

February 16, 2000

The Honorable Douglas R. Jones  
House of Representatives  
**STATEHOUSE MAIL**

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

Dear Representative Jones:

You have asked the Attorney General's Office to provide legal guidance regarding the Idaho State Department of Agriculture's (ISDA) statutory authority to allow a dairyman, whose permit to sell milk for human consumption is temporarily revoked, to donate the forfeited proceeds from the sale of such milk to a charity of his choice. Specifically, you asked:

May I please have an opinion on the Department of Agriculture policy of fining a dairy operation and then letting the dairy determine a charity to receive the money. Please explain the statutory authorization for this practice.

Our conclusion is that the governing statutes do not specifically address this practice. However, it is also our conclusion that the ISDA may, under certain conditions, enter into a consent agreement with a dairyman that allows for the donation of forfeited funds to a charitable organization. ISDA may not, however, allow a dairyman to determine which charitable organization receives such funds.

**BACKGROUND**

Your question focuses on the ISDA's authority to impose penalties upon a dairy that is not in compliance with applicable standards of sanitation or any other law of this state. Chapter 4 of title 37 of the Idaho Code governs the sanitary inspection of dairies as well as the issuance of permits allowing the sale of milk for human consumption. This statute also governs the revocation of such permits. Your question concerns those situations in which the inspected dairy products comply with statutory and regulatory standards, but the sanitary conditions of the dairy facility itself do not. Therefore, we focus only on the provisions of the statute governing violations of sanitary condition requirements.

## ANALYSIS

Idaho Code § 37-401 authorizes the ISDA to inspect the sanitary conditions of facilities producing dairy products intended for human consumption. Idaho Code § 37-401 states:

The director of the department of agriculture is hereby authorized and directed to . . . make sanitary inspection of . . . containers, utensils, equipment, buildings, premises or anything whatsoever employed in the production, handling, storing, processing or manufacturing of dairy products or that would affect the purity of the products. Inspections, examinations and tests shall be made to meet the requirements of the laws of the state and of the United States for the sale of the products or their transportation in both intrastate and interstate commerce. . . . The director or agent shall issue a permit authorizing the sale of milk for human consumption to all dairy farms that meet the requirements of this chapter, and rules promulgated pursuant to this chapter.

Section 37-401 places an affirmative duty upon the ISDA to inspect dairies and to issue a permit authorizing the sale of milk for human consumption to dairy facilities that are in full compliance with state and federal law.

Idaho Code § 37-403 requires the ISDA to issue a report of its findings and conclusions upon inspection of dairy farms, including dairy waste systems. This section states:

Whenever, under any law of this state, the director of the department of agriculture or any agent is required to inspect dairy farms and dairy waste systems for compliance with rules prescribed by the department, or determine the sanitary condition of anything referred to in section 37-401, Idaho Code, . . . the director shall make or cause to be made an examination and inspection and shall report his findings and conclusions.

Section 37-403 authorizes the ISDA to revoke a permit to sell milk for human consumption only upon the basis of a written report. Idaho Code § 37-403 states:

When the issuance or the revoking of any license or permit by the department of agriculture is required to be made after an inspection . . . the issuance or revocation of license or permit shall be based upon the report or reports so made by the director.

In addition, the legislature has authorized the ISDA to seek criminal prosecution and injunctive relief through the district court in the county in which a violation occurs. Idaho Code § 37-408 provides:

Anyone failing to comply with any of the provisions of this chapter or any standards, rules or orders promulgated hereunder shall be guilty of a misdemeanor and upon conviction shall be subject to a fine not exceeding two hundred dollars (\$200) or imprisonment in the county jail not to exceed three (3) months, or by both a fine and imprisonment. The director of the department of agriculture may bring civil actions to enjoin violation of this chapter or the standards, rules or orders promulgated thereunder.

In summary, when a dairyman fails to comply with statutory and regulatory standards, this statute authorizes the ISDA to do one or all of the following: (1) revoke a permit to sell milk for human consumption; (2) seek an injunction in district court; (3) request that the prosecutor in the county where the violation occurred bring criminal charges against the dairyman.

The statute does not expressly authorize the ISDA to impose sanctions other than those listed above. Thus, the ISDA cannot require a dairyman to donate forfeited proceeds from the sale of milk to a charitable organization. It is our understanding, however, that ISDA, in some instances, has entered into voluntary agreements whereby the forfeited funds from the sale of milk are donated to charitable organizations as an alternative to simply discarding the milk produced during the time period in which the dairyman's permits were temporarily revoked.

In principle, this practice is authorized by the Idaho Department of Agriculture Rules of Practice and Procedure, IDAPA 02.01.01, *et seq.*, and the Idaho Administrative Procedure Act (APA), Idaho Code §§ 67-5201, *et seq.*, which address the procedures for disposition of contested cases. Under the APA, a contested case is defined as any proceeding "that may result in the issuance of an order." Idaho Code § 67-5240. An "order" is an "agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons." Idaho Code § 67-5201(11). Clearly, the revocation of a dairy's permit to sell milk is an agency action determining the privilege of such dairy. Therefore, when the ISDA issues a notice of intent to revoke a dairy's permit to sell milk for human consumption, the ISDA has initiated a contested case.

The ISDA Rules of Practice and Procedure and the APA control agency decisionmaking procedures in the absence of more specific statutory requirements. Pursuant to the ISDA Rules of Practice and Procedure, the ISDA has broad discretion to settle contested cases and is, in fact, encouraged to do so. IDAPA 02.01.01.302.01 states in relevant part:

These rules encourage the use of informal proceedings to settle or determine contested cases. Unless prohibited by statute, the agency may provide for the use of informal procedure at any stage of a contested case.

Under IDAPA 02.01.01.302, the ISDA may conduct informal settlement negotiations and enter into voluntary settlement agreements with violators. It is important to note, however, that a contested case is not settled until all parties agree to the terms of the settlement “in writing.” IDAPA 02.01.01.302.02. This language refers to a written document that memorializes the nature of the violation and the steps the violator must take to avoid formal administrative proceedings. The written document, generally referred to as a settlement agreement, stipulation or consent order, is signed by the violator and the director of the ISDA. These settlements lead to the entry of an order by the director, which gives the ISDA continuing jurisdiction over the dispute and the power to enforce the agreement.

It is our understanding that the majority of administrative enforcement proceedings within the ISDA result in voluntary settlement agreements. In the course of settling enforcement actions, agencies may include voluntary undertakings in administrative consent decrees that they could not impose directly on a regulated entity. The question then is whether the ISDA, in agreeing to the terms of a voluntary consent agreement, has exceeded its statutory authority. We have found no Idaho cases dealing with this issue. However, the federal caselaw regarding agency consent agreements that implicate interests beyond those of private parties is instructive. When federal courts are required by law to approve an administrative agency consent decree, the courts generally review a proposed consent decree to ensure that it is “fair, adequate, and reasonable; that the proposed decree will not violate the Constitution, a statute, or other authority; [and] that it is consistent with the objectives of Congress.” Durrett v. Housing Auth., 896 F.2d 600, 604 (1st Cir. 1990). *See also*, United States v. City of Alexandria, 614 F.2d 1358, 1362 (5th Cir. 1980) (consent decree proposed by a private defendant and government agency may be overcome if decree contains provisions which are unreasonable, illegal, unconstitutional, or against public policy).

Applying these standards here, ISDA has broad discretion to settle contested cases and may choose from a range of potential remedies. These settlements are lawful so long as they do not violate federal or state or constitutional principles; advance the purposes of the statutes that are the basis of the enforcement action; and evidence some connection between the penalty and the state of Idaho’s interest. Thus, although the selection of administrative sanctions is vested in the agency’s discretion, that discretion is limited by statute, Knight v. Dept. of Ins., 124 Idaho 645, 650, 862 P.2d 337, 342 (Ct. App. 1993), and by the standards outlined above. The ISDA may exercise its sound discretion to ensure that these standards are met.

## CONCLUSION

Although the ISDA is authorized to pursue statutory goals through informal proceedings, the agency, in so doing, must ensure that the terms of a settlement agreement do not violate state or federal constitutional principles. The terms of a settlement agreement between the ISDA and a dairyman must also advance the purposes of chapter 4, title 37, Idaho Code, related statutes and rules. Those purposes include the protection of the public health, safety and welfare. The ISDA must exercise its administrative authority to ensure that a donation to a charitable organization adheres to both requirements. Therefore, it is our opinion that the ISDA may not allow a dairyman unfettered discretion as to which charitable organization forfeited funds are donated.

Sincerely,

HARRIET HENSLEY  
Deputy Attorney General  
Natural Resources Division