

## **ATTORNEY GENERAL OPINION NO. 01-3**

To: Patrick A. Takasugi  
Director  
Idaho State Department of Agriculture  
**VIA HAND DELIVERY**

Per Request for Attorney General's Opinion

### **QUESTION PRESENTED**

You asked for guidance as to the procedure the Director of the Idaho State Department of Agriculture ("Director") should follow in making the "determination" that there are no other viable agricultural alternatives to crop burning, as required by Idaho Code § 22-4803(1). As part of your request, you asked whether the Director can "simply issue a determination based on [his or her] experience and intimate acquaintance with Idaho agriculture, and [his or her] review of published literature." Finally, you have asked whether there is any "statutory or other guidance regarding the need to maintain records of the facts relied upon in making the determination."

### **CONCLUSION**

The determination required by Idaho Code § 22-4803(1) will likely be subject to deferential judicial review using an "arbitrary and capricious" standard under the Idaho Administrative Procedure Act, Idaho Code §§ 67-5201 through 67-5292. In order to withstand such a judicial review, the determination must be based on documentary evidence, including letters, memoranda, published literature, and various other reports; a reviewing court would be unable to review the Director's "intimate acquaintance with Idaho agriculture" and, thus, could not determine that the Director had formed a sufficient basis for the determination. Failure to develop a sufficient record will likely result in a reversal of the Director's determination. The materials utilized by the Director in making the determination must be retained so that in the event the determination is challenged, the reviewing court has a record to review.

### **ANALYSIS**

Your question concerns the interaction between title 22, chapter 48, of the Idaho Code, concerning Smoke Management and Crop Residue Disposal, and title 67, chapter 52, Idaho Code, the Idaho Administrative Procedure Act (APA). Idaho Code § 22-4803 states, in relevant part:

- (1) The open burning of crop residue grown in agricultural fields shall be an allowable form of open burning when the provisions of this

chapter, and any rules promulgated pursuant thereto, and the environmental protection and health act, and any rules promulgated pursuant thereto, are met, *and when no other agricultural viable alternatives to burning are available, as determined by the director . . . .*

(Emphasis added.) Accordingly, Idaho Code § 22-4803(1) imposes a duty on the Director of the ISDA to make a determination. An agency's performance of, or failure to perform, any duty placed on it by law is subject to judicial review under the APA. *See* Idaho Code § 67-5270. Therefore, the Director's determination, made pursuant to Idaho Code § 22-4803(1), is reviewable pursuant to the APA.

There are three types of actions performed by an agency which are reviewable under the APA: (1) issuance of orders following a contested case; (2) promulgation of rules; and (3) other duties which are imposed on the agency pursuant to law. The determination required by Idaho Code § 22-4803(1) constitutes neither an order nor a rule.<sup>1</sup> Accordingly, the Director need not adhere to the APA requirements governing either contested cases or rule promulgation. Agencies, however, do many things in addition to promulgating rules and issuing orders. *See* Michael S. Gilmore & Dale D. Goble, The Idaho Administrative Procedure Act: A Primer For The Practitioner, 30 IDAHO L. REV. 273, 288 (1993) (hereinafter "APA Primer"). The determination required by Idaho Code § 22-4803 is one of these additional duties.

Idaho Code § 22-4803(1) does not restrict, in any manner, the information that may be considered by the Director in reaching his or her determination. However, pursuant to Idaho Code § 67-5275(1)(c), the "agency record" of an action that constitutes neither a rule nor an order consists of "*any* agency documents expressing the agency action" (emphasis added). Presumably, such a record would include "letters, memoranda, and other pre-decisional and all decision documents." APA Primer at 354.

The APA sets forth the standard of judicial review of agency decisions. Fuller v. Department of Educ. Div. of Vocational Rehab., 117 Idaho 126, 127, 785 P.2d 690, 691 (1990). The Director's determination, a factual one, will be governed by the "arbitrary, capricious, or an abuse of discretion" standard of review set forth in Idaho Code § 67-5279(2). An agency decision is arbitrary, capricious or an abuse of discretion if it was not based on those factors that the legislature thought relevant, ignored an important aspect of the problem, provided an explanation that ran counter to the evidence before the agency, or involved a clear error of judgment. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); APA Primer at 365.

In order to survive review under the "arbitrary and capricious" standard, the Director should consider the advantages and disadvantages—important aspects upon which the determination will be based—of any alternatives in order to determine whether such are agriculturally "viable." So long as the Director's determination is supported by

substantial evidence, it is likely to withstand judicial review. Accordingly, the Director, in reaching the determination required by Idaho Code § 22-4803(1), should gather all available information on crop burning and its alternatives, carefully review that information, and reach an informed decision which is supported by the evidence.

Your question specifically asks whether the Director may rely on his or her experience and intimate acquaintance with Idaho agriculture in making the determination required by Idaho Code § 22-4803(1). The Director may rely on such information so long as it is in a form capable of judicial review, such as an affidavit wherein the Director sets forth that information. However, such an affidavit alone may not be sufficient to enable the Director's determination to withstand judicial review. Additionally, the affidavit must exist at the time the determination is made, and not be created later. The presence of an adequate record before the decision-maker *at the time his or her decision is made* is critical. The Idaho Supreme Court has looked unfavorably upon findings which are created after a decision has been made and entered because such "are not the 'findings' contemplated" by Idaho Supreme Court decisions. Curr v. Curr, 124 Idaho 686, 691, 864 P.2d 132, 137 (1993).

Finally, you have also asked whether there is any "statutory or other guidance regarding the need to maintain records of the facts relied upon in making the determination." Pursuant to Idaho Code § 67-5250(2):

Unless otherwise prohibited by any provision of law, each agency shall index by subject all agency guidance documents. The index and the guidance documents shall be available for public inspection and copying at cost in the main office and each regional or district office of the agency. As used in this section, "agency guidance" means all written documents, other than rules, orders, and pre-decisional material, that are intended to guide agency actions affecting the rights or interests of persons outside the agency. "Agency guidance" shall include *memoranda, manuals, policy statements, interpretations of law or rules, and other material that are of general applicability, whether prepared by the agency alone or jointly with other persons*. The indexing of a guidance document does not give that document the force and effect of law or other precedential authority.

(Emphasis added.) Any documents that satisfy the aforementioned definition of "agency guidance" and are relied upon by the Director must be indexed. More importantly, however, as stated above, the Director's determination could be subjected to judicial review. Such a review will be based on the record before the Director at the time of the determination. Accordingly, it is necessary for the Director to maintain the records upon which his or her determination was based.

## AUTHORITIES CONSIDERED

### 1. Statutes and Rules:

Idaho Code § 22-4803.  
Idaho Code § 22-4803(1).  
Idaho Administrative Procedure Act, Idaho Code §§ 67-5201 through 67-5292.  
Idaho Code § 67-5201(12).  
Idaho Code § 67-5201(19).  
Idaho Code § 67-5250(2).  
Idaho Code § 67-5270 .  
Idaho Code § 67-5275(1)(c).  
Idaho Code § 67-5279(2).

### 2. Idaho Cases:

Curr v. Curr, 124 Idaho 686, 864 P.2d 132 (1993).

Fuller v. Department of Educ. Div. of Vocational Rehab., 117 Idaho 126, 785 P.2d 690 (1990).

### 3. Federal Cases:

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

### 4. Other Authorities:

Michael S. Gilmore & Dale D. Goble, The Idaho Administrative Procedure Act: A Primer For The Practitioner, 30 IDAHO L. REV. 273 (1993).

DATED this 3<sup>rd</sup> day of August, 2001.

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### Analysis by:

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<sup>1</sup> 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 §

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67-5201(12). A “rule” on the other hand is an agency statement of general applicability promulgated in compliance with the requirements of the APA, which implements, interprets, or prescribes a law or policy, or the procedure or practice requirements of an agency. Idaho Code § 67-5201(19).