails in all respects to preserve the separation of powers and thus fails to comply with the Constitution.

**V. ERMIC SHOULD BE AWARDED ITS ATTORNEY'S FEES**

ERMIC submits that the IRIA clearly violates the Constitution and it was not reasonable for the Department to defend the Act. Accordingly, ERMIC respectfully requests the Court to grant its attorney's fees on appeal pursuant to Idaho Code § 12-117.

**VI. CONCLUSION**

ERMIC respectfully requests the Court to reverse the district court's decision and instead hold that the IRIA violates the Constitution and the decisions of the Department and the EAC thereunder are void ab initio.

Respectfully submitted this 17th day of July, 2019.

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