10-18-2011

Idaho Wool Growers Ass'n, Inc. v. State Respondent's Brief Dckt. 38743

No. 38743-2011

IN THE SUPREME COURT OF THE STATE OF IDAHO

IDAHO WOOL GROWERS ASSOCIATION, INC., an Idaho corporation, individually and on behalf of its members; FRANK SHIRTS, JR., individually and as a member of the Idaho Wool Growers Association; RONALD W. SHIRTS, LESLIE SHIRTS and JOHN T. SHIRTS, individually and d/b/a/ SHIRTS BROTHERS SHEEP and as members of the Idaho Wool Growers Association,

Plaintiffs/Appellants,

v.

STATE OF IDAHO; IDAHO FISH & GAME COMMISSION; IDAHO DEPARTMENT OF FISH & GAME; CAL GROEN, Director of Idaho Department of Fish and Game,

Defendants/Respondents.

RESPONDENTS' BRIEF

Appeal from the District Court of the Third Judicial District of the State of Idaho, in and for Adams County

Honorable Bradly S. Ford, District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Federal Statutes

Idaho Statutes and Session Laws

Other Authorities

Rules

STATEMENT OF THE CASE

The Amended Complaint alleges that Frank Shirts, Jr., and Ronald, Leslie and John Shirts, d/b/a/ Shirts Brothers Sheep (collectively the "Shirts and Shirts Bothers") held federal grazing permits allowing them "to graze their sheep on certain allotments in the Payette National Forest" in or near the Hells Canyon area, and that the "grazing permits were and are essential to the success and viability of the Shirts' and Shirts Brothers' grazing operations." R., p. 11.

Federal grazing permits confer upon the holder a "personal privilege" to graze livestock on federal lands that is "revocable at the government's discretion." Hage v. United States, 35 Fed. Cl. 147, 167 (1996). The grazing privilege is "withdrawable at any time for any use by the sovereign without the payment of compensation," Swim v. Bergland, 696 F.2d 712, 719 (9th Cir. 1983), quoting Osborne v. United States, 145 F.2d 892, 896 (9th Cir. 1944), and "the cancellation of [a permit] does not give rise to damages." Hage, 35 Fed. Cl. at 150. See R., p. 73 ("[t]he Plaintiffs do not take issue with IDFG's statement that federal grazing permits are not contracts").

While decisions to discontinue federal grazing privileges are reserved to the discretion of federal land managers, Idaho recognizes sheep grazing on federal lands as an important economic activity and works with federal agencies to ensure that grazing privileges are respected. This policy guided Respondents State of Idaho, Idaho Fish and Game Commission, the Idaho Department of Fish and Game and its director (collectively "IDFG")

in carrying out a cooperative project with the United States Forest Service and other agencies to reintroduce bighorn sheep to Hells Canyon. In March of 1997, R.M. Richmond, Supervisor of the Wallowa-Whitman National Forest, sent the following letter on Forest Service letterhead to Stan Boyd, Executive Director of the Idaho Wool Growers Association:

> Dear Mr. Boyd:
>
> The effort to transplant bighorn sheep into historic habitat in Hells Canyon is a cooperative project involving the States of Idaho, Oregon, and Washington, The Foundation for North American Wild Sheep, the Forest Service, and the Bureau of Land Management. The Hells Canyon Bighorn Sheep Restoration Committee (the committee) is interested in having the support of the woolgrowers industry for this effort to repopulate parts of Hells Canyon with bighorn sheep.
>
> The Committee understands the bighorns may occasionally migrate outside of their designated range and come into contact with domestic sheep. These bighorns will be considered "at risk" for potential disease transmission and death. There is also the potential for an exposed bighorn to leave the area and spread disease to other bighorn sheep. Under these conditions, the Idaho Department of Fish and Game, the Oregon Department of Fish and Wildlife, and the Washington Department of Wildlife will assume the responsibility for bighorn losses and further disease transmission in their respective states. The three Departments will also take whatever action is necessary to reduce further losses of bighorn sheep without adversely impacting existing domestic sheep operators. The enclosed map clearly delineates the project area within the Hells Canyon complex. Bighorns straying into currently active sheep allotments will be considered "at risk" by all of the Committee entities. This means that the Committee recognizes the existing domestic sheep operations in or adjacent to the Hells Canyon complex, on both National Forest and private lands, and accepts the potential risk of disease transmission and loss of bighorn sheep when bighorns invade domestic sheep operations.
>
> The Committee will make every effort to keep interested parties informed about actions being considered by the Committee in its effort to repopulate Hells Canyon with bighorn sheep. We will provide all health information gathered on bighorn sheep to the woolgrowers industry and other interested parties.

R., pp. 197-98 (hereinafter "1997 Letter" or "Letter"). The Letter was also signed by representatives of IDFG, the Oregon Department of Fish and Game, the Washington Department of Fish and Wildlife, the Bureau of Land Management, and the Foundation for North American Wild Sheep.[1]

Below, Appellants Idaho Wool Growers Association ("IWGA"), the Shirts, and Shirts Bothers (collectively "Woolgrowers") asserted that the 1997 Letter "constitutes a contract with IWGA and its members to indemnify the IWGA and its members from any harm or economic loss caused by the reintroduction of the bighorn sheep into the Hells Canyon area." R., pp. 67-68. Woolgrowers allege the 1997 Letter represents the entirety of the agreement between IDFG and Woolgrowers. See R., p. 132 (the "Letter Agreement memorialized the 'deal' IDFG had reached with the Wool Growers: the Wool Growers would drop their objections to the reintroduction of the bighorn sheep and in return IDFG promised that it would protect the Wool Growers from economic harm arising from the reintroduction").

Shortly after the 1997 Letter was executed, the Idaho Legislature amended Idaho Code § 36-106(e) by adding a new subsection, 5(D), which provided that the director of IDFG may not take action to "undertake actual transplants of bighorn sheep into areas they do not now inhabit or to augment the number of bighorn sheep in existing herds" until notice was given to affected boards of county commissioners,

[1] A copy of the 1997 Letter is reproduced as Addendum 1 to this brief. A copy of the Letter was attached to the First Amended Complaint and incorporated into its allegations. R., p. 12.

land owners, and grazing permittees. 1997 Idaho Sess. Laws 863, 864-65. The director was also required to submit a plan to legislative leaders describing the location and numbers of bighorn sheep to be transplanted. Id. Hearings were to be held if "any affected individual or entity expresses written concern" regarding proposed transplants. Id. at 865. Additionally:

> Upon any transplant of bighorn sheep into areas they do not now inhabit or a transplant to augment existing populations, the department shall provide for any affected federal or state land grazing permittees or owners or leaseholders of private land a written letter signed by all federal, state and private entities responsible for the transplant stating that the existing sheep or livestock operations in the area of any such bighorn sheep transplant are recognized and that the potential risk, if any, of disease transmission and loss of bighorn sheep when the same invade domestic livestock or sheep operations is accepted.

Id. The legislation included an emergency clause causing it to go into effect upon its approval by the governor, which occurred on March 24, 1997. Id. at 867. Woolgrowers assert that the executive director of the Idaho Wool Growers Association was listed as the contact for the legislation. Appellants' Brief at 15.

Bighorn sheep were reintroduced into Hells Canyon, and for a number of years the Forest Service and other signatories accepted bighorn losses that occurred. Woolgrowers allege, however, that beginning in April 2007 "the Forest Service reneged on its commitment in the 1997 Letter and began to modify various grazing permits in 2007, 2008, 2009, and 2010, including those of Shirts and Shirts Brothers." R., p. 13. The permit modifications arose from an administrative appeal, in which a reviewing officer for the chief of the Forest Service ordered the regional forester to complete a risk analysis of bighorn sheep viability.

Western Watersheds Project v. U.S. Forest Service, 2007 WL 1430734 at *2 (D. Idaho 2007). The analysis concluded there was a high risk of disease transmission from domestic sheep to bighorn sheep. Id. Western Watersheds Project then brought an action in federal court seeking to enjoin sheep grazing on six allotments held by the Shirts and Shirts Brothers. The Forest Service responded by agreeing to impose grazing restrictions on most of the allotments. Id. at *1. The Forest Service eventually modified several additional allotments grazed by the Shirts or Shirts Bothers. See, e.g., Western Watersheds Project v. U.S. Forest Service, 2007 WL 1729734 (D. Idaho 2007) (denying motion to enjoin modifications); Western Watersheds Project v. U.S. Forest Service, 2007 WL 3407679 at *4 (D. Idaho 2007) (declining to stay modifications).

The Forest Service's modification of the Shirts' and Shirts Brothers' grazing permits prompted the Idaho legislature to amend Idaho Code § 36-106(e)(5) to reiterate that it "is the policy of the state of Idaho that existing sheep or livestock operations in the area of any bighorn sheep transplant or relocation are recognized and that the potential risk, if any, of disease transmission and loss of bighorn sheep when the same invade domestic livestock or sheep operations is accepted." 2009 Idaho Sess. Laws 913, 915. The legislature added a new subsection to § 36-106(e)(5) requiring IDFG to work with federal grazing permittees to develop best management practices for each grazing allotment and certify that with such practices in place the risk of disease transmission was acceptable:

> (E) The Idaho department of fish and game: (1) shall develop a state management plan to maintain a viable, self-sustaining population of bighorn sheep in Idaho which shall consider as part of the plan the current federal or

> state domestic sheep grazing allotment(s) that currently have any bighorn sheep upon or in proximity to the allotment(s); (2) within ninety (90) days of the effective date of this act will cooperatively develop best management practices with the permittee(s) on the allotment(s). Upon commencement of the implementation of best management practices, the director shall certify that the risk of disease transmission, if any, between bighorn and domestic sheep is acceptable for the viability of the bighorn sheep. The director's certification shall continue for as long as the best management practices are implemented. The director may also certify that the risk of disease transmission, if any, between bighorn and domestic sheep is acceptable for the viability of the bighorn sheep based upon a finding that other factors exist, including but not limited to previous exposure to pathogens that make separation between bighorn and domestic sheep unnecessary.

2009 Idaho Sess. Laws at 915-16. The legislative history indicates that the amendment was "negotiated and agreed upon by the Governor's office, the Senate, and the Shirts family's attorney," and was intended to address "grazing on the Payette National Forest lands." R., pp. 113-14 (House Res. & Cons. Comm. Minutes, April 29, 2009).[2]

The Amended Complaint does not allege that IDFG failed to comply with the amended terms of Idaho Code § 36-106(e)(5) to develop best management practices and certify to federal agencies that the risk of disease transmission is acceptable. Instead, Woolgrowers allege generally that IDFG "took no action to block the Forest Service from

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[2] The legislative history was provided to the district court pursuant to this Court's holding that in deciding a motion to dismiss under IRCP 12(b)(6), the facts appearing on the face of the complaint may be "supplemented by such facts as the court may properly judicially notice." Independent School Dist. of Boise City v. Harris Family Ltd. Partnership, 150 Idaho 583, 588, 249 P.3d 382, 387 (2011), quoting Taylor v. McNichols, 149 Idaho 826, 833, 243 P.3d 642, 649 (2010). Courts may take "judicial notice of public and private acts of the legislature and the journals of the legislative bodies for the purpose of ascertaining what was done by the legislature." Idaho State Tax Comm'n v. Haener Bros., Inc., 121 Idaho 741, 743, 828 P.2d 304, 306 (1992), quoting Knight v. Employment Sec. Agency, 88 Idaho 262, 266, 398 P.2d 643, 645 (1965).

modifying the grazing allotments for Shirts and Shirts Brothers and took insufficient action to prevent Shirts and Shirts Brother from being harmed from these decisions," and further alleged that as "the result of the prior and continuing grazing permit modifications, IWGA, Shirts, and Shirts Brothers have suffered significant economic losses and will continue to suffer economic losses." R., p. 14. In argument, however, Woolgrowers "concede[d] that IDFG probably has no legal power to block the United States Forest Service from modifying federal grazing permits," and "concede[d] that if their claim against IDFG were solely that IDFG failed to 'block' the Forest Service from modifying the Shirts' grazing permits then their Complaint can and should be dismissed." R., p. 67. Given this concession, the sole basis for Woolgrower's claim against IDFG was the allegation that "IDFG took insufficient action to prevent Shirts and Shirts Brothers from being harmed from [the Forest Service's] decisions." R., p. 14 (Amended Complaint).

The Amended Complaint did not define the type of action that would have been deemed sufficient by Woolgrowers to prevent harm, but in argument to the district court they asserted that IDFG was obligated to "protect and indemnify Plaintiffs" from loss of federal grazing privileges by "providing alternative sources of feed; providing alternative grazing lands; or providing monetary compensation for economic losses suffered by Plaintiffs." R., p. 69. Woolgrowers later conceded, however, "that they are not pursuing an action for specific performance or some alternative means of mitigating the alleged damages caused to [Woolgrowers] by the [Forest Service] actions," but instead were only seeking "monetary indemnification from the IDFG for the act of the [Forest Service] reducing the Plaintiffs'

grazing allotment." R., p. 183. In Woolgrowers' words, "IDFG through its Letter Agreement and the State through enactment of the 1997 statute . . . guaranteed that the Wool Growers members would be indemnified for any economic loss they suffered because of the reintroduction of the bighorns." R., p. 69. In short, Woolgrowers assert that IDFG assumed financial liability for all economic losses suffered by Woolgrowers even if the losses were caused by decisions of federal agencies outside IDFG's control. See Appellants' Brief at 10 ("nowhere in the four corners of the Letter Agreement is it suggested that 'the Department [will only] be responsible for their own acts'") (quoting district court memorandum decision).

The district court, after noting Woolgrowers' acknowledgment "that IDFG could not prevent the [Forest Service] from modifying the grazing permits," characterized the claim as "essentially an action for monetary indemnification from the IDFG for the act of the [Forest Service] reducing the Plaintiffs' grazing allotment." R., pp. 182-83. The court concluded that the claim for indemnification should be dismissed since the plain language of the 1997 Letter "does not specifically state or imply that the Departments will pay money damages to the IWGA for any loss of grazing rights caused by the [Forest Service] or for any other act of the Departments." R., p. 183. The district court also concluded that any attempt to create such liability would be void for violation of Idaho Code § 59-1015, which prohibits contractual creation of indebtedness without proper appropriation. R., p. 183.

With regard to the claims based on Idaho Code § 36-106, the district court found the statute to be unambiguous, and that "nothing in the words of the statute suggests that the

legislature intended to obligate the State or the IDFG to pay damages or indemnify the Plaintiff for any economic loss related to the described activities, let alone an economic loss occasioned by the act of a Federal agency." R., p. 187.

The Court concluded that the Woolgrowers' claims of estoppel also failed since "[t]here is nothing set forth in the letter to suggest that the IDFG was representing or committing to indemnify the Plaintiff or otherwise pay damages to the Plaintiff for the loss of grazing privileges as a result of the independent acts of the [Forest Service]" and because of principles generally precluding the invocation of estoppel against governments carrying out sovereign or governmental duties. R., p. 193-94. Judgment was entered dismissing all counts in the Amended Complaint for failure to state a claim pursuant to Idaho Rule of Civil Procedure 12(b)(6). R., pp. 199-200.

ATTORNEY FEES ON APPEAL

Idaho Code § 12-117(1) requires the award of attorney fees and other reasonable expenses in any "civil judicial proceeding involving as adverse parties a state agency or political subdivision and a person" if the court "finds that the nonprevailing party acted without a reasonable basis in fact or law."

For the reasons explained in the argument section of this brief, Appellants continue to assert claims that not only lack a reasonable factual or legal basis, but are directly contrary to the facts alleged in the Amended Complaint. Arguments asserting the assumption of certain financial obligations by IDFG are constructed out of whole cloth that bear no relation to the actual language of the statute and alleged contract upon which the claims are based. See,

Mareci v. Coeur d'Alene School Dist. No. 271, 150 Idaho 740, 744-45, 250 P.3d 791, 795-96 (Idaho 2011) (awarding attorney fees on appeal where appellant made arguments without supporting authority and "contrary to the clear and unambiguous wording of the statute"). Moreover, much of Woolgrowers' argument on appeal is taken, often verbatim, from arguments presented unsuccessfully to the district court. An award of attorney fees pursuant to Idaho Code § 12-117 is appropriate when the appellant "continue[s] to rely on the same arguments used in front of the district court, without providing any additional persuasive law or bringing into doubt the existing law on which the district court based its decision" or "fail[s] to add any new analysis or authority to the issues raised below." Castrigno v. McQuade, 141 Idaho 93, 98, 106 P.3d 419, 424 (2005).

ARGUMENT

Woolgrowers assert that by alleging "an agreement, consideration, breach of the agreement and resulting damages" they have done "all that is necessary" to avoid dismissal. Appellants' Brief at 8. The Idaho Rules of Civil Procedure ("I.R.C.P."), however, require a "short and plain statement of the claim showing that the pleader is entitled to relief." I.R.C.P. 8(a) (emphasis added). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).[3]

[3] The cited Supreme Court rulings were interpreting Fed. R. Civ. P. 8(a)(2), which is identical to subsection (2) of I.R.C.P. 8(a)(1). In applying the I.R.C.P., Idaho courts refer to authorities construing identical federal rules for guidance. Herrera v. Estay, 146 Idaho 674, 678, 201 P.3d 647, 651 (2009).

"[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" Id. at 1950 (quoting Fed. R. Civ. P. 8(a)(2)). Here, the Amended Complaint sets forth a series of conclusory statements characterizing what is facially a letter as an extraordinary and unprecedented agreement to use public funds to indemnify Woolgrowers from economic harm. Such bare allegations do not fulfill the pleading requirements of I.R.C.P. 8(a), particularly where the asserted legal conclusions are inconsistent with the pleaded facts. "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft, 129 S. Ct. at 1949. "[O]n a motion to dismiss, courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007), quoting Papasan v. Allain, 478 U.S. 265, 286 (1986).

Once the Woolgrowers' legal conclusions are disregarded, it is obvious that the facts set forth in the Amended Complaint do not show that IDFG agreed to indemnify the Plaintiffs against economic loss, particularly losses caused solely by the actions of a third party outside the control of IDFG. Quite the contrary: for the reasons stated below, the facts as set forth in the Amended Complaint compel the conclusion that no matter what additional evidence Woolgrowers may offer, there is no legally enforceable contractual, equitable, or statutory claim for indemnification of economic losses suffered by Woolgrowers.

A. The Facts Pleaded in the Amended Complaint Fail to Show the Existence of an Enforceable Contract between IDFG and Woolgrowers.

The district court did not resolve the issue of whether the Amended Complaint adequately shows an "agreement" between IDFG and Woolgrowers because in its motion to dismiss IDFG argued that even if the 1997 Letter is assumed to be an "agreement" the Amended Complaint still fails to state a claim, because: (1) if construed to be an agreement the Letter did not set forth an obligation to indemnify Woolgrowers from economic losses; and (2) if construed to be an indemnity agreement the Letter would be contrary to public policy and void *ab initio*. Before this Court, however, Woolgrowers assert that the Amended Complaint adequately "alleges an agreement, consideration, breach of the agreement and resulting damages." Appellants' Brief at 8. While IDFG maintains that the dismissal can be upheld without determining the status of the Letter, it nonetheless responds to Woolgrowers' assertions.

1. On its face, the 1997 Letter is nothing more than the type of letter commonly sent by agencies to interest groups that may be affected by agency actions—it explains what actions the agency plans to take and expresses interest in having the interest group's support for the agency's efforts. The Letter states that the Committee "is interested in having the support of the woolgrowers industry for this effort to repopulate parts of Hells Canyon with bighorn sheep." R., p. 197. It then states the Committee accepts the potential risk of disease transmission and bighorn losses and states that wildlife managers will "take whatever action is necessary to reduce further losses of bighorn sheep without adversely impacting existing

domestic sheep operators." R., p. 197. There is nothing on the face of the Letter that constitutes an offer to enter into a contract. "An offer is a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Intermountain Forest Management, Inc. v. Louisiana Pacific Corp., 136 Idaho 233, 237, 31 P.3d 921, 925 (2001) quoting Restatement (Second) of Contracts § 24. None of the actions described in the Letter are conditioned upon IWGA's provision of political support. See Shore v. Peterson, 146 Idaho 903, 913, 204 P.3d 1114, 1124 (2009) (unilateral contract exists only if "the offeror makes a promise that is conditional on the offeree's acceptance").

Thus, the Letter lacks the most fundamental aspect of a contract: the existence of a bargain. The Restatement (Second) of Contracts states: "It is essential to a bargain that each party manifest assent with reference to the manifestation of the other." Restatement (Second) of Contracts § 23 (1981). Here, the Letter is the opposite of a bargain—while IWGA's political support was obviously desired, the Letter manifests the Committee's intent to carry out the specified actions regardless of whether IWGA supported reintroduction. Given the lack of any indication that the actions to be taken by the signatory agencies were dependent on the manifestation of IWGA's assent to the bighorn sheep reintroduction program, the Amended Complaint fails to set forth facts showing the existence of a contract.

2. Given the facts alleged in the Amended Complaint, the element of consideration is also lacking. Woolgrowers argue that in consideration for IDFG's agreement to protect domestic sheep operations from economic harm Woolgrowers "withdrew their

opposition to the reintroduction of the bighorn sheep and ceased legislative action to prohibit IDFG from participating in the program." Appellants' Brief at 3. In short, Woolgrowers allege that "the consideration for the contract was [IWGA's] forbearance from opposing the reintroduction." Id. at 8.

A promise to forebear from lobbying for or against legislation has not been recognized as consideration under Idaho law. "Forbearance to exercise a right against either a promisor or a third person is sufficient consideration for a contract." McColm-Traska v. Valley View, Inc., 138 Idaho 497, 501, 65 P.3d 519, 523 (2003) (emphasis added), quoting Walter E. Wilhite Revocable Living Trust v. Northwest Yearly Meeting Pension Fund, 128 Idaho 539, 546, 916 P.2d 1264, 1271 (1996). The right surrendered, however, must be a legally recognizable claim or defense that is "not doubtful because of uncertainty as to the facts or the law." Restatement (Second) of Contracts § 74 (1981). Cases recognizing forbearance as consideration typically involve forbearance of legal claims based on contract or statute. See, e.g., McColm-Traska, 138 Idaho at 502, 65 P.3d at 524 (promise to not pursue negligence claim); Walter E. Wilhite Revocable Living Trust, 128 Idaho at 547, 916 at 1272 (promise to not pursue foreclosure on property or payment of note); Eastern Idaho Production Credit Ass'n v. Placerton, Inc., 100 Idaho 863, 867, 606 P.2d 967, 971 (1980) (promise to not sue on matured contract right).

Other courts have suggested that a promise to not lobby the legislature in opposition to a proposed agency action is not adequate consideration for an alleged contract. In Northrop Grumman Corp. v. United States, 46 Fed. Cl. 622 (2000), the plaintiff alleged that

NASA had agreed to re-structure space-station development contracts with plaintiffs and three other contractors in a manner that preserved much of the contract work that plaintiff would have received absent such restructuring. Plaintiff argued that "its consideration for the contract with NASA was agreeing to forebear lobbying Congress in opposition to the restructured Space Station Program." Id. at 625. The court held "[a] decision to forbear bringing a meritorious claim may create valid consideration [b]ut we are not aware of authority supporting the notion that agreeing not to lobby Congress is a benefit to the Government." Id.

Likewise, this Court should reject Woolgrowers' assertion that forbearance of anticipated lobbying efforts constitutes valid consideration for the alleged agreement. IWGA did not forbear a legally cognizable claim, but forbore only its plan to engage in political lobbying. Not only is such forbearance fraught with uncertainty as to how the legislature may react, but "[s]uch an agreement could raise public policy concerns if it were valuable consideration." Id. at 625 n.2. Neither the Idaho Fish and Game Commission nor the IDFG director are authorized to use IDFG funds to pay private organizations to lobby for or against legislation. See generally Idaho Code §§ 36-104, 36-106.

B. The Amended Complaint Fails to Plead Any Facts Showing that IDFG Agreed to Indemnify Sheep Operators from Economic Harm in the Event the Forest Service Acted to Modify Grazing Permits.

It is ultimately unnecessary to determine the status of the 1997 Letter to uphold dismissal of the Amended Complaint. Assuming for purposes of argument that the 1997 Letter is a contract, Woolgrowers' assertion that the 1997 Letter commits IDFG to protect

Woolgrowers from economic harm arising from modification of grazing privileges is directly contrary to the alleged facts.

Agreements to indemnify or protect another party from economic losses caused by the action of a third party must be stated unequivocally. "The language imposing indemnity must be clear, unequivocal, and certain [and] the losses to be indemnified must be clearly stated and the intent of the indemnitor's obligation to indemnify against them must be expressed in clear and unequivocal terms and to such an extent that no other meaning can be ascribed." 41 Am. Jur. 2d Indemnity § 7 (2010); R.W. Beck and Associates, Inc. v. Job Line Const., Inc., 122 Idaho 92, 96, 831 P.2d 560, 564 (Ct. App. 1992) ("[t]he obligation to indemnify is to be strictly construed, and the status of indemnitee is also interpreted narrowly").

Here, the Amended Complaint fails to adequately allege an agreement to indemnify Woolgrowers from economic losses in the event the Forest Service modified their grazing permits. First, no language typical of indemnification is present, such as "indemnify," "save," or "hold harmless." There is in fact a complete absence of any terms indicating that IDFG assumed liability for Woolgrowers' economic losses. The only language touching upon liability is the provision by which all signatories agreed to "recognize" existing domestic sheep operations and accept the risk of disease transmission and loss of bighorn sheep. The plain meaning of "recognize" is to "show acceptance of the validity" of an instrument, status or action. American Heritage Dictionary 1460 (4th ed. 2000); see also Black's Law Dictionary 1277 (7th ed. 1999) (defining "recognition" as "[c]onfirmation that

an act done by another person was authorized"). A statement of intent to "accept the risk" is generally construed as a waiver or release of potential liability. See Restatement (Second) of Tort § 496B (1965) ("[a] plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm"). Under the plain terms of the 1997 Letter, the only risk assumed by the signatories was the risk that bighorn sheep may be lost. There is no statement accepting or transferring the risk that grazing rights may be modified.

The signatories' willingness to accept the risk of bighorn losses cannot be transformed by rules of construction into an agreement to indemnify Woolgrowers for economic losses. Perhaps for that reason, Woolgrowers assert that the obligation to indemnify Woolgrowers for economic losses rests solely the Letter's statement that IDFG and the other state wildlife management agencies would "take whatever action is necessary to reduce further losses of bighorn sheep without adversely impacting existing domestic sheep operators." Appellants' Brief at 10.

The Amended Complaint alleges that the "intent" of the quoted language was that IDFG "would take whatever action was necessary so that Idaho domestic sheep operations and operators would not be harmed as a result of the reintroduction of Bighorn Sheep in Hells Canyon." R., p. 5. This bald legal conclusion, however, is not supported by the facts in the Amended Complaint. The 1997 Letter recites that bighorn sheep migrating outside their designated range may contact domestic sheep, become diseased, then "leave the area and spread disease to other bighorn sheep." R., p. 197. The letter then states that "under

these conditions" IDFG will "assume the responsibility for bighorn losses" and take whatever action is necessary to reduce "further losses" of bighorn sheep. Id.

The district court correctly concluded that, in context, the proviso that IDFG would avoid "adversely impacting" domestic sheep operations modifies and restricts only the statement that IDFG would take "whatever action is necessary to reduce further losses of bighorn sheep." R., p. 181. Even with all inferences made in favor of Woolgrowers, the Amended Complaint fails to show that IDFG obligated itself to take whatever actions are necessary to mitigate or indemnify Woolgrowers' economic losses in the event the Forest Service modified their grazing permits. This is particularly true given the allegation that the Forest Service, by modifying grazing permits, reneged on promises made in the Letter. R., p. 13. Any commitment by IDFG to avoid adverse impacts on domestic sheep operators while taking action to reduce bighorn losses was made in conjunction with the Forest Service's promise to accept the risk that bighorn sheep may be lost. Nothing in the 1997 Letter obligates IDFG to assume financial responsibility for actions of other signatories alleged to be inconsistent with the terms of the Letter.

C. Any Agreement by IDFG to Use Public Funds to Indemnify Woolgrowers from Economic Harm Would be Illegal and Hence Void as a Matter of Law.

Even if the Amended Complaint adequately alleged the existence of an agreement by IDFG to indemnify Woolgrowers from economic losses, the Amended Complaint must still be dismissed for failure to state a claim, for such an agreement would be void as a matter of law. See, e.g. Davis & Associates, Inc. v. District of Columbia, 501 F. Supp. 2d 77, 80-81

(D.D.C. 2007) (dismissing action for failure to state a claim when underlying government contracts were void *ab initio* for violation of statute prohibiting contracts for future payments in excess of existing appropriations).

1. A fundamental principle of administrative law is that an agency cannot act outside its statutory authority. See Idaho Code § 67-5279 (agency actions to be set aside if "in excess of the statutory authority of the agency"); Yaden v. Gem Irr. Dist., 37 Idaho 300, 310, 216 P. 250, 253 (1923) ("a contract made with a public officer in excess of the provisions of the statute authorizing the contract is void, so far as it departs from or exceeds the terms of the law"); see also Air Quality Products, Inc. v. State of California, 157 Cal.Rptr. 791, 796 (Cal. App. 1979) ("no contractual obligation may be enforced against a public agency unless it appears the agency was authorized by the Constitution or statute to incur the obligation; a contract entered into by a governmental entity without the requisite constitutional or statutory authority is void and unenforceable").

Standing alone, the lack of any statutory provision authorizing IDFG to indemnify private sheep operators from loss of federal grazing permits is sufficient to uphold dismissal. Here, however, the contract alleged in the Amended Complaint not only lacks statutory authority, it is explicitly prohibited and void. Idaho Code § 59-1015 provides that no state officer or agency:

> [S]hall enter, or attempt to offer to enter into any contract or agreement creating any expense, or incurring any liability, moral, legal or otherwise, or at all, in excess of the appropriation made by law for the specific purpose or purposes for which such expenditure is to be made, or liability incurred, except in the case of insurrection, epidemic, invasion, riots, floods or fires.

Idaho Code § 59-1016 provides that any contract attempting to create indebtedness "in violation of the provisions of this chapter, or any indebtedness created against the state in excess of the appropriation provided for in any act, shall be void." Both statutes implement the provisions of Article 7, § 13 of the Idaho Constitution, which prohibits the withdrawal of money from the state treasury "but in pursuance of appropriations made by law." Generally, an appropriation requires "authority from the Legislature expressly given in legal form, to the proper officers, to pay from the public moneys a specified sum, and no more, for a specified purpose, and no other." Herrick v. Gallet, 35 Idaho 13, 17, 204 P. 477, 478 (1922). The one exception is when money is paid from a special fund or revolving fund dedicated to a particular purpose; in such circumstances it is not necessary to appropriate a specific sum, and continuing appropriations may be made. Leonardson v. Moon, 92 Idaho 796, 804, 453 P.2d 542, 550 (1969); Nelson v. Marshall, 94 Idaho 726, 732-33, 497 P.2d 47, 53-54 (1972) (holding constitutional continuing appropriation from water resource board revolving development fund). Regardless of whether an appropriation is annual or continuous, money can only be expended in accordance with purposes specified by the legislature in the applicable appropriation act. Leonardson, 92 Idaho at 804-05, 453 P.2d at 550-51.

Below, the district court concluded that if the 1997 Letter was a contract it would be "void as a matter of law because it would have been an attempt to create indebtedness without proper appropriation." R., p. 183. The district court's conclusion should be upheld because if can be determined as a matter of law that no appropriations have been made to cover the indebtedness that IDFG is alleged to have created in the 1997 Letter.

2. Woolgrowers first assert that "in this early stage of litigation . . . there is no proof" that the 1996 or 1997 legislatures did not appropriate money to cover the claims asserted by Woolgrowers in 2010. Appellants' Brief at 12. Such proof, however, is readily available in the Idaho Session Laws, which establish that all money appropriated by the Legislature to IDFG in 1996 and 1997 was only available for expenditure in the immediately following fiscal years. See Idaho Code § 67-3509 (appropriations are "available for expenditure . . . from the first day of July of the year during which such appropriation is made to and including the thirtieth day of June of the year following"). The IDFG appropriation bill for 1996 appropriated specified amounts to IDFG "to be expended for the designated programs . . . from the listed funds for the period July 1, 1996, through June 30, 1997." 1996 Idaho Sess. Laws 473. Likewise, the 1997 appropriation bill provided that all appropriated funds were to be expended "from the listed funds for the period July 1, 1997, through June 30, 1998." 1997 Idaho Sess. Laws 867, 868.

The plain language of the 1996 and 1997 appropriation acts establishes, as a matter of law, that no money was appropriated in either 1996 nor 1997 to pay the indemnity obligation alleged by Woolgrowers, which did not accrue until 2007 at the earliest. The appropriations specified in an annual appropriations act "mark the limit of expenditure" allowed to the agency. State v. Taylor, 58 Idaho 656, 667, 78 P.2d 125, 130 (1938). This is true even if the annual appropriation is from a special fund otherwise subject to continuous appropriation—the more particular statute prevails. Id. "Appropriation acts when passed by the legislature of the state of Idaho . . . whether the appropriation is fixed or continuing, are fixed budgets

beyond which state officers, departments, bureaus and institutions may not expend." Idaho Code § 67-3516. Thus, even if the purposes specified in the 1996 and 1997 appropriation acts were broad enough to cover the indemnity obligation alleged by Woolgrowers, the plain language of the 1996 and 1997 appropriation acts prohibit payment of such expenditure after the immediately following fiscal year.

In order to incur a contractual obligation that would be paid after expiration of the annual appropriation, the Idaho Code requires that the funds be encumbered using the procedures provided in Idaho Code § 67-3521(2). Any contractual obligation encumbered for payment in a future year, however, "must be adequately covered by appropriated funds from the current fiscal year." Idaho Code § 67-3521(2). Even then, encumbered funds can only be retained for one year before "revert[ing] to the fund from which encumbered," absent extension by the administrator of the division of financial management. Idaho Code § 67-3521(3). Here, the alleged obligations to domestic sheep operators did not accrue until 2007 at the earliest, a period of ten years after the 1997 appropriation. Even if money could be encumbered for a period of ten years, funds can be encumbered only by identifying the specific amount payable under the contract. Idaho Code § 67-3521(2). There are no procedures for encumbering unliquidated obligations. Therefore, it is established as a matter of law that if IDFG had assumed in 1997 an unliquidated obligation to reimburse domestic sheep operators for economic losses occurring in 2007, such an obligation was not covered by appropriations made to IDFG in 1996 or 1997 and is therefore void.

3. Woolgrowers next attempt to avoid the restrictions of Idaho Code §§ 59-1015 and 59-1016 by asserting that there was no need for the "1996-1997 Legislature [to] have appropriated money at that time," since neither IDFG nor the Legislature had any "way to know" whether damages would occur "or the extent of those damages." Appellant's Brief at 13. If anything, Woolgrowers' argument proves the point: the very purpose of Idaho Code § 59-1015 is to prohibit agencies from contractually obligating the state to pay unliquidated sums of money that may exceed funds available in future years. For that reason this Court, in applying the predecessors to §§ 59-1015 and 59-1016, has held that the "prohibitions of the statutes and the Constitution against creating any expense or incurring any liability against the state, in excess of existing appropriations therefor, apply to the time of incurring the expense or liability rather than to the time the particular bill or claim is presented for payment." State ex rel. Hansen v. Parsons, 57 Idaho 775, 790, 69 P.2d 788, 794 (1937).[4] In short, unless there was an annual or continuing appropriation in place in 1997 to cover the obligation alleged by Woolgrowers, the alleged obligation is void *ab initio*.

Likewise, this Court must reject Woolgrowers' suggestion that it is "premature and unnecessary at this stage" to determine whether the 1997 Letter obligated funds without an appropriation because the legislature "could appropriate monies in the next session if the

[4] The Court was interpreting predecessor statutes, §§ 57-1015 and 57-1016, that were, except for numbering, identical to the current versions of Idaho Code §§ 59-1015 and 59-1016. State ex rel. Hansen was partially overruled, on other grounds, in State ex rel. Williams v. Musgrave, 84 Idaho 77, 87, 370 P.2d 778, 784 (1982) (holding that money in state insurance fund does not belong to state and is not subject to art. 7, § 13, of the Constitution).

agreement were found to be valid." Appellants' Brief at 14. The legislature cannot ratify agreements made in violation of Idaho Code § 59-1015 by appropriating money at a later date. The Idaho Constitution, Article III, § 19, prohibits any "local or special laws . . . [l]egalizing as against the state the unauthorized act or invalid act of any officer." This Court has held that if a claim is incurred in violation of § 56-1015 or Article VII, § 13 of the Constitution, "any subsequent attempt of the Legislature to pay [the claim] was unconstitutional." State ex rel. Hansen, 57 Idaho at 788, 69 P.2d at 793.

4. Woolgrowers next assert that Idaho Code § 59-1015 would be inapplicable if IDFG has "special custodial funds" that "are not subject to appropriation," and suggests one such fund may be Idaho Code § 36-408(5)(b, which authorizes IDFG to sell a bighorn sheep tag by lottery and use the money "in solving problems between bighorn sheep and domestic sheep." Appellants' Brief at 12-13. Woolgrowers assert that § 36-408(5)(b) may authorize IDFG to raise money "to protect the Woolgrowers without taking funds from the State Treasury." Appellants' Brief at 13. Woolgrowers' argument, however, ignores the statutory directive requiring the bighorn sheep lottery proceeds to be deposited in the fish and game expendable trust account. Idaho Code § 36-408(5)(b). In turn, the statute authorizing the fish and game expendable trust account requires that moneys are to be appropriated to the fish and game commission before expenditure—absent an annual appropriation, money in the account can only be "invested by the state treasurer in the manner provided for investment of idle state moneys." Idaho Code § 36-108. Therefore, while such money can be used to solve

problems between bighorn sheep and domestic sheep, IDFG is prohibited by the terms of Idaho Code § 59-1015 from contractually obligating such money without an appropriation.[5]

Likewise, Woolgrowers err in asserting that other special funds established for IDFG may not be subject to appropriation. Because IDFG is financed primarily through the sale of licenses and federal funding, most IDFG funds are special or dedicated funds. Nonetheless, with one exception, all IDFG funds are appropriated by the legislature to IDFG by means of annual appropriation acts. The fish and game fund, consisting of money from licenses, tags, and permits, is "appropriated in the state treasury," Idaho Code § 36-107, and the expenditure allowed from the fund is established in annual appropriation acts. See, e.g., 1996 Idaho Sess. Laws 473 (establishing appropriations from fish and game fund and other specified funds for fiscal year 1997). The fish and game federal account, consisting of "moneys received from the federal government for the administration of any aspect of the fish and game laws of this state," is "subject to appropriation." Idaho Code § 36-110. The same is true for the fish and game nonexpendable trust account, Idaho Code § 36-109; the fish and game set-aside account and feeding account, Idaho Code § 36-111; the animal damage control fund, Idaho Code § 36-112, and the expendable big game depredation fund, Idaho Code § 36-115.

The only IDFG revolving fund subject to a continuous appropriation is the wildlife restoration project fund, Idaho Code § 36-1805. Money in the fund comes primarily from "grants-in-aid" provided by the federal government to IDFG under the terms of the Wildlife

[5] When the 1997 Letter was executed, Idaho Code § 36-408 provided that money from bighorn sheep lottery tags was to be deposited into a dedicated "bighorn sheep account" to be used to resolve problems with domestic sheep, but, as in the present statute, such money was only to "be expended pursuant to appropriation." 1991 Idaho Sess. Laws 342, 343.

Restoration Projects Act. Idaho Code § 36-1805. By federal law, money in the wildlife restoration project fund is limited to restoring "areas of land or water adaptable as feeding, resting, or breeding places for wildlife and fish" and related research and incidental expenses. Idaho Code § 36-1804; see also 16 U.S.C. § 669a(8) (limiting purposes for which federal grants in revolving fund may be used). Thus, money in the wildlife restoration project fund could not be used to pay Woolgrowers for their economic losses.

5. Woolgrowers make a final attempt to avoid the prohibitions of Idaho Code § 59-1015 by noting that it includes an exception allowing expenditures without appropriation for certain emergencies, including epidemics. The exception in § 59-1015 for expenditures to address "epidemics" and other emergencies must be interpreted *in pari materia* with the statute governing declarations of emergency, which requires the "duly proclaimed existence of extreme peril to the safety of persons and property within the State . . . caused by such conditions as . . . epidemic," Idaho Code § 46-601(1). Woolgrowers' economic losses arising from modification of federal grazing permits do not pose a situation of "extreme peril" justifying the expenditure of public money without appropriation.

6. In sum, at the time IDFG signed the 1997 Letter, there was no appropriation of funds to pay the future and unliquidated liabilities allegedly assumed by IDFG. Even if Plaintiffs were successful in proving that the 1997 Letter was intended to function as an indemnification agreement, such agreement is unenforceable since it would be void under the terms of Idaho Constitution Article VII, § 13 and Idaho Code §§ 59-1015 and 59-1016.

Thus, there is no set of facts under which Plaintiffs may prevail, and the district court correctly dismissed all claims based on the 1997 Letter.

Such dismissal does not, as Woolgrowers allege, raise constitutional concerns regarding impairment of contracts or deprivation of property without due process. Impairment of contracts occurs only when the contractual obligations alleged to have been impaired were in existence at the time the disputed law is enacted. Lindstrom v. Dist. Bd. of Health, 109 Idaho 956, 961, 712 P.2d 657, 662 (Ct. App. 1985). Here, the provisions of Idaho Constitution Article VII, § 13 and Idaho Code §§ 59-1015 and 59-1016 predate the 1997 Letter by decades, so that even if the Letter were intended to be a contract it was void *ab initio*, and no impairment of contract or violation of due process occurred.

D. The Amended Complaint Fails to Show that IDFG Should be Estopped from Denying the Alleged Obligation to Indemnify Woolgrowers.

Woolgrowers' assertion that the Amended Complaint sets out the elements for applying estoppel to the alleged promises in the 1997 Letter must be rejected based on two fundamental legal principles. First, estoppel is not generally applicable to state agencies acting in a sovereign or governmental capacity. Sagewillow, Inc. v. Idaho Dept. of Water Resources, 138 Idaho 831, 845, 70 P.3d 669, 683 (2003). Nor can estoppel be applied in detriment of state obligations to protect property held in trust for the public. State v. Taylor, 44 Idaho 353, 359, 256 P. 953, 955 (1927).

Woolgrowers' suggestion that the reintroduction of bighorn sheep was carried out for commercial or proprietary purposes is unfounded. In Idaho, the "state's control over fish and

game within its limits . . . is within the police power of the Legislature" and the "'wild game and fish within a state belong to the people in their collective sovereign capacity.'" Sherwood v. Stephens, 13 Idaho 399, 403, 90 P. 345, 346 (1907), quoting Ex parte Maier, 37 P. 402 (Ca. 1894). See also Walbridge v. Robinson, 22 Idaho 236, 243, 125 P. 812, 814 (1912) ("wild animals [are] subject to the regulation and control of the state in its sovereign capacity").

One of the seminal cases in American wildlife law, Barrett v. State, 116 N.E. 99 (N.Y. Ct. App. 1917), established that the protection of wildlife is "a governmental function for the benefit of the public at large, and no one can complain of the incidental injuries that may result." Id. at 100. In short, the balancing of the economic consequences of wildlife protection against the public benefits is a governmental function, not a proprietary function. See State v. Thompson, 136 Idaho 322, 326, 33 P.3d 213, 217, (Ct. App. 2001) (citing Barrett in support of conclusion that state is not generally liable for economic losses arising from acts of wildlife).

The fact that bighorn sheep were once extirpated from Hells Canyon does not transform their reintroduction into a proprietary function—their reintroduction is as much a sovereign function as would be protection of native herds. See Moerman v. California, 21 Cal. Rptr. 2d 329, 333 (Ct. App. 1993) (holding that state's responsibility for actions of reintroduced elk was same as for all other wild animals: "it is unreasonable to argue that because the animals were once eliminated from Lake and Mendocino Counties and driven to the brink of extinction, that they are now nothing more than a public improvement or pet,

under the control of the state"). Given these background principles of state sovereignty over wildlife, estoppel cannot be applied to inhibit IDFG in carrying out its statutory mandate to preserve, protect, and perpetuate wildlife. Idaho Code § 36-103.

The second principle rendering estoppel inapplicable here establishes that state officers cannot bind the state to promises or commitments that are not authorized by statute. Applying estoppel in such circumstances would essentially "allow an administrative agency to expand its own powers and effectively amend statutes without legislative action." Kelso & Irwin, P.A. v. State Ins. Fund, 134 Idaho 130, 138, 997 P.2d 591, 599 (2000). Thus, when a public contract is illegal and void for violation of law, "the court will leave the parties as it finds them and refuse to enforce the contract. The contract cannot be treated as valid by invoking waiver or estoppel." Wernecke v. St. Maries Joint School Dist. No. 401, 147 Idaho 277, 287, 207 P.3d 1008, 1018 (2009). This is particularly true for contracts by public agencies purporting to incur financial obligations in contravention of constitutional prohibitions. In Deer Creek Highway Dist. v. Doumecq Highway Dist., 37 Idaho 601, 218 P. 371 (1923), this Court examined a contract by two highway districts to construct a bridge. Upon completion of construction, one highway district failed to pay its agreed-upon share of costs, and the other brought suit to recover. 37 Idaho at 605, 218 P. at 371. The Court held that the underlying contract was void for violation of Article 8, § 3 of the Idaho Constitution, which prohibits governmental subdivisions from incurring indebtedness in excess of the income and revenue available in the year of contracting, absent the assent of two-thirds of qualified voters. Id. at 606, 218 P. at 372. The appellant highway district nonetheless argued

that the respondent highway district was estopped from denying its obligation, "the theory being that appellant relied upon the promise of respondent to pay its proportion of the cost of construction, that respondent had benefitted and should be estopped to set up the illegality of the contract as a defense." Id. at 607, 218 P. at 372.

The court rejected the application of estoppel, noting first the general principle that:

> Highway districts are creatures of the statute, their powers are limited, persons dealing with them are conclusively presumed to know the extent of their powers, and one entering into contracts with them in excess of their powers does so at his peril. They have only the powers expressed in the statute and such as may be necessarily implied.

Id. Given the foreknowledge that governmental entities cannot contract in excess of their authority, and the constitutional provision declaring the incurred indebtedness void, the Court held that "[a]n estoppel can never be invoked in aid of contract which is expressly prohibited by a constitutional or statutory provision." Id. at 609, 218 P. at 373, quoting School District v. Twin Falls County, 30 Idaho 400, 164 P. 1174 (1917).

Likewise, in this case, estoppel cannot be invoked to enforce any alleged promise made by IDFG to incur liability for economic losses suffered by Woolgrowers due to modification of federal grazing rights. Not only was Woolgrowers on notice that IDFG could only make commitments within the limits of its statutory authority, such a promise, whether embodied in a formal contract or made in circumstances that would otherwise create a situation for application of estoppel, would be prohibited by the laws prohibiting the obligation of funds not yet appropriated and cannot be enforced by this Court.

E. The Amended Complaint Fails to State a Claim Showing Violation of IDFG's Statutory Duties Regarding Bighorn Sheep Reintroduction.

1. Woolgrowers assert that IDFG was required by Idaho Code § 36-106 to protect domestic sheep operators from economic consequences arising from modification of federal grazing permits, failed to do so, and therefore Woolgrowers are entitled to damages for economic loss. R., p. 15. The Amended Complaint fails to state a claim of damages for violation of the statute for, as a general matter, the award of damages against an agency for failure to carry out a statutory duty is precluded. Idaho Code § 65-5270 provides that judicial review of agency actions, including actions based on an "agency's . . . failure to perform, any duty placed on it by law," Idaho Code § 67-5201(3)(c), is to be governed by the administrative procedure act ("IAPA"), Idaho Code chapter 52, title 67, unless another provision of law is applicable to the particular matter.

Assuming (as did the district court, R., pp. 175-76) that Woolgrowers brought its action within the time limits allowed by Idaho Code § 67-5273, the IAPA limits the remedy for violation of statutory duties to a court order setting aside the agency action and remanding for further proceedings. Idaho Code § 67-5279. No award of damages is authorized. See University of Utah Hosp. v. Bd. of Comm'rs of Payette County, 128 Idaho 517, 520, 915 P.2d 1375, 1378 (Ct. App. 1996) (courts lack statutory authority to enter money judgments against agency in IAPA proceedings). Thus, even if Woolgrowers were able to demonstrate that IDFG had violated a statutory duty relating to the reintroduction of

bighorn sheep, the Woolgrowers' claim for damages is foreclosed by the IAPA unless specifically authorized by another statute.

2. Woolgrowers have not identified any statutory provision explicitly authorizing the award of damages against IDFG for failure to carry out statutory duties with regard to bighorn sheep reintroduction. Woolgrowers seek to avoid identifying such authority by asserting that the interpretation of Idaho Code § 36-106 is a factual issue to "be verified by testimony of the relevant witnesses as well as the relevant legislative history." Appellants' Brief at 16. Legislative intent, however, is not a factual issue, it is a "question of law over which this Court exercises free review." Doe v. Boy Scouts of America, 148 Idaho 427, 430, 224 P.3d 494, 497 (2009). Legislative intent is to be determined by reference to the plain meaning of the words used in a statute, or, in the event of an ambiguity, by reference to "the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history." Id. (internal quotation marks omitted).

Legislative history is not a matter for factual development—it is the prerogative of the legislature to determine what history should be kept of its proceedings, and the Court takes judicial notice of the journals kept by the legislative bodies for the purpose of ascertaining such intent. Idaho State Tax Comm'n v. Haener Bros., Inc., 121 Idaho 741, 743, 828 P.2d 304, 306 (1992). Woolgrowers' assertion that it must be allowed to demonstrate legislative intent through testimony of legislators or other participants in the legislative process was roundly rejected by this Court in Gillihan v. Gump, 140 Idaho 264, 268, 92 P.3d

514, 518 (2004) (plurality op.), where the Court refused to consider an affidavit of a legislator in determining the intent of a statute. The Court reasoned that:

> First, post-enactment statements of legislators are not part of the record of the Legislative Assembly that are considered the contemporaneous "history" that is appropriate for courts to consult. . . . Second, a post-enactment statement of an individual legislator represents the views—or, perhaps more accurately, the recollections—of a single participant in the legislative process. Even when the statements of individual legislators are offered during the enactment process, they are commonly viewed cautiously as evidence of the intentions of the entire assembly. . . . Courts are all the more loath to determine the intentions of the institution as a whole on the basis of isolated statements that are generated after enactment, without any evidence that the other members of the legislative body even were aware of them, much less that they agreed with them.

Id. at 268-69, 92 P.3d at 518-19, quoting Salem Keizer Ass'n of Classified Employees v. Salem Keizer Sch. Dist., 61 P.3d 970 (Or. App. 2003).[6] See also In re Mexico Money Transfer Litigation, 267 F.3d 743, 748 (7th Cir. 2001) (finding that affidavits of legislators setting forth their understanding of a statute's intent, "offered away from the legislative halls and long after the law's enactment, are worthless"). Thus, there are no factual issues that prohibit dismissal of claims alleging violation of Idaho Code § 36-106.

3. IDFG's duty to mitigate the impacts of bighorn sheep reintroduction on federal grazing permitees is set forth in plain and unambiguous language that is utterly at odds with Woolgrowers' assertions that the legislature "mandated IDFG to protect domestic sheep operators from economic harm" and "authorize[d] an award of damages against the

[6] Gillihan was overturned on other grounds in Gonzalez v. Thacker, 148 Idaho 879, 231 P.3d 524 (2009).

State in the amount of economic harm sustained by the Woolgrowers." Appellants' Brief at 16.

From 1997 to 2009, IDFG's statutory duties with respect to domestic sheep operators were set forth in Idaho Code § 36-106(e)(5)(D) as follows: IDFG was to provide notice to grazing permittees before engaging in bighorn sheep transplants, provide a hearing if any affected permittee expressed written concern, and join federal and state entities in sending a "written letter" stating that the existing sheep operations were recognized and that the risk of loss of bighorn sheep was accepted. 1997 Idaho Sess. Laws 863, 864-65. [7] That was the extent of the duties imposed on IDFG.

There is nothing in the plain language of the 1997 legislation requiring IDFG to use public funds to reimburse domestic sheep operators for economic losses in the event that grazing permits were modified. Perhaps this is why Woolgrowers make no effort to identify terms that may be construed as requiring reimbursement of Woolgrowers' losses, but instead resort to crafting language that does not exist ("the context of the enactment and the plain language of the statute itself . . . mandated IDFG to protect domestic sheep operators from economic harm"), and asserting that "[Woolgrowers] should have the right at trial . . . to elicit evidence regarding legislative intent." Appellants' Brief at 15-16.

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[7] As part of the 2009 amendments to Idaho Code § 36-106, the term "letter" was changed to "agreement." 2009 Idaho Sess. Laws at 915. This change, however, was not made retroactive to the 1997 Letter. See Hill v. American Family Mut. Ins. Co., 150 Idaho 619, 628, 249 P.3d 812, 821 (2011) ("[n]o statute is retroactive unless the Legislature expressly declares that it is").

The lack of any provision requiring IDFG to reimburse domestic sheep operators for modification of grazing privileges is fatal to Woolgrowers' claims. If the legislature had intended to reimburse domestic sheep operators from economic losses it would have spoken plainly, as it has in other instances. For example, Idaho Code § 25-141D establishes the "sheep and goat disease indemnity fund" and provides that money in the fund may be "used to indemnify owners whose animals or herds have been condemned or destroyed" at the direction of the state board of sheep commissioners. Idaho Code § 25-141D. No analogous authority for expenditures is found in Idaho Code § 36-106. The duty imposed on IDFG by the 1997 legislation stopped with the sending of the letter stating that existing domestic sheep operations are "recognized" and that the risk of disease transmission and loss of bighorn sheep is "accepted." While such language accepts the risk that bighorn sheep may be lost, it does not impose upon IDFG the risk that grazing privileges may be lost or otherwise require reimbursement for such losses. This is confirmed by the requirement that the "letter" is to be signed by all "federal, state and private entities responsible for the transplant." Since the legislature had to understand that it could not impose upon federal agencies the obligation to indemnify domestic sheep operators from economic loss, the plain terms of the statute likewise do not impose any such obligation upon IDFG.

4. Woolgrowers' argument that the terms of Idaho Code § 36-106 require IDFG to mitigate the modification of federal grazing privileges by reimbursing Woolgrowers for economic losses are further belied by the 2009 amendments to § 36-106, which set forth explicitly the exclusive duty owed to Woolgrowers in the event bighorn sheep transplants

create conflicts with grazing on "current federal or state domestic sheep grazing allotments." Idaho Code § 36-106(e)(5)(E). To help resolve such conflicts, IDFG is directed to "cooperatively develop best management practices with the permittee(s)," and upon implementation of the best management practices, "certify that the risk of disease transmission, if any, between bighorn and domestic sheep is acceptable for the viability of the bighorn sheep." Id.

It was not coincidental that the 2009 amendment occurred shortly after the federal courts upheld the modification of the Shirts' and Shirts Brothers' federal grazing allotments to protect bighorn sheep. Legislation must be construed "under the assumption that the legislature knew of all legal precedent . . . in existence at the time the statues were passed. City of Sandpoint v. Sandpoint Independent Highway Dist., 126 Idaho 145, 150, 879 P.2d 1078, 1083 (1994). That was certainly the case here. The legislative history indicates that the amendment had been "negotiated and agreed upon by the Governor's office, the Senate, and the Shirts family's attorney," and was intended to address "grazing on the Payette National Forest lands." R., pp. 113-14 (House Res. & Cons. Comm. Minutes, April 29, 2009). Hence, the legislative history leaves no doubt that the legislature, being made aware of modifications to the Shirts' grazing permits, chose to impose specific and limited obligations upon IDFG to assist in resolving conflicts on federal grazing allotments. Under the canon of construction *expressio unius est exclusio alterius*, the legislature's designation of specific duties in response to a specific problem implies the exclusion of things not mentioned. See, e.g., State v. Michael, 111 Idaho 930, 933, 729 P.2d 405, 408 (1986)

("[w]hen a statute enumerates the areas that are to be encompassed in its enforcement, it is generally accepted that those areas not specifically mentioned are not to be included [and] we will not engraft additional terms into the language of [the statute]"). Under the circumstances, implying an obligation to reimburse domestic sheep operators for economic losses would be completely at odds with the legislature's directives.

In sum, Woolgrower's statutory claims must be dismissed as a matter of law: legislative intent is readily discernable from the plain terms of the statute and the legislative history, and Woolgrowers are not entitled to present any factual testimony or other evidence to alter or complement legislative intent.

CONCLUSION

This Court should affirm the Judgment of the district court dismissing the Amended Complaint for failure to state a claim, and award IDFG reasonable attorneys' fees and costs on appeal for defending against issues with no reasonable basis in fact or law.

RESPECTFULLY SUBMITTED this 18th day of October 2011.

LAWRENCE G. WASDEN
Attorney General
Clive J. Strong
Division Chief, Natural Resources Division

STEVEN W. STRACK
Deputy Attorney General

CERTIFICATE OF MAILING

I hereby certify that on October 18, 2011, I caused to be mailed two true and correct copies of the forgoing **RESPONDENT'S BRIEF** to the Appellants' counsel as identified on the front cover.

STEVEN W. STRACK
Deputy Attorney General

ADDENDA

1. Letter from USDA Forest Service and other parties to Stan Boyd, Executive Director, Idaho Woolgrowers Association, January 16, 1997.

2. 1997 Idaho Session Laws 863 (amendments to Idaho Code § 36-106).

3. Idaho Code § 36-106 (2011).

ADDENDUM NO. 1

United States Department of Agriculture
Forest Service
Wallowa-Whitman National Forest
P. O. Box 907
Baker City, OR 97814

Reply to: 2210

Date: January 16, 1997

Idaho Woolgrowers Association
Mr. Stan Boyd, Executive Director
P. O. Box 2596
Boise, ID 83701

Dear Mr. Boyd:

The effort to transplant bighorn sheep into historic habitat in Hells Canyon is a cooperative project involving the States of Idaho, Oregon, and Washington, The Foundation for North American Wild Sheep, the Forest Service, and the Bureau of Land Management. The Hells Canyon Bighorn Sheep Restoration Committee (the committee) is interested in having the support of the woolgrowers industry for this effort to repopulate parts of Hells Canyon with bighorn sheep.

The Committee understands that bighorns may occasionally migrate outside of their designated range and come into contact with domestic sheep. These bighorns will be considered "at risk" for potential disease transmission and death. There is also the potential for an exposed bighorn to leave the area and spread disease to other bighorn sheep. Under these conditions, the Idaho Department of Fish and Game, the Oregon Department of Fish and Wildlife, and the Washington Department of Wildlife will assume the responsibility for bighorn losses and further disease transmission in their respective states. The three Departments will also take whatever action is necessary to reduce further losses of bighorn sheep without adversely impacting existing domestic sheep operators. The enclosed map clearly delineates the project area within the Hells Canyon complex. Bighorns straying into currently active sheep allotments will be considered "at risk" by all of the Committee entities. This means that the Committee recognizes the existing domestic sheep operations in or adjacent to the Hells Canyon complex, on both National Forest and private lands, and accepts the potential risk of disease transmission and loss of bighorn sheep when bighorns invade domestic sheep operations.

The Committee will make every effort to keep interested parties informed about actions being considered by the Committee in its effort to repopulate Hells Canyon with bighorn sheep. We will provide all health information gathered on bighorn sheep to the woolgrowers industry and other interested parties.

Sincerely,

R M Richmond
USDA Forest Service, Wallowa-Whitman NF — Jan. 16, 1997 Date

Tom Rich
Idaho Dept. of Fish and Game — JAN 23, 1997 Date

James W. Greer
Oregon Dept. of Fish and Wildlife — Feb. 26, 1997 Date

W. C. Smith
Washington Dept. of Fish and Wildlife — Feb. 21, 1997 Date

Allan E. Thomas
Bureau of Land Management — Jan. 24, 1997 Date

Duncan B. Gilchrist
Foundation for N. American Wild Sheep
Secretary — March 4, 1997 Date

Enclosure

cc: Forest Supervisor, Payette NF
Forest Supervisor, Nez Perce NF

ADDENDUM NO. 2

CHAPTER 284
(H.B. No. 337, As Amended)

AN ACT

RELATING TO TRANSPLANTS OF BIGHORN SHEEP; AMENDING SECTION 36-106, IDAHO CODE, TO PROVIDE CONDITIONS PRECEDENT BEFORE THE FISH AND GAME DIRECTOR CAN APPROVE ANY FUNDS OR TO TAKE ANY ACTION TO PROVIDE FOR THE TRANSPLANTS OF BIGHORN SHEEP INTO AREAS THEY DID NOT INHABIT; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 36-106, Idaho Code, be, and the same is hereby amended to read as follows:

36-106. DIRECTOR OF DEPARTMENT OF FISH AND GAME. (a) Office of Director Created. The commission shall appoint a director of the department of fish and game, hereinafter referred to as the director, who shall be a person with knowledge of, and experience in, the requirements for the protection, conservation, restoration, and management of the wildlife resources of the state. The director shall not hold any other public office, nor any office in any political party organization, and shall devote his entire time to the service of the state in the discharge of his official duties, under the direction of the commission.

(b) Secretary to Commission. The director or his designee shall serve as secretary to the commission.

(c) Compensation and Expenses. The director shall receive such compensation as the commission, with the concurrence and approval of the governor, may determine and shall be reimbursed at the rate provided by law for state employees for all actual and necessary traveling and other expenses incurred by him in the discharge of his official duties.

(d) Oath and Bond. Before entering upon the duties of his office, the director shall take and subscribe to the official oath of office, as provided by section 59-401, Idaho Code, and shall, in addition thereto, swear and affirm that he holds no other public office, nor any position under any political committee or party. Such oath, or affirmation, shall be signed in the office of the secretary of state.

The director shall be bonded to the state of Idaho in the time, form and manner prescribed by chapter 8, title 59, Idaho Code.

(e) Duties and Powers of Director.

1. The director shall have general supervision and control of all activities, functions, and employees of the department of fish and game, under the supervision and direction of the commission, and shall enforce all the provisions of the laws of the state, and rules and regulations of the commission relating to wild animals, birds, and fish and, further, shall perform all the duties prescribed by section 67-2405, Idaho Code, and other laws of the state not inconsistent with this act, and shall exercise all necessary powers incident thereto not specifically conferred on the commission.

2. The director is hereby authorized to appoint as many classified employees as the commission may deem necessary to perform administrative duties, to enforce the laws and to properly implement management, propagation, and protection programs established for carrying out the purposes of the Idaho fish and game code.

3. The appointment of such employees shall be made by the director in accordance with the Idaho personnel commission act and rules promulgated pursuant to chapter 53, title 67, Idaho Code, and they shall be compensated as provided therein. Said employees shall be bonded to the state of Idaho in the time, form, and manner prescribed by chapter 8, title 59, Idaho Code.

4. The director is hereby authorized to establish and maintain fish hatcheries for the purpose of hatching, propagating, and distributing all kinds of fish.

5. (A) The director, or any person appointed by him in writing to do so, may take wildlife of any kind, dead or alive, or import the same, subject to such conditions, restrictions and regulations as he may provide, for the purpose of inspection, cultivation, propagation, distribution, scientific or other purposes deemed by him to be of interest to the fish and game resource of the state.

(B) The director shall have supervision over all of the matters pertaining to the inspection, cultivation, propagation and distribution of the wildlife propagated under the provisions of title 36, Idaho Code. He shall also have the power and authority to obtain, by purchase or otherwise, wildlife of any kind or variety which he may deem most suitable for distribution in the state and may have the same properly cared for and distributed throughout the state of Idaho as he may deem necessary.

(C) The director is hereby authorized to issue a license/tag/permit to a nonresident landowner who resides in a contiguous state for the purpose of taking one (1) animal during an emergency depredation hunt which includes the landowner's Idaho property subject to such conditions, restrictions or regulations as the director may provide. The fee for this license/tag/permit shall be equal to the costs of a resident hunting license, a resident tag fee and a resident depredation permit.

(D) Notwithstanding the provisions of section 36-408, Idaho Code, to the contrary, on and after the effective date of this act, the director shall not expend any funds, or take any action, or authorize any employee or agent of the department or other person to take any action, to undertake actual transplants of bighorn sheep into areas they do not now inhabit or to augment the number of bighorn sheep in existing herds until:

(i) The boards of county commissioners of the counties in which the release is proposed to take place have been given reasonable notice of the proposed release.

(ii) The affected federal and state land grazing permittees and owners or leaseholders of private land in or contiguous to the proposed release site have been

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given reasonable notice of the proposed release.

(iii) The president pro tempore of the senate and the speaker of the house of representatives have received from the director a plan for the forthcoming year that details, to the best of the department's ability, the proposed transplants which shall include the estimated numbers of bighorn sheep to be transplanted and a description of the areas the proposed transplant or transplants are planned for.

Upon request, the department shall grant one (1) hearing per transplant if any affected individual or entity expresses written concern within ten (10) days of notification regarding any transplants of bighorn sheep and shall take into consideration these concerns in approving, modifying or canceling any proposed bighorn sheep transplant. Any such hearing shall be held within thirty (30) days of the request. Upon any transplant of bighorn sheep into areas they do not now inhabit or a transplant to augment existing populations, the department shall provide for any affected federal or state land grazing permittees or owners or leaseholders of private land a written letter signed by all federal, state and private entities responsible for the transplant stating that the existing sheep or livestock operations in the area of any such bighorn sheep transplant are recognized and that the potential risk, if any, of disease transmission and loss of bighorn sheep when the same invade domestic livestock or sheep operations is accepted.

6. (A) The director shall have the power, at any time when it is desired to introduce any new species, or if at any time any species of wildlife of the state of Idaho shall be threatened with excessive shooting, trapping, or angling or otherwise, to close any open season for such time as he may designate; in the event an emergency is declared to exist such closure shall become effective forthwith upon written order of the director; in all other cases upon publication and posting as provided in section 36-105, Idaho Code.

(B) In order to protect property from damage by wildlife, the fish and game commission may delegate to the director or his designee the authority to declare an open season upon that particular species of wildlife to reduce its population. The director or his designee shall make an order embodying his findings in respect to when, under what circumstances, in which localities, by what means, and in what amounts, numbers and sex the wildlife subject to the hunt may be taken. In the event an emergency is declared to exist such open season shall become effective forthwith upon written order of the director or his designee; in all other cases upon publication and posting as provided in section 36-105, Idaho Code.

(C) Any order issued under authority hereof shall be published in at least one (1) newspaper of general circulation in the area affected by the order for at least once a week for two (2) consecutive weeks, and such order shall be posted in public places in each county as the director may direct.

(D) During the closure of any open season or the opening of any special depredation season by the director all provisions of laws relating to the closed season or the special depredation season on such wildlife shall be in force and whoever violates any of the provisions shall be subject to the penalties prescribed therefor.

(E) Prior to the opening of any special depredation hunt, the director or his designee shall be authorized to provide up to a maximum of fifty percent (50%) of the available permits for such big game to the landholder(s) of privately owned land within the hunt area or his designees. If the landholder(s) chooses to designate hunters, he must provide a written list of the names of designated individuals to the department. If the landholder(s) fails to designate licensed hunters, then the department will issue the total available permits in the manner set by rule. All hunters must have a current hunting license and shall have equal access to both public and private lands within the hunt boundaries. It shall be unlawful for any landholder(s) to receive any form of compensation from a person who obtains or uses a depredation controlled hunt permit.

7. The director shall make an annual report to the governor, the legislature, and the secretary of state, of the doings and conditions of his office, which report shall be made in accordance with section 67-2509, Idaho Code.

8. The director may sell or cause to be sold publications and materials in accordance with section 59-1012, Idaho Code.

9. Any deer, elk, antelope, moose, bighorn sheep or bison imported or transported by the department of fish and game shall be tested for the presence of certain communicable diseases that can be transmitted to domestic livestock. Those communicable diseases to be tested for shall be arrived at by mutual agreement between the department of fish and game and the department of agriculture. Any moneys expended by the department of fish and game on wildlife disease research shall be mutually agreed upon by the department of fish and game and the department of agriculture.

In addition, a comprehensive animal health program for all deer, elk, antelope, moose, bighorn sheep, or bison imported into, transported, or resident within the state of Idaho shall be implemented after said program is mutually agreed upon by the department of fish and game and the department of agriculture.

In order to enhance and protect the health of wildlife within the state, as well as safeguard the health of livestock resources, the director of the department of agriculture shall employ at least one (1) veterinarian licensed in Idaho whose duties shall include, but not be limited to, addressing wildlife disease issues and coordinating disease prevention work between the department of fish and game and the department of agriculture. The employing of said veterinarian shall be by mutual agreement of the director of the department of fish and game and of the director of the department of agriculture. The veterinarian shall be on the staff of the division of animal industries, department of agriculture. The salary or compensation to be paid said veterinarian or veterinarians

shall be divided equally between the department of fish and game and the department of agriculture, and the department of fish and game's portion shall be deposited directly into the livestock disease control account. The veterinarian shall be employed on and after July 1, 1989.

10. In order to monitor and evaluate the disease status of wildlife and to protect Idaho's livestock resources, any suspicion by fish and game personnel of a potential communicable disease process in wildlife shall be reported within twenty-four (24) hours to the department of agriculture. All samples collected for disease monitoring or disease evaluation of wildlife shall be submitted to the division of animal industries, department of agriculture.

11. (A) The director is authorized to enter into an agreement with an independent contractor for the purpose of providing a telephone order and credit card payment service for controlled hunt permits, licenses, tags, and permits.

(B) The contractor may collect a fee for its service in an amount to be set by contract.

(C) All moneys collected for the telephone orders of such licenses, tags, and permits shall be and remain the property of the state, and such moneys shall be directly deposited by the contractor into the state treasurer's account in accordance with the provisions of section 59-1014, Idaho Code. The contractor shall furnish a good and sufficient surety bond to the state of Idaho in an amount sufficient to cover the amount of the telephone orders and potential refunds.

(D) The refund of moneys for unsuccessful controlled hunt permit applications and licenses, tags, and permits approved by the department may be made by the contractor crediting the applicant's or licensee's credit card account.

SECTION 2. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval.

Approved March 24, 1997.

CHAPTER 285
(H.B. No. 345)

AN ACT

APPROPRIATING MONEYS TO THE DEPARTMENT OF FISH AND GAME FOR FISCAL YEAR 1998; LIMITING THE NUMBER OF AUTHORIZED FULL-TIME POSITIONS; PROVIDING LEGISLATIVE INTENT REGARDING THE IDAHO WILDLIFE MAGAZINE; AND AMENDING SECTION 36-112, IDAHO CODE, TO PROVIDE THAT THE STATE CONTROLLER SHALL TRANSFER AN ADDITIONAL FIFTY THOUSAND DOLLARS PER YEAR FROM THE FISH AND GAME ACCOUNT TO THE ANIMAL DAMAGE CONTROL ACCOUNT TO BE USED FOR THREE YEARS TO FUND ANIMAL DAMAGE CONTROL EFFORTS IN CONJUNCTION WITH RESEARCH PROJECTS FOR THE PROTECTION OF UPLAND GAME AND BIG GAME AND TO PROVIDE THAT UPON COMPLETION OF THE THREE YEAR PERIOD THE ADDITIONAL MONEYS TRANSFERRED

ADDENDUM NO.3

Idaho Statutes

TITLE 36
FISH AND GAME

CHAPTER 1
FISH AND GAME COMMISSION

36-106. DIRECTOR OF DEPARTMENT OF FISH AND GAME. (a) Office of Director Created. The commission shall appoint a director of the department of fish and game, hereinafter referred to as the director, who shall be a person with knowledge of, and experience in, the requirements for the protection, conservation, restoration, and management of the wildlife resources of the state. The director shall not hold any other public office, nor any office in any political party organization, and shall devote his entire time to the service of the state in the discharge of his official duties, under the direction of the commission.

(b) Secretary to Commission. The director or his designee shall serve as secretary to the commission.

(c) Compensation and Expenses. The director shall receive such compensation as the commission, with the concurrence and approval of the governor, may determine and shall be reimbursed at the rate provided by law for state employees for all actual and necessary traveling and other expenses incurred by him in the discharge of his official duties.

(d) Oath and Bond. Before entering upon the duties of his office, the director shall take and subscribe to the official oath of office, as provided by section 59-401, Idaho Code, and shall, in addition thereto, swear and affirm that he holds no other public office, nor any position under any political committee or party. Such oath, or affirmation, shall be signed in the office of the secretary of state.

The director shall be bonded to the state of Idaho in the time, form and manner prescribed by chapter 8, title 59, Idaho Code.

(e) Duties and Powers of Director.

1. The director shall have general supervision and control of all activities, functions, and employees of the department of fish and game, under the supervision and direction of the commission, and shall enforce all the provisions of the laws of the state, and rules and proclamations of the commission relating to wild animals, birds, and fish and, further, shall perform all the duties prescribed by section 67-2405, Idaho Code, and other laws of the state not inconsistent with this act, and shall exercise all necessary powers incident thereto not specifically conferred on the commission.

2. The director is hereby authorized to appoint as many classified employees as the commission may deem necessary to perform administrative duties, to enforce the laws and to properly implement management, propagation, and protection programs established for carrying out the purposes of the Idaho fish and game code.

3. The appointment of such employees shall be made by the director in accordance with chapter 53, title 67, Idaho Code, and rules promulgated pursuant thereto, and they shall be compensated as provided therein. Said employees shall be bonded to the state of Idaho in the time, form, and manner prescribed by chapter 8, title 59, Idaho

Code.

4. The director is hereby authorized to establish and maintain fish hatcheries for the purpose of hatching, propagating, and distributing all kinds of fish.

5. (A) The director, or any person appointed by him in writing to do so, may take wildlife of any kind, dead or alive, or import the same, subject to such conditions, restrictions and rules as he may provide, for the purpose of inspection, cultivation, propagation, distribution, scientific or other purposes deemed by him to be of interest to the fish and game resources of the state.

(B) The director shall have supervision over all of the matters pertaining to the inspection, cultivation, propagation and distribution of the wildlife propagated under the provisions of title 36, Idaho Code. He shall also have the power and authority to obtain, by purchase or otherwise, wildlife of any kind or variety which he may deem most suitable for distribution in the state and may have the same properly cared for and distributed throughout the state of Idaho as he may deem necessary.

(C) The director is hereby authorized to issue a license/tag/permit to a nonresident landowner who resides in a contiguous state for the purpose of taking one (1) animal during an emergency depredation hunt which includes the landowner's Idaho property subject to such conditions, restrictions or rules as the director may provide. The fee for this license/tag/permit shall be equal to the costs of a resident hunting license, a resident tag fee and a resident depredation permit.

(D) Unless relocation is required pursuant to subparagraph (E) herein, notwithstanding the provisions of section 36-408, Idaho Code, to the contrary, the director shall not expend any funds, or take any action, or authorize any employee or agent of the department or other person to take any action, to undertake actual transplants of bighorn sheep into areas they do not now inhabit for the purpose of augmenting existing populations until:

(i) The boards of county commissioners of the counties in which the release is proposed to take place have been given reasonable notice of the proposed release.

(ii) The affected federal and state land grazing permittees and owners or leaseholders of private land in or contiguous to the proposed release site have been given reasonable notice of the proposed release.

(iii) The president pro tempore of the senate and the speaker of the house of representatives have received from the director a plan for the forthcoming year that details, to the best of the department's ability, the proposed transplants which shall include the estimated numbers of bighorn sheep to be transplanted and a description of the areas the proposed transplant or transplants are planned for.

Upon request, the department shall grant one (1) hearing per transplant or relocation if any affected individual or entity expresses written concern within ten (10) days of notification regarding any transplants or relocations of bighorn sheep and shall take into consideration these concerns in approving, modifying or canceling any proposed bighorn sheep transplant or relocation. Any such hearing shall be held within thirty (30)

days of the request. It is the policy of the state of Idaho that existing sheep or livestock operations in the area of any bighorn sheep transplant or relocation are recognized and that the potential risk, if any, of disease transmission and loss of bighorn sheep when the same invade domestic livestock or sheep operations is accepted. Prior to any transplant or relocation of bighorn sheep into areas they do not now inhabit or a transplant or relocation for the purpose of augmenting existing populations, the department shall provide for any affected federal or state land grazing permittees or owners or leaseholders of private land a written agreement signed by all federal, state and private entities responsible for the transplant or relocation stating that the existing sheep or livestock operations in the area of any such bighorn sheep transplant or relocation are recognized and that the potential risk, if any, of disease transmission and loss of bighorn sheep when the same invade domestic livestock or sheep operations is accepted.

(E) The Idaho department of fish and game: (1) shall develop a state management plan to maintain a viable, self-sustaining population of bighorn sheep in Idaho which shall consider as part of the plan the current federal or state domestic sheep grazing allotment(s) that currently have any bighorn sheep upon or in proximity to the allotment(s); (2) within ninety (90) days of the effective date of this act will cooperatively develop best management practices with the permittee(s) on the allotment(s). Upon commencement of the implementation of best management practices, the director shall certify that the risk of disease transmission, if any, between bighorn and domestic sheep is acceptable for the viability of the bighorn sheep. The director's certification shall continue for as long as the best management practices are implemented. The director may also certify that the risk of disease transmission, if any, between bighorn and domestic sheep is acceptable for the viability of the bighorn sheep based upon a finding that other factors exist, including but not limited to previous exposure to pathogens that make separation between bighorn and domestic sheep unnecessary.

6. (A) The director shall have the power, at any time when it is desired to introduce any new species, or if at any time any species of wildlife of the state of Idaho shall be threatened with excessive shooting, trapping, or angling or otherwise, to close any open season or to reduce the bag limit or possession limit for such species for such time as he may designate; in the event an emergency is declared to exist such closure shall become effective forthwith upon written order of the director; in all other cases upon publication and posting as provided in section 36-105, Idaho Code.

(B) In order to protect property from damage by wildlife, the fish and game commission may delegate to the director or his designee the authority to declare an open season upon that particular species of wildlife to reduce its population. The director or his designee shall make an order embodying his findings in respect to when, under what circumstances, in which localities, by what means, and in what amounts, numbers and sex the wildlife subject to the hunt may be taken. In the event an emergency is declared to exist such open season shall become effective forthwith upon written order of the director or his

designee; in all other cases upon publication and posting as provided in section 36-105, Idaho Code.

(C) Any season closure order issued under authority hereof shall be published in at least one (1) newspaper of general circulation in the area affected by the order for at least once a week for two (2) consecutive weeks, and such order shall be posted in public places in each county as the director may direct.

(D) During the closure of any open season or the opening of any special depredation season by the director all provisions of laws relating to the closed season or the special depredation season on such wildlife shall be in force and whoever violates any of the provisions shall be subject to the penalties prescribed therefor.

(E) Prior to the opening of any special depredation hunt, the director or his designee shall be authorized to provide up to a maximum of fifty percent (50%) of the available permits for such big game to the landholder(s) of privately owned land within the hunt area or his designees. If the landholder(s) chooses to designate hunters, he must provide a written list of the names of designated individuals to the department. If the landholder(s) fails to designate licensed hunters, then the department will issue the total available permits in the manner set by rule. All hunters must have a current hunting license and shall have equal access to both public and private lands within the hunt boundaries. It shall be unlawful for any landholder(s) to receive any form of compensation from a person who obtains or uses a depredation controlled hunt permit.

7. The director shall make an annual report to the governor, the legislature, and the secretary of state, of the doings and conditions of his office, which report shall be made in accordance with section 67-2509, Idaho Code.

8. The director may sell or cause to be sold publications and materials in accordance with section 59-1012, Idaho Code.

9. Any deer, elk, antelope, moose, bighorn sheep or bison imported or transported by the department of fish and game shall be tested for the presence of certain communicable diseases that can be transmitted to domestic livestock. Those communicable diseases to be tested for shall be arrived at by mutual agreement between the department of fish and game and the department of agriculture. Any moneys expended by the department of fish and game on wildlife disease research shall be mutually agreed upon by the department of fish and game and the department of agriculture.

In addition, a comprehensive animal health program for all deer, elk, antelope, moose, bighorn sheep, or bison imported into, transported, or resident within the state of Idaho shall be implemented after said program is mutually agreed upon by the department of fish and game and the department of agriculture.

10. In order to monitor and evaluate the disease status of wildlife and to protect Idaho's livestock resources, any suspicion by fish and game personnel of a potential communicable disease process in wildlife shall be reported within twenty-four (24) hours to the department of agriculture. All samples collected for disease monitoring or disease evaluation of wildlife shall be submitted to the division of animal industries, department of agriculture.

11. (A) The director is authorized to enter into an agreement with an independent contractor for the purpose of

providing a telephone order and credit card payment service for controlled hunt permits, licenses, tags, and permits.

(B) The contractor may collect a fee for its service in an amount to be set by contract.

(C) All moneys collected for the telephone orders of such licenses, tags, and permits shall be and remain the property of the state, and such moneys shall be directly deposited by the contractor into the state treasurer's account in accordance with the provisions of section 59-1014, Idaho Code. The contractor shall furnish a good and sufficient surety bond to the state of Idaho in an amount sufficient to cover the amount of the telephone orders and potential refunds.

(D) The refund of moneys for unsuccessful controlled hunt permit applications and licenses, tags, and permits approved by the department may be made by the contractor crediting the applicant's or licensee's credit card account.

12. The director may define activities or facilities that primarily provide a benefit: to the department; to a person; for personal use; to a commercial enterprise; or for a commercial purpose.