

**TO:** Governor Mark Gordon; Secretary of State Edward A. Buchanan; State Treasurer Curtis E. Meier, Jr.; State Auditor Kristi Racines; Superintendent of Public Instruction Jillian Balow

**FROM:** The American Civil Liberties Union of Wyoming

**DATE:** January 21, 2019

**RE:** The Applicability of Wyoming's Private Correctional Facilities Act to the Proposed Immigration Detention Facility in Uinta County

To Wyoming's Five State Elected Officials:

I am writing to you on behalf of the American Civil Liberties Union ("ACLU") of Wyoming. The ACLU is a non-profit, non-partisan organization that is committed to working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee to everyone in this country.

I am contacting you today to communicate the ACLU of Wyoming's stance on the applicability of the state's laws governing private detention facilities to the proposed construction of a private immigration detention center in Uinta County. The ACLU of Wyoming believes that the laws in question not only apply to the proposed detention facility, but are an invaluable tool to ensure that all detainees held in a private facility are treated with respect and dignity. This letter highlights both the common-sense need for these laws as well as a legal analysis of why the legislature clearly intended them to apply to privately run immigration detention facilities. For the reasons laid out below, the ACLU of Wyoming strongly believes that the laws in question apply to the proposed construction in Uinta County and, as such, that no such facility can be legally constructed or operated in this state without your approval.

## **I. FACTS**

Beginning in the summer of 2017, the Uinta County Commissioners started exploring the possibility of contracting with a private company to construct and operate an



immigration detention facility in the county.<sup>1</sup> Recently, more specifics about the potential construction of such a facility have become available. In a public notice released on November 12, 2019, the Uinta County Commissioners explained that they are considering selling sixty acres of county land to Municipal Capital Markets Group, Incorporated (“MCM”).<sup>2</sup> This sale would include a provision that the land can only be used to construct the proposed immigration detention.

Assuming the sale is completed, MCM would then work with CoreCivic, a corporation that owns and manages private prisons and detention centers throughout the country, to contract with the Immigration and Customs Enforcement (“ICE”) agency of the Department of Homeland Security (“DHS”) to construct and operate an immigration detention facility on this land. Detainees housed in this facility would then be held on the basis of federal law providing for the civil detention of individuals in removal proceedings or to affect their removal from the U.S. pending a final order of removal from a federal immigration judge.

Since the possibility of construction was first announced, there has been uncertainty regarding whether the project would trigger Wyoming Statute (“WY ST”) § 7-22-102 that prohibits a local government from entering into a contract to construct or operate a private incarceration facility in the state without first obtaining your approval in your role as the five state elected officials—the Governor, the Secretary of State, the State Treasurer, the State Auditor, and the Superintendent of Public Instruction. In an attempt to address this uncertainty, in June of 2018 the State’s Attorney General issued an opinion (“the AG’s Opinion”) in which he determined that the proposed construction did not require approval from these officials because an immigration detention center does not qualify as a private incarceration facility.<sup>3</sup>

For the following reasons, the ACLU of Wyoming respectfully disagrees with the AG’s Opinion and urges you to prevent the Uinta County Commissioners from taking any action to further the construction of this facility prior to obtaining your approval as the five

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<sup>1</sup> See Uinta County Resolution No. 17-10. <http://www.uintacounty.com/DocumentCenter/View/5219/17-10-Support-of-Proposed-ICE-Facility?bidId=>.

<sup>2</sup> See November 12, 2019 Uinta County Public Notice. <http://www.uintacounty.com/CivicAlerts.aspx?AID=143>.

<sup>3</sup> See Attorney General Formal Opinion 2018-001. <https://drive.google.com/file/d/11C1FlqLBfhnEVlcJE6kGpw5hFf4L0nCN/view>

state elected officials. To do otherwise would flout the will of the state’s legislature and could expose the state and Uinta County to potential time-consuming and costly litigation.

## II. PURPOSE AND IMPORTANCE OF THE ACT

Wyoming’s Private Correctional Facilities Act (“the Act”) is contained in WY ST §§ 7-22-101 through 115. These laws ensure that no privately-run detention facility may be built or operate in Wyoming unless it meets carefully crafted standards set forth by the state’s legislature.<sup>4</sup> However, if the proposed detention center is exempt from these requirements, it would have free rein to operate within the state’s borders without any of the integral safeguards that the state’s laws demand.

The Act sets forth a number of non-negotiable requirements and restrictions on companies which seek to operate a privately-run detention facility in the state. These standards govern important issues such as the quality and quantity of training that facility employees receive and the situations in which facility detention officers may use force.<sup>5</sup> The Act also requires these companies to maintain enough liability insurance to indemnify the government against civil rights lawsuits brought by detainees.<sup>6</sup> This insurance requirement is especially important considering the large number of individual and class action civil rights lawsuits that have been filed against privately run immigration detention facilities and the counties in which they are located.<sup>7</sup> Without the insurance requirement in the Act,

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<sup>4</sup> The ACLU has consistently been critical of privately-run detention centers of any kind. While we are confident that the Act applies to the proposed facilities, we do not suggest that the regulations in the Act are sufficient to overcome the numerous flaws in the industry. See <https://www.aclu.org/issues/smart-justice/mass-incarceration/private-prisons> (“The American economy should not include locking people in cages for profit.”).

<sup>5</sup> See WY ST §§ 7-22-107, 7-22-106

<sup>6</sup> See WY ST § 7-22-110.

<sup>7</sup> See e.g. *Elmaghraby v. Ashcroft*, No. 1:04-cv-1809 (E.D.N.Y., settlement filed Feb. 27, 2006) (settlement for \$300,000 for civil rights violations related to abusive conditions of confinement in detention); *Castaneda v. United States*, No. 2:07-cv-07241-DDP-JC (C.D. Cal., filed Nov. 2, 2017) (settlement for \$1.95 million after detention facility failed to perform biopsy, resulting in penile amputation and death from cancer); *Lyon v. ICE, et al.*, No. 13-cv-05878 (N.D. Cal., filed Dec. 19, 2013) (awarding \$405,000 in attorneys’ fees in a settlement resolving claims including violations of the First and Fifth Amendments); *Plascencia v. United States, et al.*, No. 5:17-cv-02515 (C.D. Cal., filed Dec. 19, 2017) (settling a civil rights lawsuit in which the county where an ICE facility was located agreed to pay \$35,000 for improperly detaining a U.S. citizen in the facility in violation of the Fourth and Fourteenth Amendments.); *Fraihat, et al. v. U.S. Immigration and Customs*

similar lawsuits brought against the proposed detention center in Uinta County could result in the state or local government being financially liable.

In addition to the rules that protect Wyoming from liability, the Act also ensures that the state retains its ability to access and monitor these facilities. Private detention companies, unlike government actors, are not subject to federal open records laws, civil service requirements, certain administrative laws, and other legal checks that would otherwise apply if DHS was directly managing the facility.<sup>8</sup> Recognizing this shortcoming, the Act requires every private detention company that contracts with the state to be monitored by an employee dedicated solely to the task.<sup>9</sup> This employee must be approved by you—the five state elected officials—must report “to the state and any other contracting governmental entity at least monthly[,]” and is guaranteed access to “any and all data, reports and other materials . . . necessary to carry out [the] monitoring responsibilities[.]”<sup>10</sup>

Additionally, the Act ensures that members of the public have the same right of access to these privately-run facilities as they would to state operated facilities.<sup>11</sup> These supervision mechanisms are vital to protect the rights of detainees in any privately-run detention facility, regardless of whether it is a private prison or an immigration detention center.

The role of the state in overseeing the proposed facility is critical because the federal government’s oversight of privately-run immigration detention centers consistently fails to protect the health and safety of the detainees. DHS has explicitly acknowledged that the methods ICE uses to ensure privately run facilities comply with detention standards are

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*Enforcement, et al.*, No. 19-cv-01546 (C.D. Cal., filed Aug. 19, 2019) (pending class action suit representing a class of approximately 55,000 immigrants in ICE custody and alleging, inter alia, violations of the Fifth Amendment).

<sup>8</sup> See Jody Freedman & Martha Minow, *Government by Contract: Outsourcing and American Democracy*, 1-13 (Jody Freedman & Martha Minow eds., 2009) (canvassing these concerns with respect to government contracting generally).

<sup>9</sup> WY ST § 7-22-108(a).

<sup>10</sup> WY ST § 7-22-108(a), (b).

<sup>11</sup> WY ST § 7-22-108(c).

inadequate. A 2018 report from DHS’s own Office of Inspector General (“OIG”) noted that ICE’s current practices to inspect and monitor privately run facilities failed to “ensure consistent compliance with detention standards[.]”<sup>12</sup> Similarly, an OIG report from 2019 concluded that “ICE does not adequately hold detention facility contractors accountable for not meeting performance standards.”<sup>13</sup>

The consequences of the federal government’s failure to properly monitor these privately-run facilities can result in abhorrent conditions for detainees. Yet another report from the OIG—again, an office within DHS—found that without proper monitoring, these privately run detention facilities frequently exhibit “problems” that “undermine the protection of detainees’ rights, their humane treatment, and the provision of a safe and healthy environment.”<sup>14</sup> The report detailed that in spite of inspection and monitoring by the federal government, facilities displayed “a lack of professionalism and inappropriate treatment of detainees by facility staff,” and “fostered a culture of disrespect and disregard for detainees’ basic rights.” This lack of oversight resulted in disturbing conditions such as unjustified strip searches, lack of access to hygienic necessities including toothpaste and hot water, delayed access to medical care, “spoiled, wilted, and moldy” food, and instances of staff abusing their disciplinary authority to lock down or segregate detainees—including one detainee “being locked down for multiple days for sharing coffee with another detainee.”

With the federal government failing to properly monitor and inspect these privately-run facilities, it is imperative that the state has the ability to do so. However, if the proposed Uinta County facility does not fall under the Act, the state would be powerless to monitor, correct, and prevent similar dehumanizing behavior from taking place within Wyoming’s borders.

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<sup>12</sup> U.S. Department of Homeland Security, Office of the Inspector General, “ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements,” June 26, 2018. Available at <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>.

<sup>13</sup> U.S. Department of Homeland Security, Office of the Inspector General, “ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards,” January 29, 2019. Available at <https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf>.

<sup>14</sup> U.S. Department of Homeland Security, Office of the Inspector General, “Concerns about ICE Detainee Treatment and Care at Detention Facilities,” December 11, 2017. Available at <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf>.



Luckily, as discussed in greater detail below, a comprehensive reading of the Act clearly shows that privately run immigration detention centers are governed by the same state laws that apply to any other privately-run detention facility. As such, you—the Governor, the Secretary of State, the State Treasurer, the State Auditor, and the Superintendent of Public—should prevent the proposed detention center from being constructed without your approval in order to comply with Wyoming law and to retain your ability to monitor and protect every person who is detained in the state.

### **III. ANALYSIS OF WYOMING’S LAWS**

The Act establishes a clear procedure that must be complied with before any private detention facility can operate in the state. The code applies to any privately run “facility” and defines a facility as any “jail, prison, or other incarceration facility.” Therefore, the key question is whether Uinta County’s proposed immigration detention center meets the Act’s definition of “facility.” If the proposed project meets this definition, then it is subject to the Act’s requirements and cannot move forward without your consent.

After carefully examining both the AG’s Opinion and the laws themselves, the ACLU of Wyoming has determined that the proposed detention center is a “facility” under the Act.

#### **A. The Proposed Immigration Detention Center is a “Facility”**

The AG’s Opinion concludes that an immigration detention center does not qualify as a “facility” under the definition set forth in the Act and that the five state elected officials are not required to approve the proposed construction. Unfortunately, this conclusion ignores basic principles of statutory construction and represents a selective reading of the Act.

As an initial matter, it is important to note that the judiciary, not the Attorney General, has the ultimate authority to interpret the state’s laws. In fact, the Wyoming Supreme Court has explicitly stated that opinions issued by the Attorney General’s office

are not binding on the courts.<sup>15</sup> Here, the judiciary would likely disagree with the AG’s Opinion because it ignores the plain language of the relevant statutes.<sup>16</sup>

As noted above, the Act defines a “facility” as any “jail, prison, or other incarceration facility.” A plain reading of the phrase “other incarceration facility” clearly encompasses an immigration detention center. The AG’s Opinion acknowledges that a common dictionary definition of “incarcerate” is “to confine.”<sup>17</sup> Since there can be no doubt that a person being held in a detention center is being confined, a plain reading of the Act shows that an immigration detention center qualifies as an “incarceration facility.”

In addition to this plain reading, the United States Supreme Court has stated that when there is ambiguity over the meaning of a term—such as the term “facility” here—it is appropriate “to consider the ordinary meaning of the defined term[.]”<sup>18</sup> The ordinary meaning and usage of the term “facility” clearly applies to an immigration detention center. This ordinary usage is most evident in the fact that both the Uinta County Commissioners and ICE have repeatedly referred to the proposed center as a facility. For instance, in a public notice issued by the County Commissioners on November 12, 2019, they repeatedly refer to the proposed construction as a “facility.”<sup>19</sup> Additionally, according to ICE’s

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<sup>15</sup> *Langdon v. Aetna Life Ins. Co.*, 640 P.2d 1092, 1094 (Wyo. 1982) (“Court determination may be necessary on issues already presented to the attorney general for an opinion[.]”).

<sup>16</sup> *See Gordon v. State by and through Capital Bldg. Rehab.*, 413 P.3d 1093, 1108 (Wyo. 2018) (finding that an attorney general opinion ignored the plain language of the state’s constitution and noting that “when this Court finds cogent reasons for disagreement with an attorney general opinion, we are duty bound to say so[.]”).

<sup>17</sup> The Tenth Circuit and the Wyoming Supreme Court consistently turn to dictionary definitions to interpret statutory language. *Fish v. Kobach*, 840 F.3d 710, 733 (10th Cir. 2016) (“We may consult a dictionary to determine the plain meaning of a term.”)(Internal citations omitted); *Matter of Birkholz*, 434 P.3d 1102, 1106 (Wyo. 2019) (“When we examine ‘plain language,’ we often are guided by dictionary definitions of the terms used in the statute.”).

<sup>18</sup> *Bond v. United States*, 572 U.S. 844, 862 (2014); *see also Johnson v. United States*, 559 U.S. 133, 136 (2010) (consulting the ordinary meaning of a statutorily defined term when there was ambiguity over the scope of the definition).

<sup>19</sup> *See* November 12, 2019 Uinta County Public Notice. <http://www.uintacounty.com/CivicAlerts.aspx?AID=143> (“At the time, there was discussion of different options that the federal government may utilize to build such a *facility*. One option contemplated collaboration with Uinta County to be an active participant in the *facility*.”)(emphasis added).

operations manual, the type of immigration detention center proposed here is a “Contract Detention *Facility*.”<sup>20</sup>

Further, interpreting the definition of facility in WY ST § 7-22-101(a)(v) to apply to immigration detention centers prevents the statutory phrase “other incarceration facility” from becoming meaningless. According to the AG’s Opinion, “jail,” “prison,” and “other incarceration facility” all refer exclusively to criminal detention centers. However, the AG’s Opinion admits that the “ordinary definition of ‘jail’ is a facility for people “awaiting trial or convicted of minor offenses[;]” while a “[p]rison” is a building “for the confinement of persons held while awaiting trial or sentenced after conviction.” Therefore, the definitions of “jail” and “prison” cover the entirety of the criminal detention process—pre and post-trial detention for both minor and more significant offenses.

Both the United States Supreme Court and the Tenth Circuit Court of Appeals have consistently emphasized that “[i]t is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”<sup>21</sup> As such, “other incarceration facilit[ies]” must be interpreted to include people being held in facilities other than jails or prisons—such as civil detainees in an immigration detention facility—to prevent the phrase from becoming meaningless.

Finally, other provisions of the Act show that, when read in its entirety, it is clearly intended to apply broadly to any privately-operated detention center regardless of whether the people detained are being held for criminal or civil reasons. This broad scope can be seen most clearly in WY ST § 7-22-102(c)(iii)(A)-(C). In this section, the legislature explicitly states that the Act applies to any facility in which people are detained “(A) Under the jurisdiction of the United States government or any of its offices, departments or agencies; (B) Otherwise under the control of the United States government or any of its offices,

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<sup>20</sup> See *Performance-Based National Detention Standards 2011* at 466.

<https://www.ice.gov/doclib/detention-standards/2011/7-5.pdf> (defining a “Contract Detention Facility” as “[a] facility that provides detention services under a competitively bid contract awarded by the ICE”) (emphasis added).

<sup>21</sup> *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *Elwell v. Okla. Ex rel. Bd. of Regents of Univ. of Okla.*, 693 F.3d 1303, 1307 (10th Cir. 2012); see also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation Of Legal Texts* at 174 (2012) (“If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.”).

departments or agencies; or (C) Lawfully confined by any jurisdiction within the United States.” None of this language supports the conclusion of the AG’s Opinion that the Act solely applies to criminal detainees. Instead, the legislature included specific language to permit the detention of people held under a wide range of different jurisdictions and agencies—including anyone under the jurisdiction of “any” federal agency or otherwise “lawfully confined by any jurisdiction within the United States.” Civil detainees in a privately-run ICE facility clearly meet these definitions.

In conclusion, the AG’s Opinion is incorrect that the proposed immigration detention center does not qualify as a “facility” under the Act. This interpretation would ignore the plain meaning of the word “facility,” would render the phrase “other incarceration facility” meaningless, and would contradict more relevant language in the Act. As such, the Act applies to the proposed facility and its construction cannot be pursued without the consent of the five state elected officials.

### **B. Selling the Land to a Third Party Does not Alleviate these Concerns**

The requirement to obtain approval from the five state elected officials cannot be avoided by selling the land to a third party—such as MCM—who would then contract with a private company to build and operate a detention center. Engaging in such a transaction without obtaining approval from the appropriate elected officials would violate both the spirit and the letter of the law.

As discussed above, the Act is clearly meant to apply to any privately-operated facility in Wyoming that deprives a person of their freedom. The legislature made this intent especially evident in WY ST § 7-22-115(a). This statute states that “[n]o private entity shall construct, operate or manage any private jail, prison or other structure to house or incarcerate inmates or prisoners in this state except pursuant to contract under this article.” This provision shows that regardless of the whether the land on which the facility is being built is owned by the government or a third party, a “private entity” cannot “construct, operate, or manage” any private detention facility unless they have followed the requirements of the Act. Accordingly, a local government cannot bypass the Act by selling land to a third party; the consent of the five state elected officials is still required before any private detention facility can be constructed or operated in the state.

**IV. CONCLUSION**

Wyoming's laws are clear: no private detention facility—whether criminal or civil—can exist in the state unless it complies with the requirements of the Act. This means that the proposed detention center in Uinta County cannot legally be built without prior approval from you, the state's top five elected officials. This is true regardless of whether the county contracts directly with CoreCivic or if they sell the land to a third party who then contracts with this company. To move forward with either of these transactions without your statutorily required approval would violate the legislature's intent and would expose the county and state to potential litigation. Additionally, it could result in any eventual facility being operated in the state without adequate regulation and oversight.

Therefore, the ACLU of Wyoming strongly encourages the state's five elected officials to ensure that any further actions by the Uinta County Commissioners to pursue this facility comply with Wyoming's laws.

Thank you,



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