STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
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September 21, 2020

Hon. Lauren Necochea
Idaho House of Representatives
District 19
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Dear Representative Necochea,

I write in response to your letter dated September 16, 2020 requesting answers to the following questions:

1. Do proposed Washington County Ordinances #86, #87 and #88 run afoul of the U.S. Constitution's Supremacy Clause, as a result of "interference" with federal laws and regulations by effectively regulating the activities of the federal government?

2. Could Washington County be exposed to legal costs resulting from a challenge by the federal government or other parties?

SUMMARY RESPONSE:

It is highly likely that the proposed ordinances would be found invalid by a reviewing court because the ordinances attempt to regulate or interfere with actions of the Federal Government that are specifically allowed for by federal law and regulations and for which authority is exclusively vested in the federal land management agencies. While state and local jurisdiction was preserved over federal lands in the Organic Administration Act of 1897, state or local laws that conflict with federal law are still preempted under the Supremacy Clause of the United States Constitution.

If legal challenge were brought to challenge these ordinances, it is undoubted that Washington County would incur legal expenses and costs in defending the ordinances. A federal court may award the prevailing party in any such challenge their respective court

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costs pursuant to Federal Rule of Civil Procedure 54, but not necessarily attorney fees. Presumably, the challenging party would be the United States it is unlikely that Washington County would be liable for the United States' attorney fees as there is no statutory authority under which a court would award the U.S. its fees.

ANALYSIS:

I will begin by summarizing the legal effects of the three ordinances so as to illumintate the discussion below and how these ordinances are likely preempted by federal law.

Ordinance #86 – provides for legal restrictions and prohibitions regarding prescribed burning on federal lands. It:

1. Requires compliance with Idaho DEQ's rules;
2. Limits spring burning;
3. Prohibits prescribed burns during wildfire season;
4. Requires that before a prescribed fire is permitted, the land management agency must use other forest management methods;
5. Requires the permission of allotment owners and adjacent landowners;
6. Requires permission from the County Commissioners and Sheriff; and,
7. Creates personal liability for the person "designated to start and oversee the prescribed burn" and criminal liability for any person violating the requirements.

Ordinance #87- provides for restrictions on federal activities relating to roadways in the National Forest. It:

1. Requires permission from the County Commission and Sheriff to close any road;
2. Allows the Sheriff to open any closed road;
3. Prohibits Federal Officials from enforcing any laws without permission of the Sheriff; and
4. Requires the United States to "allow and promote timber extraction, mining activities and grazing."

Ordinance #88 – purports to create property rights in allotted federal lands, authorize allotment holders to manage their allotment lands and waters and extract resources from the federal lands within their allotments by:

1. Thinning Timber, planting grass and other practices to improve grazing value;
2. Improve water resources;
3. Extract timber and stone for personal use;
4. Allows the Sheriff to "protect these rights" and prosecute anyone who interferes with the exercise of such rights.

The Organic Administrative Act of 1897

Each of the three ordinances is premised in part upon an interpretation of the Organic Administration Act of 1897. This act authorized the President to establish forest reserves "to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." 30 Stat. 11, 35. When the Organic Act was passed, the state of the law was such that Congress was concerned that national forests would be construed as "enclaves" that would be subject to exclusive federal jurisdiction. *U.S. v. Gabrion*, 517 F.3d 839, 853-54 (2008). To foreclose this possibility, Congress included the following provision in the Organic Act:

> The jurisdiction, both civil and criminal, over persons within national forests shall not be affected or changed by reason of their existence, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens [of the State], or be absolved from their duties as citizens of the State.

30 Stat. at 36 (codified at 16 U.S.C. § 480). Section 480 "ensures that the mere change in ownership (from privately owned or State-owned to federally-owned) [lands] does not result in *exclusive* federal jurisdiction over these lands." *Gabrion*, 517 F.3d at 854.

Conversely, however, § 480 does not foreclose the exercise of federal jurisdiction over actions occurring on national forest lands. State jurisdiction is merely concurrent with federal jurisdiction and, concurrent state jurisdiction over national forest lands "'does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them.'" *Wyoming v. United States*, 279 F.3d 1214, 1227 (10th Cir. 2002) (quoting *Utah Power and Light Co. v. United States*, 243 U.S. 389, 404 (1917)). "[W]hen Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause." *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976). Likewise, federal courts recognize that "a federal agency by way of congressional delegation of authority also may preempt state laws and regulations." *Utah Native Plant Soc'y v. United States Forest Serv.*, 923 F.3d 860, 868 (10th Cir. 2019). "Such federal regulations preempt state law to the extent compliance with both is impossible, or 'where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation.'" *Id.* (quoting *Hillsborough Cty. v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 713 (1985).

Applying the above rules, federal courts have stricken local ordinances requiring thinning and removal of undergrowth in national forests to mitigate fire danger because the local

ordinance conflicted with Forest Service regulations requiring permission of the Forest Service before anyone could cut or otherwise damage "any timber, tree, or other forest product" in a national forest. *United States v. Bd. of Cty. Commissioners of Cty. of Otero*, 843 F.3d 1208, 1211 (10th Cir. 2016) (citing 36 C.F.R. § 261.69a) (2016).

The subjects addressed by the Washington County ordinances are all subject to federal statutes and regulations. The Organic Act of 1897 provides that the Secretary of Agriculture "shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests ...." 30 Stat. at 35 (codified at 16 U.S.C. § 551). 16 U.S.C. § 551c-1 addresses prescribed burns and limits the circumstances under which coordination with local fire officials is required. More generally, the Organic Act directed the Secretary to "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests from destruction." *Id.* (codified at 16 U.S.C. § 551). Road management and road closures are subject to an extensive system of federal regulation. *See, e.g.*, 16 U.S.C. §§ 532-538; 36 C.F.R. part 212 (travel management). The rights of grazing permittees are likewise extensively regulated by the Forest Service. *See, e.g.*, 36 C.F.R. §§ 222.1-222.54. Finally the civil liability of federal agency employees is addressed by the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80. State law may not create liability for a federal employee that is in conflict with the TCA.

While the Clean Air Act, does contain a waiver of sovereign immunity allowing regulation of federal agencies for purposes of air pollution requirements, see 42 USC § 7418, only a couple of provisions in ordinance #86 are related to air pollution. And, as noted above many would conflict with specific laws relating to prescribed burning on the National Forest.

Grazing Preferences

Another premise specifically called out in Ordinance # 88 is the preference rights created by the Taylor Grazing Act of 1934, 43 U.S.C. § 315 and federal regulations found at 43 CFR Part 4100. The characterization of these preference rights by the ordinance however is in error. Section 3 of the Taylor Grazing Act makes it clear that grazing preferences do not give rise to a property right in the land. *See* 43 USC § 315b; *see also* 36 C.F.R. § 222.3 ("Grazing permits and livestock use permits [on National Forest System lands] convey no right, title, or interest held by the United States in any lands or resources." The Courts have ruled that these preference rights give rise only to a priority to obtain a grazing permit, but do not create a property interest in the underlying land. *United States v. Fuller,* 409 U.S. 488, 492-94 (1973) *Hage v. United States*, 51 Fed. Cl. 570, 586 (2002) ("grazing permits are merely a license to use the land rather than an irrevocable right of the permit-holder."), *Corrigan v. Bernhardt*, No. 1:18-CV-512-BLW, 2019 WL 2717970, at *1 (D. Idaho June 27, 2019). If there is no federal grazing permit, the grazing preference is meaningless—it cannot exist independently of the permit. *Corrigan v. BLM,* 190 IBLA 371, 386 (2017); *see also Corrigan v. Bernhardt*, No. 1:18-CV-512-BLW, 2020 WL 930490, at *3

(D. Idaho Feb. 26, 2020) ("the preference disappears at the same moment the permit disappears"). As noted above, these federal statutes and regulations would preempt local ordinances purporting to recognize permittee ownership of any property rights in federal lands other than water rights established under state law. *See Joyce Livestock Co. v. United States*, 144 Idaho 1, 19, 156 P.3d 502, 520 (2007) (concluding that holder of federal grazing permit could acquire water right on public lands, but noting that a "water right does not constitute the ownership of the water; it is simply a right to use the water to apply it to a beneficial use").

Idaho Code 25-901

Ordinance #88's reliance on Idaho Code 25-901 is equally misplaced. That statute cannot create a property interest in federal lands enforceable against the Federal Government because it would run afoul of the Property Clause of the U.S. Constitution, U.S. Const. Art. 4, Sec. 3. Only Congress may pass laws relating to the disposal of property of the United States.

CONCLUSION:

It is likely a reviewing court would conclude that the extensive system of federal statute and regulations addressing fire management, grazing, and road systems on national forest lands preclude local ordinances, particularly where such local ordinances are not consistent with federal directives. To the extent the ordinance attempt to create enforceable property interests in the federal lands they are in error, and to the extent they attempt to modify the civil liability of the United States they are likewise invalid. There is thus a significant risk that Washington County will incur significant legal costs if its ordinances are challenged by the Federal Government or other parties.

Sincerely,

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