



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

October 11, 2011

The Honorable Steve Bair
Idaho State Senate
Co-Chair, ATV Task Force
947 W 200 S
Blackfoot, ID 83221

The Honorable Judy Boyle
Idaho House of Representatives
Co-Chair, ATV Task Force
2301 Valley Rd
Midvale, ID 83645

Re: Fish and Game Commission Motorized Vehicle Use Restrictions

Dear Senator Bair and Representative Boyle:

You asked this office to provide a legal opinion regarding the following question:

Is the Idaho Department of Fish and Game's motorized vehicle use restriction rule authorized by the provisions of Title 36, Idaho Code, or has the Department exceeded its statutory authority in implementing the rule?

Set forth below is an analysis describing the Commission's rulemaking authority, statutes which further define and limit the Commission's authority over ATV regulations, and discussion of the alternative means of interpretation of this authority and statutory system.

An Overview Of The Rule.

The Idaho Fish and Game Commission have adopted motorized vehicle use restrictions published as Rule 411 of the Rule Governing the Taking of Big Game Animals. The Rule provides as follows:

The use of motorized vehicles by hunters as an aid to hunting big game is restricted in certain areas. This use restriction is in addition to all federal, state and local laws, rules, regulations, ordinances and orders; including, but not limited to, any motorized vehicle licensing, registration, and permitting requirements and traffic laws. Hunters must comply with all motorized vehicle limits or prohibitions instituted

by the landowner or land manager. Also, this use restriction rule is not an exception from, and is in addition to, the statutory prohibition against hunting from or by the use of any motorized vehicle set forth in Section 36-1101(b)(1), Idaho Code.

01. Use Restriction. In designated areas and hunts, hunters may only use motorized vehicles on established roadways which are open to motorized traffic and capable of being traveled by full-sized automobiles. Any other use by hunters is prohibited. All off-road use by hunters is prohibited.

IDAPA 13.01.08.411. The Rule contains exceptions for handicapped operators, retrieval of downed game, and packing of camping equipment. The rule incorporates the following definitions:

- a. A full-sized automobile shall be defined as any motorized vehicle with a gross weight in excess of one thousand five hundred (1,500) pounds.
- b. An established roadway shall be defined as any road that is established, built, maintained, approved or designated by any governmental entity or private landowner for the purpose of travel by full-sized automobiles. An established roadway shows evidence of repeated use by full-sized automobiles, and may include a traveled way of natural earth with depressed wheel tracks and little or no vegetation in the wheel tracks.
- c. A hunter shall be defined as a person engaged in the activity of hunting as defined in Section 36-202(j), Idaho Code.

Similar restrictions are included in the Rules Governing the Taking of Upland Game Animals, IDAPA 13.01.07.101, and the Rules Governing the Taking of Game Birds, IDAPA 13.01.09.302. The Rules apply only in specified game management units designated as "motor vehicle use restriction units." IDAPA 13.01.08.412.

"[R]egulations of administrative agencies are generally upheld if they are reasonably directed to the accomplishment of the purposes of the statute under which they are established." Idaho County Nursing Home v. Idaho Dept. of Health and Welfare, 120 Idaho 933, 937, 821 P.2d 988, 992 (1991). While the judiciary must always make "an independent determination whether the agency regulation is within the scope of the authority conferred," such determination "includes an inquiry into the extent to which the legislature intended to delegate discretion to the agency to construe or elaborate on the authorizing

statute.” Roeder Holdings, L.L.C. v. Bd. of Equalization of Ada County, 136 Idaho 809, 813, 41 P.3d 237, 241 (2002), abrogated on other grounds, Ada County Bd. of Equalization v. Highlands, Inc., 141 Idaho 202, 108 P.3d 349 (2005) (internal quotation marks omitted). Where the Legislature grants an agency broad power to craft “quasi-legislative rules,” judicial review is narrow. *Id.* Even under narrow review, a regulation must be set aside in the event of an explicit conflict between the regulation and a statute. Idaho County Nursing Home, 120 Idaho at 937, 821 P.2d at 992.

The Scope Of The Commission’s Rulemaking Authority.

Idaho Code § 36-103(b) provides “it shall be the authority, power and duty of the fish and game commission to administer and carry out the policy of the state in accordance with the provisions of the Idaho fish and game code.” The Legislature determined that “[b]ecause conditions are changing and in changing affect the preservation, protection, and perpetuation of Idaho wildlife, the methods and means of administering and carrying out the state’s policy must be flexible and dependent on the ascertainment of facts which from time to time exist and fix the needs for regulation and control of fishing, hunting, trapping, and other activity relating to wildlife.” *Id.* While the Commission “is not authorized to change” state policy, it is authorized to “administer” it due to the impracticality of administration by the Legislature. *Id.*

Appellate decisions suggest that Commission actions fall with the statutory authorization of Idaho Code § 36-103(b) if they are rationally related to “advanc[ing] the public’s interest in wildlife preservation.” State v. Thurma, 134 Idaho 90, 95, 996 P.2d 309, 314 (Ct. App. 1999).

In addition to the overarching grant of authority given the Commission in Idaho Code § 36-103(b) to administer state wildlife policies, the Commission is “authorized and empowered” to “administer[] the policy as declared in section 36-103” by, among other things, promulgating rules or proclamations establishing “when, under what circumstances, in which localities, by what means, what sex, and in what amounts and numbers the wildlife of this state may be taken.” Idaho Code § 36-104(b)(2). The Commission may also adopt temporary rules imposing “such restrictions and conditions upon hunting, angling or trapping” as the Commission finds “necessary for the preservation, protection, or management of any wildlife of this state.” Idaho Code § 36-104(b)(3).

Generally speaking, the restriction of motorized vehicle use while engaged in hunting falls within the Commission’s expansive authority to establish “by what means . . . the wildlife of this state may be taken” and its authority to regulate “other

activity relating to wildlife.” Idaho Code §§ 36-103, 36-104. The term “hunting” is defined broadly in the Idaho Code to include a number of activities, including:

chasing, driving, flushing, attracting, pursuing, worrying, following after or on the trail of, shooting at, stalking, or lying in wait for, any wildlife whether or not such wildlife is then or subsequently captured, killed, taken, or wounded. Such term does not include stalking, attracting, searching for, or lying in wait for, any wildlife by an unarmed person solely for the purpose of watching wildlife or taking pictures thereof.

Idaho Code § 36-202(j). Because the Commission has the authority to determine the “means” of hunting and the authority to regulate “other activity relating to wildlife,” it has the general authority to limit the means by which game is pursued, followed or stalked, including limits on the use of motorized vehicles.

The analysis cannot stop there, however, for the Legislature has explicitly addressed the use of motorized vehicles in hunting, and if there is any conflict between the Commission’s motorized vehicle use restriction rule and the legislative provisions, the rule must give way. Idaho County Nursing Home v. Idaho Dept. of Health and Welfare, 120 Idaho 933, 937, 821 P.2d 988, 992 (1991)(“[w]hen a conflict exists between a statute and a regulation, the regulation must be set aside to the extent of the conflict”).

The Statutes May Limit Commission Authority.

There are two legislative provisions addressing the use of motor vehicles in conjunction with hunting. The first provision is found in Idaho Code § 36-106, defining the powers of the Commission. It provides that:

In the event owners or lawful possessors of land have restricted the operation of motor-propelled vehicles upon their land, the commission, upon consultation with all other potentially affected landowners, and having held a public hearing, if requested by not less than ten (10) residents of any county in which the land is located, may enter into cooperative agreements with those owners or possessors to enforce those restrictions when the restrictions protect wildlife or wildlife habitat. Provided, however, the commission shall not enter into such agreements for lands which either lie outside or are not adjacent to any adjoining the proclaimed boundaries of the national forests in Idaho.

....

The commission may promulgate rules to administer the restrictions and cooperative agreements addressed in this subsection.

Idaho Code § 36-104(b)(10). This provision does not authorize the Commission to close roads to motorized vehicle use—rather, it merely authorizes the Commission to enter into cooperative agreements to enforce road closures adopted by the Forest Service and other forest land owners. The legislative history of the provision includes several statements emphasizing that the Commission was being granted only the power to enforce closures imposed by land owners. Joe Hinson, speaking on behalf of the forest industry, stated “nothing in this bill allows the Commission to close a road.” Minutes, House Res. & Cons. Comm., March 17, 1986. Senator Terry Sverdsten, testifying before the House Resources and Conservation Committee, “stressed to the committee that the Fish and Game Commission would not be closing roads.” *Id.* IDFG Director Jerry Conley “told the Committee that the legislation has been very carefully worded to eliminate the ability of the Fish and Game Department to close roads.” *Id.*

The other statutory provision addressing use of motorized vehicles in hunting is Idaho Code § 36-1101:

Except as may be otherwise provided under this title or commission rules or proclamations promulgated pursuant thereto, it is unlawful for any person to:

1. Hunt from Motorized Vehicles. Hunt any of the game animals or game birds of this state from or by the use of any motorized vehicle except as provided by commission rule; provided however, that the commission shall promulgate rules which shall allow a physically disabled person to apply for a special permit which would allow the person to hunt from a motorized vehicle which is not in motion. . . .
2. Molest with Motorized Vehicles. Use any motorized vehicle to molest, stir up, rally or drive in any manner any of the game animals or game birds of this state.

The scope of the statutory prohibition on hunting from motorized vehicles is fairly narrow: it prohibits hunting “from or by the use of” a motor vehicle, a term that appears intended to mean either shooting from the vehicle or using the vehicle itself as a weapon. The statute does not appear to contemplate the banning of motorized vehicles in defined areas by all persons using such vehicles as an aid to hunting. This fact is acknowledged in the motorized vehicle use restrictions rule, which states that the restrictions therein are “in addition to the statutory prohibition against hunting from or by the use of any motorized vehicle set forth in Section 36-1101(b)(1), Idaho Code.”

Legislative Intent Must Be Discerned.

The fact that the Legislature adopted limited restrictions in § 36-1101 on the use of motorized vehicles in conjunction with hunting may imply that the Legislature intended that no additional restrictions on the use of motor vehicles would be implemented. "When a statute enumerates the areas which are to be encompassed in its enforcement, it is generally accepted that those areas not specifically mentioned are not to be included. In other words, the specific mention of one thing implies the exclusion of another; *expressio unius est exclusio alterius*." State v. Michael, 111 Idaho 930, 933, 729 P.2d 405, 408 (1986).

This inference is, if anything, strengthened by the fact that the enumeration of the Commission's powers in Idaho Code § 36-104 does not include explicit authority to restrict motorized vehicle use, but in fact grants only the limited authority to enforce road closures imposed by land owners. Again, the maxim of *expressio unius est exclusio alterius* may be applied by the courts to imply that the enumerated grant of authorities is intended to exclude authorities not so enumerated. KGF Development, LLC v. City of Ketchum, 149 Idaho 524, 528, 236 P.3d 1284, 1288 (2010) (using canon to construe scope of authorities granted to city under local land use planning act). This conclusion is bolstered by legislative history demonstrating that the bill was carefully drafted to exclude any possibility of the Commission closing roads on its own authority.

The maxim of *expressio unius est exclusio alterius*, however, is "only a tool used to determine legislative intent. It is not an unimpeachable rule of law." Hewson v. Asker's Thrift Shop, 120 Idaho 164, 167, 814 P.2d 424, 427 (1991). Even if applied to infer that the Legislature intended the statutory restrictions on motorized vehicle use in conjunction with hunting to be exclusive, it does not amount to an explicit prohibition on the authority of the Commission to adopt additional restrictions upon motorized vehicle use upon findings that such restrictions are necessary to achieve wildlife management goals. Thus, the possibility exists that a reviewing court may conclude that the motorized vehicle use restrictions rule is reasonably related to the broad purpose of preserving, protecting, and perpetuating Idaho wildlife, particularly given the narrow standard of review applied to judicial review of quasi-legislative administrative rules. Roeder Holdings, L.L.C. v. Board of Equalization of Ada County, 136 Idaho 809, 813, 41 P.3d 237, 241 (2001).

Conclusion.

In short, legislative intent with regard to Commission authority to restrict motor vehicle use is not well defined. Notably, the motorized vehicle use restrictions rule did undergo legislative review. While the fact that a rule survived legislative review is not a definitive determination that the rule is authorized by statute, it serves at

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least as an advisory opinion that the rule conforms with legislative intent. Holly Care Center v. State, Dept. of Employment, 110 Idaho 76, 81, 714 P.2d 45, 50 (1986). In sum, the Legislature may wish to revisit these statutes to either expressly permit or prohibit Commission rulemaking over this subject matter. Such an amendment could likely remove all doubt as to the intent and interpretation of these statutes because when the language is plain on its face, there is no need to discern intent.

The analysis and conclusions herein are based on the research of the author in response to your request for assistance and are not intended as a formal legal opinion or to represent the views of this office on any policy issues.

Sincerely,

A handwritten signature in blue ink, appearing to read "B. Kane", with a long horizontal flourish extending to the right.

BRIAN KANE
Assistant Chief Deputy

BPK/CJS: dd