STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

March 9, 2009

Sent Via Hand Delivery

Senator Gary J. Schroeder
Idaho Senate
Senator Jon Thorson
Idaho Senate

Re: Senate Bill 1124

Dear Senators Schroeder and Thorson:

You both asked this office to review Senate Bill 1124, which would: (1) require an agreement between all involved federal, state and private entities prior to transplant or relocation of bighorn sheep; (2) devolve decision-making authority to boards of county commissioners for approval of proposed bighorn sheep transplant or relocation plans; (3) require the Idaho Department of Fish and Game to relocate bighorn sheep in the event that bighorn sheep stray into close proximity with domestic sheep on private, state or federal lands; and (4) impose certain testing requirements for communicable diseases prior to any transportation of deer, elk, antelope, moose, bighorn sheep or bison. Each aspect of the bill will be addressed in turn.

(1) Requirement of hold harmless agreements prior to transplant or relocation of bighorn sheep.

Senate Bill 1124 would require all federal, state and private entities involved in the transplant or relocation of bighorn sheep to sign an agreement acknowledging that the transplant or relocation will not adversely affect existing domestic sheep operations, and holding domestic sheep and livestock operations harmless from all adverse impacts.

As a first principle, it must be recognized that under the Supremacy Clause of the United States Constitution, the State may not require federal officials to enter into such an agreement as a prerequisite to actions authorized by federal statute. In other words, if federal laws empower federal agencies to transplant or relocate bighorn sheep, they may do so without complying with the terms of Senate Bill 1124. Thus, the primary effect to these provisions of Senate Bill 1124

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would be to prevent state officials from transplanting or relocating bighorn sheep without the written concurrence of involved federal and private entities.

Despite the above-stated principle, Senate Bill 1124 may serve to provide a framework for cooperation between federal and state officials. A number of federal laws and regulations require "programs for the conservation and rehabilitation of wildlife, fish, and game" to be implemented "in cooperation with the State agencies." 16 U.S.C. § 670h(a)(1); 16 U.S.C. § 670g; *see also* 16 U.S.C. § 670h(c)(1) (cooperative programs with state agencies). Cooperation with state agencies is contemplated for "plans for securing and maintaining desirable populations of wildlife species." 36 C.F.R. § 241.2. Forest Service officials are also directed to "cooperate with State game officials in the planned and orderly removal in accordance with the requirements of State laws of the crop of game, fish, fur-bearers and other wildlife on national forest lands." *Id.*

Such mandated cooperation, however, does not foreclose the possibility of unilateral transplantation or relocation of bighorn sheep by federal agencies, nor does it foreclose the possibility of federal officials taking action under federal laws or regulations to restrict grazing on federal allotments in order to prevent contact with bighorn sheep or other wildlife. The Property Clause of the United States Constitution vests Congress with "plenary power over" national forests and other federal lands. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 593 (1987); *see also Kleppe v. New Mexico*, 426 U.S. 529 (1976) (federal Wild and Free-Roaming Horses and Burros Act preempted State of New Mexico from enforcing its estray regulations on Bureau of Land Management and Forest Service lands); *Hunt v United States*, 278 U.S. 96 (1928) ("the game laws or any other statute of the state to the contrary notwithstanding," the Forest Service man destroy deer herds where necessary to "protect its lands and property").

For example, the National Forest Management Act (NFMA) has been interpreted to require the Forest Service to "safeguard the continued viability of wildlife in the Forest." *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 961 (9th Cir. 2002); *see also Ecology Center, Inc. v. Austin*, 430 F.3d 1057, 1062 (9th Cir. 2005) (NFMA includes a "mandate to maintain wild-life viability"). It is likely that federal courts would interpret the mandates in the NFMA to require federal action to protect bighorn sheep even where federal officers had entered into an agreement to hold domestic sheep owners harmless from any adverse impacts on bighorn sheep. It is a fundamental principle of contract law that in the event of a conflict between an agreement and a statutory mandate, the agreement is void. *Whitney v. Continental Life & Acc. Co.*, 89 Idaho 96, 105, 403 P.2d 573, 579 (1965) (holding that if a contract is void as against public policy, then the court will refuse to enforce it).

One area of known conflict between bighorn sheep and domestic livestock is the Hells Canyon Recreation Area ("HCNRA"). The Hells Canyon National Recreation Area Act ("HCNRA Act") requires the Secretary of Agriculture to administer the recreation area for

various purposes including the "protection and maintenance of fish and wildlife habitat." 16 U.S.C. § 460gg-4(4). The Secretary additionally is authorized to utilize the HCNRA for, *inter alia*, grazing to the extent "compatible with the provisions of this [Act]." *Id.* § 460gg-4(7). Implementing regulations require termination of domestic livestock use "where . . . incompatible with the protection, restoration, or maintenance of fish and wildlife *or* their habitat." 36 C.F.R. § 292.48 (emphasis supplied). This regulatory provision has been cited as a basis for modifying domestic sheep grazing practices when inconsistent with the sustainability of bighorn populations. *Idaho Wildlife Fed'n v. Richmond*, No. 94-1347-AS, at 18 (D. Or. Apr. 10, 1996). While the HCNRA Act also recognizes grazing as a "traditional and valid" use of the HCNRA, 16 U.S.C. § 460gg-10, the regulations governing grazing within the HCNRA state that where "domestic livestock grazing is incompatible with the protection, restoration, or maintenance of fish and wildlife or their habitats . . . the livestock use shall be modified as necessary to eliminate or avoid the incompatibility." 36 C.F.R. § 292.48(b).

Given the above regulations, federal courts may continue to require federal agencies to restrict livestock grazing where such restrictions are deemed necessary to protect bighorn sheep. Due to preemption principles, Senate Bill 1124 would not operate to prevent such restrictions.

(2) Devolvement of decision-making authority to boards of county commissioners for approval of proposed bighorn sheep transplant or relocation plans.

The provisions of Senate Bill 1124 devolving ultimate decision-making authority to boards of county commissioners to approve, modify or cancel proposed bighorn sheep transplant or relocation do not appear to violate restrictions on delegation of legislative authority, despite the lack of statutory standards defining the circumstances under which counties may approve, modify or cancel bighorn sheep transplant or relocation plans. The non-delegation doctrine is generally inapplicable when delegations are made "to another legislative body." *Sun Valley Co. v. City of Sun Valley*, 109 Idaho 424, 428, 708 P.2d 147, 151 (1985), *overruled on other grounds, Concerned Taxpayers of Kootenai County v. Kootenai County*, 137 Idaho 496, 499, 50 P.3d 991, 994 (2002).

The devolvement of final decision-making authority to county officials for transplantation or relocation of bighorn sheep, however, could be interpreted by federal authorities as relieving them of the obligation to cooperate in decisions relating to the transplantation or relocation of bighorn sheep. While there is a long history of federal deference to state wildlife laws, there is not a similar history of deference to county wildlife ordinances. Likewise, while federal statues and regulations require federal agencies to cooperate with *state* agencies and officials in regard to wildlife management, *see, e.g.*, 16 U.S.C. § 670g; 36 C.F.R. § 241.2, there are no similar requirements requiring cooperation with *county* officials. Thus, devolving authority over bighorn sheep management to county commissions could actually result in an increased federal role in bighorn sheep management.

(3) Relocation of Bighorn Sheep When in Close Proximity to Domestic Sheep.

Senate Bill 1124 would require IDFG to relocate bighorn sheep when in "close proximity" to domestic sheep, unless the director of IDFG certifies that "there is no risk of disease transmission between the bighorn sheep and the domestic sheep." Standards are provided for determining such risk. Senate Bill 1124 then goes on to provide, however, that if owners or leaseholders object to the sufficiency of the director's certification, then the director must relocate the bighorn sheep despite the certification. The owner or leaseholder may apparently object on any basis—in essence, the owner or leaseholder may "veto" the director's certification. It is possible that a court would conclude that this constitutes an unconstitutional delegation of legislative authority to the private entity. *Newport Intern. University, Inc. v. State, Dept. of Educ.*, 186 P.3d 382, 390 (Wyo. 2008) (delegation of legislative powers to private entity without sufficient standards to determine whether entity is carrying out legislature's intent may violate due process).

On the other hand, it is possible that a reviewing court would interpret this provision to require the owner's or leaseholder's concurrence as an element of the director's determination that that there is an "appropriate separation" between the bighorn sheep and the domestic sheep. In other words, the requirement could be interpreted as an acknowledgement that determination of the "appropriate separation" is dependent on the particular circumstances, so that the director could not make a finding of appropriateness without the concurrence of affected owners or leaseholders. Under such an interpretation the statute would likely be held constitutional.

(4) Disease Testing and Transportation of Listed Big Game Animals.

Senate Bill 1124 would amend Idaho Code § 36-106(e)(9) to provide that before importation or transportation of deer, elk, antelope, moose, bighorn sheep or bison, all animals shall be tested for "any" communicable disease that can be transmitted to domestic livestock. The term "domestic livestock," however, is not defined in Title 36. Various sections of the Idaho Code define the term "livestock" to include "any cattle, sheep, goat, swine, poultry, or equine animals used for food or in the production of food fiber, feed, or other agricultural-based consumer products" (Idaho Code § 22-1102); "wild or domesticated game" (*Id.*); domestic ratites including cassowary, ostrich, emu and rhea (Idaho Code § 25-3601); horses, mules, and asses (Idaho Code § 25-1101); mink, chinchilla and other fur-bearing animals (Idaho Code § 25-3001), and domestic elk, reindeer, and fallow deer (Idaho Code § 25-3701). Given the many definitions of the term "domestic livestock," the amended provision may be difficult to implement.

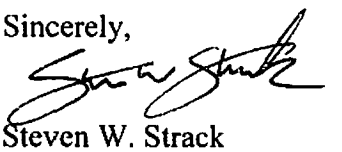
The proposed amendment to §36-106(e)(9) expanding testing to "*any* communicable disease that can be transmitted to domestic livestock" would involve testing of all listed animals for all diseases that can be transmitted to domestic livestock, regardless of whether the particular animal can carry the disease, whether the disease is expected to occur in Idaho, and whether the

disease is harmful to domestic livestock. Such a requirement would significantly expand ISDA and IDFG duties.

The proposed amendment to §36-106(9) and §25-210(e)(3) requires testing "prior to" transport or importation. In conjunction with the proposed prohibition against relocation, transport or importation of any of the listed species testing positive, this requirement may pose additional implementation issues in terms of the location and duration of animal confinement (in cases such as the currently common occurrence of relocating moose were they pose a safety risk when wandering into developed areas).

This letter is provided to assist you and is not intended as a formal legal opinion or to represent the views of this office on any policy issues. Rather, this response is an informal and unofficial expression of the views of this office addressing the legal questions you presented based upon the research of the author.

Sincerely,



Steven W. Strack
Deputy Attorney General

SWT/olv

cc: Sen. Pearce
Rep. Denney