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February 17, 1989

The Honorable Jim Stoicheff
House Minority Leader
House of Representatives
State Capitol
Statehouse Mail

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Smoke Management Act, Idaho Code §§ 39-2301 to 2305

Dear Representative Stoicheff:

In your letter of January 12, 1989, you asked whether a representative of the Clean Air Coalition has made a correct interpretation of the Smoke Management Act, Idaho Code §§ 39-2301 to 2305. The question presented is whether the Smoke Management Act, in conjunction with Idaho Code § 52-108, provides grass growers more protection from nuisance lawsuits than the Right to Farm Act, Idaho Code §§ 22-4501 to 4504, provides to farmers in general.

I. The Smoke Management Act

The Smoke Management Act, Idaho Code §§ 39-2301 to 2305, establishes a voluntary smoke management program designed to promote agricultural activities relying on grass seed field burning while minimizing any potential effects field burning has on air quality. To accomplish this, the Smoke Management Act created a Smoke Management Advisory Board to advise the Director of the Idaho Department of Health and Welfare in the administration and enforcement of the Smoke Management Act by overseeing funds deposited into the Agricultural Smoke Management Account (Account). The Account was created by the Smoke Management Act to provide funds for implementation of the Smoke Management Program. The Account also provides funds to research the development of alternative crops which do not require burning, to research improved burning practices for crops which may require burning, and to research alternatives to field burning. The Account is funded by a fee to be paid to the

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Department of one dollar ($1.00) for each acre of crop land to be burned.

The Smoke Management Act authorizes the open burning of grass seed fields. Specifically, the Smoke Management Act states as follows:

> The open burning of plant life grown in agricultural fields shall be an allowable form of open burning when the provisions of this section are met, for the purpose of:
>
> (a) Disposing of crop residues;
>
> (b) Developing physiological conditions conducive to increased crop yields; or
>
> (c) Controlling diseases, insects, pests or weed infestations.

Idaho Code § 39-2305(1). The Smoke Management Act also requires any person conducting agricultural field burning in Kootenai and Benewah Counties to make every reasonable effort to burn only when weather conditions are conducive to good smoke dissipation as determined by the industry-conducted Smoke Management Program, and the burning does not violate current state and federal air quality standards. Persons conducting agricultural field burning in Benewah and Kootenai Counties must also register each field with the Department of Health and Welfare each year burning is conducted. Idaho Code §§ 39-2305(2)(a) and (3). In sum, the open burning of agricultural grass seed fields is authorized by the Smoke Management Act.

Idaho Code § 52-108 states that, "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." The open burning of agricultural grass seed fields is done under the express authority of the Smoke Management Act. As a result, grass growers conducting field burning in compliance with the Smoke Management Act are generally immune from suits for public or private nuisance. See, City of Twin Falls v. Harlan, 27 Idaho 769, 151 P. 1191 (1915) (ditch constructed and maintained under express authority of a statute cannot be deemed a nuisance) and City of Lewiston v. Isaman, 19 Idaho 653, 115 P. 494 (1911) (cellar-way and doors in sidewalk maintained by authority of law cannot be deemed a nuisance). Presumably, grass growers conducting field burning in a manner inconsistent with the Smoke Management Act could be sued for public or private nuisance. For instance, persons conducting agricultural field burning for

purposes other than those specified in the Smoke Management Act may be subject to suit for public or private nuisance.

II. The Right to Farm Act

The Right to Farm Act, Idaho Code §§ 22-4501 to 4504, was enacted to provide farmers a measure of protection from nuisance lawsuits. The Idaho Legislature, in enacting the Right to Farm Act, found that agricultural activities conducted on farm land in urbanizing areas are often subjected to nuisance lawsuits, and that such suits encourage and even force the premature removal of farm lands from agricultural uses. Idaho Code § 22-4501.

The Right to Farm Act provides as follows:

> No agricultural operation or an appurtenance to it shall be or become a nuisance, private or public, by any changed conditions in or about the surrounding nonagricultural activities after the same has been in operation for more than one (1) year, when the operation was not a nuisance at the time the operation began; provided, that the provisions of this section shall not apply whenever a nuisance results from the improper or negligent operation of any agricultural operation or an appurtenance to it.

Idaho Code § 22-4503. Agricultural operation is defined to include, without limitation, "any facility for the growing, raising or production of agricultural, horticultural and viticultural crops and vegetable products of the soil, poultry and poultry products, livestock, field grains, seeds, hay, apiary and dairy products, and the processing for commercial purposes of livestock or agricultural commodities." Idaho Code § 22-4502(1).

Under the Right to Farm Act, farmers may not be used for public or private nuisance, as a result of changed conditions in surrounding nonagricultural activities, when their agricultural operation has been ongoing for more than one year, and the operation was not a nuisance at the time it began. Farmers may be used for public or private nuisance when: (1) the agricultural operation was, at its commencement, a public or private nuisance, or (2) the agricultural operation is a nuisance as a result of improper or negligent operation. Grass growers conducting agricultural field burning in compliance with the Smoke Management At, on the other hand, are generally immune from public or private nuisance lawsuits, regardless of when the agricultural field burning was commenced. Therefore, farmers are afforded less protection from public or private nuisance lawsuits by the Right to Farm Act than grass growers

conducting field burning in compliance with the Smoke Management Act.

III. Conclusion

The Smoke Management Act, in conjunction with Idaho Code § 52-108, provides grass growers with more protection from public or private nuisance lawsuits than the Right to Farm Act provides to farmers in general. Agricultural grass seed field burning conducted in compliance with the Smoke Management Act cannot, pursuant to Idaho Code § 52-108, be deemed a nuisance. The Right to Farm Act, on the other hand, protects farmers from public or private nuisance lawsuits only when their agricultural operation has been conducted for more than a year, the operation was not a nuisance at the time it began, and the operation is not conducted improperly or negligently.

If our office can be of further assistance, please call.

Sincerely,

John C. McCreedy
Deputy Attorney General

JCM/pg

cc: John Ledger