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FORMAL OPINION 2018-001

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RE: The Role of the Five State Elected Officials in the Authorization of the Federal Immigration Detention Facility in Evanston

It is the understanding of this Office that each of the five state elected officials—the Governor, Secretary of State, State Treasurer, State Auditor, and Superintendent of

Public Instruction—have received, both individually and collectively, repeated inquiries from public officials and members of the public regarding the potential construction of a federal immigration detention center in Uinta County, Wyoming. These inquiries raise a significant topic: whether the project would require the consent of the five state elected officials under Chapter 22 of Title 7 of the Wyoming statutes, entitled "Private Correctional Facilities." A corollary question is whether the five elected officials might pass on the issue even if their consent is not required.

The conclusion of this Office is that the immigration detention center is not a private correctional facility subject to the authority of the five state elected officials. We therefore advise that you take no action in this matter.

Legal Background

In 1991, the Wyoming Legislature enacted the Private Correctional Facilities Act. 1991 Wyo. Sess. Laws 784 (ch. 252). This act is codified at Wyoming Statutes §§ 7-22-101 through –114. Among other things, it authorized the creation of private correctional facilities, subject to the provisions of the act. Wyo. Stat. Ann. §§ 7-22-102, -103. Among these provisions is a requirement that any such project may proceed only upon receipt of "the consent of the five (5) state elected officials." *Id.* § 7-22-102(a). The term "[f]ive (5) state elected officials" is statutorily defined as "the governor, secretary of state, state auditor, state treasurer and superintendent of public instruction." *Id.* § 7-22-101(a)(vi). The original act contained an uncodified savings clause, section 3, which stated that "the requirements set forth in this act (including, **in particular, requirements relating to the obtaining of necessary consents and approvals**) shall be deemed to apply only to actions taken or to be taken under authority of this act[.]" 1991 Wyo. Sess. Laws 784, 792 (ch. 252, § 3) (emphasis added).

Ten years later, the Legislature returned to the subject of private prison facilities and enacted Wyoming Statute § 7-22-115. This section prohibits private entities from "construct[ing], operat[ing] or manag[ing] any private jail, prison or other structure to house or incarcerate inmates or prisoners in this state **except pursuant to contract under this article**." Wyo. Stat. Ann. § 7-22-115(a). Neither this amendment as codified, nor the 2001 act as enrolled, reference the 1991 savings clause provision. *See id.*, Private Prison Operation, 2001 Wyo. Sess. Laws 377 (ch. 138).

Analysis

I. The 2001 amendment to the Private Correctional Facilities Act should not be interpreted as having repealed the 1991 savings clause by implication.

A. A civil immigration detention center does not qualify as a "facility" under Wyoming Statute § 7-22-101.

Wyoming Statute § 7-22-101 provides a definition of the word "facility"; in relevant part, this definition reads that a "facility" is "a jail, prison or other incarceration facility[.]" Wyo. Stat. Ann. § 7-22-101(a)(v). The chapter further provides that "a person sentenced to the custody of the department of corrections" or "to imprisonment in a city or county jail . . . may be incarcerated in a facility constructed or operated by a private entity[.]" *Id.* § 7-22-103. The ordinary definition of "jail" is "a prison, esp. one for the detention of persons **awaiting trial** or **convicted of minor offenses**." *Random House Webster's Unabridged Dictionary* 1022 (2d ed. 2001). "Prison" is similarly defined as "a building for the confinement of persons held **while awaiting trial**, persons **sentenced after conviction**." *Id.* at 1540 (emphasis added). "Incarcerate" means "to imprison; confine." *Id.* at 965.

The detention center contemplated in Uinta County is not a "facility" for two reasons. First, under federal case law, persons detained for immigration issues are considered civil detainees. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("The proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect."). The implication of Wyoming Statute § 7-22-103 is that a "facility" under the act is a facility used for criminal (i.e., punitive) incarceration. Therefore, because immigration detainees are not criminally incarcerated, those buildings which house them are not "jail[s], prison[s], or other incarceration facilit[ies]" under Wyoming law with respect to that detention. Wyo. Stat. Ann. § 7-22-101(a)(v).

Second, Wyoming Statute § 7-22-103 contemplates that individuals "incarcerated" in private correctional facilities are "person[s] sentenced to the department of corrections" **or** "to imprisonment in a city or county jail." Civil immigration detainees are detained under federal law, not State authority. 8 U.S.C. § 1226(a). Furthermore, civil detainees are neither detained awaiting trial nor are they "sentenced," because immigration proceedings are in "no proper sense a trial and sentence for a crime or offense." *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893). "The order of deportation is not a punishment for crime[,]" but rather "a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation . . . has determined that his

continuing to reside here shall depend." *Id.* Immigration detainees have thus not been "sentenced" to civil detention. A court would likely conclude therefore that this detention center is not a "facility."

B. Because the detention center is not a facility, the 1991 savings clause applies.

Again, Wyoming Statute § 7-22-101 defines "[f]acility" as "a jail, prison or other incarceration facility constructed or operated pursuant to a contract under W.S. 7-22-102." Wyo. Stat. Ann. § 7-22-101(a)(v). The following section allows "[t]he state or local government [to] contract with private entities for the construction, lease (as lessor or lessee), acquisition, improvement, operation, maintenance, purchase or management of facilities . . . but only after receiving the consent of the five (5) state elected officials as to site, number of beds and classifications of inmates or prisoners to be housed[.]" *Id.* § 7-22-102(a).

No contracting governmental entity may contract for such services without, again, approval of the five statewide elected officials. Wyo. Stat. Ann. § 7-22-102(b). The section also reserves the right of those elected officials to reject housing "of prisoners from out-of-state, nonfederal jurisdictions[.]" *Id.* § 7-22-102(d). The 1991 uncodified savings clause specifically exempts actions not taken under the 1991 act from the "requirements related to the obtaining of necessary consents and approvals." 1991 Wyo. Sess. Laws 784, 792 (ch. 252, § 3).

Because immigration detainees are considered civil detainees, the detention center which houses them is not a "facility" under Wyoming Statute § 7-22-101(a)(v). By the terms of the 1991 act, the special approval and consent procedure involving the five statewide elected officials in Wyoming Statute § 7-22-102 does not apply when, as here, the project falls outside the scope of the act. 1991 Wyo. Sess. Laws 784, 792 (ch. 252, § 3). And because the project falls outside the scope of the act, the savings clause reaffirms that the consent provisions do not apply to it. In summary, the approval of the five state elected officials is thus unnecessary for the project to go forward as conceived.

B. The 2001 amendment does not repeal the savings clause by implication.

As explained above, the Legislature amended "Private Correctional Facilities" chapter of the Wyoming Statutes in 2001. This raises the question of whether the savings clause has been repealed or somehow restricted by the 2001 amendments.

The Wyoming Supreme Court disfavors repeals by implication. *See Standard Cattle Co. v. Baird*, 8 Wyo. 144, 153, 56 P. 598, 599 (Wyo. 1899) ("Repeals by

implication are not favored[.]"); *State ex rel. Vidal v. Lamoureux*, 3 Wyo. 731, 734, 30 P. 243, 244 (Wyo. 1892). Therefore, if possible, courts will avoid a "construction which must result in the repeal by implication of laws in force[.]" *Vidal*, 3 Wyo. at 734, 30 P. at 245. Furthermore, "to operate as [a repeal by implication] it must be a *necessary* implication." *Standard Cattle Co.*, 8 Wyo. at 153, 56 P. at 599 (emphasis in original). "The two statutes must be positively repugnant or there is no repeal; and if they can stand and both have effect, they must be allowed to do so." *Id.* The Court abides by the same rule today. *See Bird v. Wyo. Bd. of Parole*, 2016 WY 100, ¶ 15, 382 P.3d 56, 64 (Wyo. 2016) ("A repeal by implication is only appropriate when the later statute is so repugnant to the earlier one that the two cannot logically stand together, or that the whole subject of the earlier statute is covered by the later one having the same object, clearly intending to prescribe the only rules applicable to the subject." (citation and internal quotation marks omitted)).

From this, the logical endpoint is that, if the 1991 savings clause and 2001 amendment—which neither references the savings clause nor makes any point to repeal it—can be read together, they should be. The original act had two parts relevant to this discussion. First, it defined what a "facility" was and required the approval of the five statewide elected officials before the State or a local government entered into a contract with a private entity to acquire, improve, manage, maintain or operate such a "facility." Wyo. Stat. Ann. §§ 7-22-101(a)(v); 7-22-102(a)–(d). Second, an uncodified savings clause limited this approval requirement to "actions taken or to be taken under authority of this act[.]" 1991 Wyo. Sess. Laws 784, 792 (ch. 252, § 3).

The 2001 amendment does not conflict with either statutory obligation; instead, where the original act applied to the State and local governments, the amendment imposes a like duty on private entities: a private entity that "construct[s], operate[s] or manage[s] any private jail, prison or other structure to house or incarcerate inmates and prisoners" must now do so "pursuant to a contract under this article." Wyo. Stat. Ann. § 7-22-115. This amendment, by its own terms, only applies to jails, prisons, or incarceration structures, which as explained above, are legally different from an immigration detention facility which performs a civil, not criminal, function. Because this amendment does not conflict with the operation of the savings clause, a court would therefore be highly unlikely to conclude that the Legislature repealed that provision by implication.

II. Because the five state elected officials do not have the authority to approve or disapprove the project, any such action would be invalid under Wyoming law.

Wyoming is a State that recognizes "limited government authority and separation of powers." *Allred v. Bebout*, 2018 WY 8, ¶ 75, 409 P.3d 260, (Wyo. 2018) (Kautz, J., concurring). Part of this constitutional scheme recognizes that executive branch agencies are "limited in authority to powers legislatively delegated." *Lineberger v. Wyo. State Bd. of Outfitters*, 2002 WY 55, ¶ 20, 44 P.3d 56, 62 (Wyo. 2002) (citation and internal quotation marks omitted). Such agencies can therefore "do no more than [they are] statutorily authorized to do." *U.S. West Commc'ns v. Wyo. Pub. Serv. Comm'n*, 988 P.2d 1061, 1068 (Wyo. 1999). Executive branch agencies may not legislate—expanding their own power by acting outside the authority duly provided to them by the Legislature—but rather have "an affirmative legal duty to implement the laws which are adopted by the Legislature." *Cook v. Wyo. Oil & Gas Conservation Comm'n*, 880 P.2d 583, 585 (Wyo. 1994).

According to the Wyoming Supreme Court, "[a]n agency's conclusions of law can be affirmed only if they are in accord with the law"; the Court's "function is to correct any error that an agency makes in its interpretation or application of the law." *Amoco Prod. Co. v. Wyo. State Bd. of Equalization*, 12 P.3d 668, 672 (Wyo. 2000). Furthermore, the Court has held, relying on Wyoming Statute § 16-3-114, that "a court on judicial review [must] invalidate agency findings or actions made without authority." *Id.*; *see also* Wyo. Stat. Ann. § 16-3-114(c)(ii)(C) (In reviewing an agency decision, "[t]he reviewing court shall . . . [h]old unlawful and set aside agency action, findings and conclusions found to be . . . [i]n excess of statutory jurisdiction, authority or limitations or lacking statutory right").

The Private Correctional Facilities statutes appear unique in Wyoming law in authorizing the Governor, Secretary of State, State Treasurer, State Auditor and Superintendent of Public Instruction to take collective action without reference to any board or commission of which these officials are a part.[1] Wyo. Stat. Ann. § 7-22-102(a)-

[1] The reference to, and definition of, the five state elected officials appears to have been a deliberate legislative choice unrelated to the (former) State Board of Charities and Reform. This is because a constitutional amendment removed the legal need for such a board in 1989. 1989 Wyo. Sess. Laws 770, 771 (Senate J.R. No. 12). Following passage of this amendment, the Legislature created the Department of Corrections and transferred to it the duties of the Board of Charities and Reform in 1991, before abolishing the Board entirely the next year. 1991 Wyo. Sess. Laws 571, 572 (Ch. 222); 1992 Wyo. Sess. Laws 102, 128 (Ch. 25, § 4).

-(c). Indeed, this Office has located no other similar statute delegating collective decision-making authority to these officials outside an established board or commission.[2] Thus, their authority with regards to the approval or disapproval of private correctional facilities is based on the language of Wyoming Statutes §§ 7-22-101 through –115, and is limited to its express terms. 1991 Wyo. Sess. Laws 784, 792 (ch. 252, § 3).

Moving beyond that statute to consider the roles of the State Building Commission, State Board of Land Commissioners, and State Loan and Investment Board, the three administrative bodies of which all five state elected officials are a part, renders this point even more clear. *See* Wyo. Stat. Ann. §§ 9-5-101(a); 11-34-102(b); 36-2-101. For example, although statute authorizes the State Building Commission to take votes to decide "final action on any matter," the Commission's authority is limited to the promulgation of rules related to the "charge and control of the capitol building with respect to its occupancy, repair and maintenance" and "rules and regulations relative to the operation, management and use the building[.]" *id.* §§ 9-5-101(a)–(b); 9-5-106(a). The Board of Land Commissioners, for its part, is given "the power and authority to take such official action as may be necessary in securing title to land grants, or any other lands acquired by the state[,]" while the State Loan and Investment Board has general authorization to make loans of state money to governmental entities, among others. *Id.* §§ 36-2-101; 16-1-109(a). Again, the Legislature has not delegated to any of these entities additional authority relating to private correctional facility projects.

Wyoming Statute § 7-22-102's statutory grant of authority to the five state elected officials does not encompass their ability to approve or disapprove the contemplated project. Wyo. Stat. Ann. § 7-22-102. And neither do their separate duties and responsibilities as members of the State Building Commission, Board of Land Commissioners, and State Loan and Investment Board. *Id.* §§ 9-5-101 through –106; 11-34-102(b); 36-2-101. Such action on this project would therefore be "more than [those officials are] statutorily authorized to do." *U.S. West Commc'ns*, 988 P.2d at 1068. Any such unauthorized action would not comport with the principles of "limited government authority" enunciated by the Supreme Court. *Allred*,¶ 75, 409 P.3d at 280 (Kautz, J., concurring); *see Lineberger*, ¶ 20, 44 P.3d at 62 (holding that "administrative agencies [are] limited in authority to powers legislatively delegated" (citation and internal quotation marks omitted)). Wyoming law does not permit executive branch representatives to so unilaterally expand their authority; thus, for the five state elected

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[2] Wyoming Statute § 9-2-2003(b), which requires majority approval "of the governor, secretary of state and state treasurer" to appoint the director of the Department of Audit, is similar but does not require concurrence of the State Auditor and Superintendent of Public Instruction.

officials to act outside their statutory authority in such a manner could be seen as aggrandizement at the expense of the Legislature's authority to delineate executive authority through legislation. *Cook*, 880 P.2d at 585.

Furthermore, the Supreme Court reverses executive branch actions taken in excess of statutory authority. *Ahlenius v. Wyo. Bd. or Prof'l Geologists*, 2 P.3d 1058, 1061–62 (Wyo. 2000). Any agency that takes action "contrary to the plain language of the [applicable] statute," will "run[] afoul of [the] rule that an agency enjoys only those powers which the legislature has expressly conferred[.]" *Id.* at 1061 (citation and internal quotation marks omitted). The Court "strictly construe[s]" "statutes under which an agency purports to exercise a doubtful power . . . against the exercise of that power." *Id.* at 1061–62. In *Ahlenius*, the Court invalidated the decision of the Board of Professional Geologists to waive certain licensure requirements on a case-by-case basis because the applicable statute only authorized a general waiver of those requirements. *Id.* The Court held that "[t]he Board acted arbitrarily, without statutory authority, and contrary to statutory authority" and it "reversed and remanded [the Board's decision] for approval of [the petitioner's] application for licensing." *Id.* at 1062.

This matter is not unlike *Ahlenius*. Here, as in that case, the five state elected officials lack explicit "statutory jurisdiction [or] authority" or the apparent "statutory right" to approve or disapprove of the proposed detention center project. Wyo. Stat. Ann. § 16-3-114(c)(ii)(C). A court would therefore "strictly construe[]" Wyoming Statute § 16-3-114 "against the exercise of that power." *Ahlenius*, 2 P.3d at 1061–62. Supreme Court precedent (and Wyoming Statute § 16-3-114) requires a reviewing court to invalidate any agency action taken without authority. *Amoco Prod. Co.*, 12 P.3d at 672; *Ahlenius*, 2 P.3d at 1062. Should the five state elected officials act in this matter, either to consent or to withhold consent from this project, their action would likely be reversed on judicial review.

Each of the five elected state officials have certain constitutional authorities that may be express in the Constitution, or that are necessarily implied by the nature of their offices. For example, the Constitution invests the Governor with "[t]he executive power" and delegates to him authority to "take care that the laws" passed by the Legislature "be faithfully executed." Wyo. Const. Art.4, §§ 1, 4. In the "Private Correctional Facilities" chapter, however, the Legislature only authorized these officials to act as a group, with consent relying on the will of a majority of that group. Wyo. Stat. Ann. § 7-22-102(a). Thus, these statutes are premised on group action, analogous to actions by a state agency. *Id.* The authority of the elected officials, in their individual capacities, is a question that this particular chapter of statutes, as applied to the immigration detention project, simply does not pose. This opinion of the Attorney General should not therefore be read to address the individual authorities of the state elected officials, which exist in other

contexts.

Conclusion

In conclusion, two key points should guide the ultimate decision of the five state elected officials whether to take up consideration of this issue. First, they have no authority to approve or disapprove the proposed federal immigration detention facility. And second, if those officials were to act even though lacking such authority, that action would be without statutory authority. Any court taking up the matter on review would therefore reverse that action, unless it were to disagree with this Office's analysis as to the authority of the five officials.

Respectfully yours,

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