September 29, 1998

No. 8262

This opinion is issued in response to certain questions presented by Mark Huddleston, Jackson County District Attorney, concerning the legal status of the Greensprings Livestock District (district).

FIRST QUESTION PRESENTED

Is a livestock district formed under ORS chapter 607 a valid legal entity when some federal lands must be counted to make up the 2,000-acre minimum land area required by ORS 607.010(3) for such districts?

ANSWER GIVEN

Yes. Federal lands may be counted towards the 2,000-acre minimum land area required for livestock districts by ORS 607.010(3).

SECOND QUESTION PRESENTED

Assuming a defect in the incorporation of a livestock district, may the validity of such a district be challenged 23 years after its formation?

ANSWER GIVEN

No. Under ORS 12.270, any challenge to a proceeding establishing the boundaries of a governmental subdivision of the State of Oregon must be brought within one year after the effective date the boundaries are established or altered.

THIRD QUESTION PRESENTED

Do the criminal penalty provisions of ORS 607.992, which make the violation of any provision of ORS chapter 607 a misdemeanor, apply to United States Bureau of Land Management (BLM) lands included within a livestock district?

ANSWER GIVEN

Yes, at least with respect to ORS 607.044 and 607.045. There is no general preemption of state criminal laws on federal lands, including those lands administered by the BLM, although there may be specific instances of conflict between federal and state laws where federal law will prevail.

DISCUSSION

It has long been the rule in Oregon that an unenclosed, unimproved area is "open range" unless included within a city or a livestock district. ***Walker v. Boomingcamp***, 34 Or 391, 392 (1896); ***Campbell v. Bridwell***, 5 Or 311, 313 (1874). Within the open range, there is no obligation on the part of an owner to keep his or her livestock within a fence or to maintain control over the movement of the livestock. ***Walker***, at 392 ("uninclosed and unimproved lands are regarded as common pasturage, and the owner of stock may suffer them to go at large and depasture such lands without being liable in trespass therefore"); ***Campbell***, at 313. In short, Oregon has historically been a "fence out" rather than a "fence in" state.

The first comprehensive livestock district law (often referred to as a "herd law") was enacted by the Oregon legislature in 1893. General Laws of Oregon (1893) p. 89. That statute authorized voters, upon petition and balloting, to prohibit stock from running at large within all or a portion of a county.(1) Thus, the voters could opt out of the "open range" and require that livestock not trespass on lands of another or on public roads. Strictly speaking, the 1893 law and subsequent livestock district laws do not require that livestock be fenced in; rather, they provide civil and criminal penalties for trespass. *See, e.g.*, ORS 607.044 and 607.045.

I. Inclusion of Federal Lands in a Livestock District

The Greensprings Livestock District was formed by vote in 1974. The district contains approximately 2,546 acres in Jackson County, of which approximately 926 acres are federal lands administered by the BLM and 1,620 acres are non-federal lands. It is the inclusion of the federal lands that gives rise to the first question, i.e., whether inclusion of federal land to make up the 2,000-acre minimum required by ORS 607.010(3) invalidates a livestock district.

In 1948, the Oregon Attorney General issued an opinion to the effect that livestock districts may not include lands in a national forest or a federal grazing district. 24 Op Atty Gen 122 (1948) (the 1948 Opinion). The basis of this conclusion was that:

From an analysis of chapter 529, Oregon Laws 1947, providing for the formation of a livestock district, it is apparent that the sections of the act are inconsistent with and opposed to the superior power of the federal government over its own lands: See Opinions of the Attorney General, 1940-1942, p. 523; 43 U.S.C.A., Ch. 8A, § 315 et seq.

Id. at 122. The 1948 Opinion also concluded, however, that a district that includes federal lands is not rendered invalid as a result. The opinion acknowledged that there was a conflict of authority from other states regarding whether inclusion of ineligible lands invalidated a district and concluded that "it is the position of this office to adopt the rule favoring the validity of the petition and the mandate of the voters at the election held pursuant to chapter 529, Oregon Laws 1947. See Opinions of the Attorney General, 1920-1922, p. 405." 24 Op Atty Gen at 123.

Since 1948, the pertinent Oregon statutes have been amended in some respects, and there have been major developments in the case law applying the Property and Supremacy Clauses of the United States Constitution (Art IV, § 3, cl 2, and Art 6, cl 2, respectively). Before reaching any constitutional issue concerning the validity of the district, we first examine whether there was any statutory defect in its formation. ***Gilliam County v. Department of Environmental Quality***, 316 Or 99, 849 P2d 500 (1993). If the statutes authorizing formation of a livestock district prohibited the inclusion of federal lands, we need not reach the issue of exclusion of federal lands on the basis of the Supremacy or Property Clauses of the United States Constitution. Accordingly, we first examine whether, as a matter of statutory construction, a livestock district may include federal lands, focusing on the changes to the pertinent state statutes between the issuance of our 1948 opinion and the formation of the Greensprings Livestock District in 1974.

1. Statutory Analysis

In interpreting a statute, we first look at the text and context of the statute to determine the legislative intent. ***PGE v. Bureau of Labor and Industries*** (***PGE***), 317 Or 606, 610, 859 P2d 1143 (1993). As part of the context of a statute, we will consider prior versions and succeeding changes in the language of the statute. ***Krieger v. Just***, 319 Or 328, 336, 876 P2d 754 (1994). If the legislative intent is clear from the text and context, the search ends there. If the legislative intent is not clear from the text and context of the statute, we look to the legislative history to attempt to discern the legislative intent. *Id*. at 611-612.

A. The Statutes Between 1948 and 1974

In 1948, at the time of the earlier opinion of the Attorney General, the state statute was silent as to whether federal lands could be included within a livestock district, containing only a general authorization for the formation of livestock districts throughout the state. The statute provided in pertinent part:

Petitions asking that an election be held to determine whether or not a livestock district shall be created shall set forth and particularly describe the boundaries of the proposed district, and ***where the described boundaries include the whole of the county*** the petitions shall contain the names of not less than 100 legal voters of the county and where the boundaries described include either one or more, or a portion of one or more, election precincts in any county, the petitions shall contain the names of not less than two legal voters from each precinct or portions of precincts included in the petitions.

Or Laws 1947, ch 529, § 2 (emphasis added). The only reference in the statute that even impliedly implicates federal lands is the provision that livestock districts may include the whole of a county. On this basis, the 1948 Opinion appears to assume without discussion that the statute authorized the inclusion of federal lands.

In 1949, the legislature repealed Oregon Laws 1947, chapter 529, and enacted Oregon Laws 1949, chapter 513, in its stead. Again, the statute anticipated that livestock districts could include the whole of a county, but was silent as to inclusion or exclusion of federal lands. Section 1 of the 1949 statute incorporated a new requirement that livestock districts contain at least 1,000 acres, but otherwise the law was largely unchanged. Or Laws 1949, ch 513, § 1.

In 1957, the livestock district laws were again substantially amended. The minimum acreage was increased from 1,000 acres to 2,000 acres and a requirement was added that

[t]he creation or dissolution of a livestock district shall not affect land entirely inclosed by federal land, unless the inclosed land is accurately and completely described in the petition. The legal voters residing on the inclosed land shall not vote on

the creation or dissolution of such a district unless the inclosed land is accurately and completely described in the petition.

Or Laws 1957, ch. 604, §§ 4, 14. The 1957 statute defined "federal land" as "a tract of land containing 25,000 acres or more owned or administered by, or under the jurisdiction of, the United States and not subject to the laws of this state." *Id.* § 2(3). These requirements remained intact in all essential respects from 1957 to 1974.

In addition to imposing additional requirements on the formation of livestock districts, the 1957 statute also set up a process to correct "substantial misunderstanding and confusion" regarding the status of previously formed livestock districts. *Id.* §§ 29-38. This process delegated to the Oregon Department of Agriculture (department) the authority to study existing districts and to issue orders determining the existence, boundaries, names and classes of livestock affected by existing districts. *Id.* §§ 29-33.

As a part of this delegation of authority, the department was required to make certain determinations. *Id.* § 34. For instance, the department was required to determine that all of Hood River and Multnomah Counties were livestock districts.[(2)] *Id.* § 34(1)(d) and (e). In addition, the department was required to determine and provide by order:

(i) That no livestock districts exist in land subject to the laws of this state which is entirely inclosed by federal land, unless otherwise provided by the laws or regulations of the United States.

(j) That no livestock districts exist in public roads passing through federal land, unless otherwise provided by the laws or regulations of the United States.

Id. § 34(1)(i) and (j). Subsection (i) appears to have been a legislative directive to the department that it follow a requirement similar to that established for new livestock districts in section 14 of the same Act, namely that lands "inclosed" by federal lands not be included in livestock districts except under certain circumstances. Subsection (j), however, does not have a counterpart in the prospective portions of the Act.

The provision that no livestock district exist in public roads passing through federal lands, *id.* § 34(1)(j), would have been unnecessary if the legislature had directed or understood that livestock districts may not include federal lands. In fact, there was no reason for the legislature to specify that public roads passing through federal lands are not included in livestock districts unless the legislature understood that livestock districts could include federal lands.

In summary, the statutes in effect between 1948 and 1974 contain no express prohibition on the inclusion of federal lands in a livestock district formed under those statutes. Or Laws 1947, ch 529; Or Laws 1949, ch 513; Or Laws 1957, ch 604. If anything, these earlier statutes (through their designation of entire counties as livestock districts and their exclusion of public roads on federal lands) suggest that the legislature understood that livestock districts did and would continue to include federal lands.

B. The Statutes from 1974 to Present

The statutes in effect at the time the district was formed in 1974 are set forth below. These statutes were largely unchanged from 1957. The first of these statutes, ORS 607.010 (1973), contained the 2,000-acre limitation that is the basis of the first question.

(1) A legal voter who desires to create a livestock district may petition the county court or board of county commissioners to hold an election for such purpose. The petition shall be filed with the county clerk of the county wherein the district is sought to be created, shall set forth the name by which the proposed district is to be designated, and shall describe the boundaries thereof.

(2) The petition shall contain the signatures of six or more legal voters from each precinct, or portion of precinct, included within the boundaries of the proposed district; but in no case shall the petitioners be required to obtain the signatures of more than 100 legal voters. No person shall sign the petition unless he owns real property within the proposed livestock district.

(3) The proposed livestock district ***shall contain not less than 2,000 acres***.

(4) The petition shall state what livestock or class or classes thereof are not to be permitted to run at large within the proposed livestock district. A class of livestock may be further designated or described by minimum or maximum age limits or by breed.

(Emphasis added.) In addition, ORS 607.012 (1973) set forth requirements for the boundaries of a livestock district.

The boundaries of the proposed livestock district shall follow subdivision lines of sections, section lines, township lines, donation land claim boundaries or lines, lakes, rivers, the boundary line of this state, public roads or county boundary lines, except that the boundary of an established livestock district may be used as a boundary for the proposed livestock district if the districts are adjacent to each other and will have a common boundary line.

The final limitation on the geographic scope of a livestock district was contained in ORS 607.043 (1973), the only reference to federal lands in these livestock district statutes, which stated:

The creation or dissolution of a livestock district shall not affect land entirely inclosed by federal land, unless the inclosed land is accurately and completely described in the petition. The legal voters residing on the inclosed land shall not vote on the creation or dissolution of such a district unless the inclosed land is accurately and completely described in the petition.

The term "federal land" was defined as "a tract of land containing 25,000 acres or more owned or administered by, or under the jurisdiction of, the United States and not subject to the laws of this state." ORS 607.005(3) (1973).

To summarize the statutes in effect in 1974, a petition for the formation of a livestock district must have: (a) been made by a legal voter; (b) set forth the name and boundaries of the district; (c) been signed by at least six voters in each precinct included in the district (all of whom must own real property in the district); (d) described a district that includes at least 2,000 acres; and (e) if non-federal lands "inclosed" by large (25,000 acres or more) tracts of federal land are to be included in the district, accurately described such inclosed lands.

These statutes had not changed materially since 1957. And the statutes in effect today, ORS 607.005 to 607.365, are essentially unchanged from the 1974 provisions set forth above.

C. Analysis and Conclusion

Since at least 1948, Oregon law has provided a general authorization for the formation of livestock districts. At no place in the statutes in effect at the time the district was formed, and at no time between 1948 and the present have the statutes excluded federal lands from such districts. The only reference to federal lands is in the negative -- a requirement that an accurate boundary description be given for non-federal lands surrounded by large federal holdings not subject to state law. ORS 607.005(3), 607.043. Areas not subject to state law are federal enclaves, such as some (but not all) military bases, and national parks. As discussed below, lands administered by the BLM are not federal holdings "not subject to state law." Quite the contrary, the statutes governing BLM lands contain specific savings provisions providing that state law will continue to apply.

Not only is there no express prohibition on the inclusion of federal lands, nothing in the context of the relevant statutes (prior and subsequent enactments and related provisions) suggests any such prohibition. Even though context can, on occasion, render an otherwise unambiguous statute ambiguous, that is not the case with regard to these statutory provisions.

If the legislature had intended a general prohibition on the inclusion of federal lands in livestock districts, it easily could have specified one. Even the provision in ORS 607.043, allowing non-federal lands enclosed by federal lands to be included in districts only when they are accurately described, applies only to situations where the enclosing "tract" is large -- 25,000 acres or more -- and only when the enclosing tract is "not subject to the laws of this state." *Id.* In short, the 1974 statutes (and their context) are unambiguous.(3) There was no prohibition on the inclusion of federal lands in a livestock district generally, nor was there any prohibition on their inclusion for the specific purpose of meeting the 2,000-acre minimum size requirement of ORS 607.010(3).(4)

In conclusion, after examining the text of the 1974 statutes and their context, we conclude that the district was authorized by statute to include federal lands within its boundaries and its minimum acreage at the time of its formation.

2. Preemption

The 1948 Opinion concluded that federal lands within a national forest or grazing district may not be included in a livestock district because "the sections of the act are inconsistent with and opposed to the superior powers of the federal government over its own lands." The opinion contains no analysis of how the Oregon livestock district laws conflict with federal laws or powers, and appears to result from the general state of the case law at that time.(5)

It remains the general rule that: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." US Const, Art IV, § 3, cl. 2 (the "Property Clause"). This provision, combined with the Supremacy Clause of the United States Constitution (Art 6, cl 2), gives the federal government extremely broad authority to preempt the application of state laws to federal property when those state laws conflict with a federal mandate.

While the federal government's authority over public lands is "without limitations," ***Kleppe v. New Mexico***, 426 US 529, 539, 96 S Ct 2285, 49 L Ed2d 34 (1976), so long as the federal government has not exercised that authority, states are free to enforce their civil and criminal laws on federal lands.

The Federal Government does not assert exclusive jurisdiction over the public lands in New Mexico, and the State is free to enforce its criminal and civil laws on those lands. But where those state laws conflict with the Wild Free-Roaming Horses and Burros Act, or with other legislation passed pursuant to the Property Clause, the law is clear: the state laws must recede.

Id. at 543 (citation omitted). *See also* ***Cipollone v. Ligget Group, Inc.***, 505 US 504, 516, 112 S Ct 2608, 120 L Ed2d 407 (1992) (judicial consideration of Supremacy Clause starts with assumption that state legislative power is not superseded by federal law unless that is "the clear and manifest purpose of Congress"); ***California Coastal Com'n v. Granite Rock Co.***, 480 US 572, 107 S Ct 1419, 94 L Ed2d 577 (1987) (upholding authority of California to condition mining permit on federal lands).

There are three grounds for preemption of state law: (a) express preemption, when federal law explicitly provides for preemption of state law, ***Shaw v. Delta Airlines, Inc.***, 463 US 85, 95-100, 103 S Ct 2890, 77 L Ed2d 490 (1983); (b) field preemption, when the extent of federal regulation is so pervasive as to make reasonable the inference that no room is left for states to supplement the federal law, ***Florida Lime & Avocado Growers, Inc., v. Paul***, 373 US 132, 142-143, 83 S Ct 1210, 10 L Ed2d 248 (1963); and (c) conflict preemption, when compliance with both federal and state law is an impossibility or when state law stands as an obstacle to accomplishment of the purposes of the federal law. ***Kennedy v. Collagen Corp.***, 67 F3d 1453 (9th Cir. 1995); ***Derenco Inc. v. Benj. Franklin Federal Sav. and Loan Ass'n***, 281 Or 533, 577 P2d 477, *cert den*, 439 US 1051, 99 S Ct 733, 58 L Ed2d 712 (1978).

A. Express and Field Preemption

The 1948 Opinion cited 43 USCA § 315 *et seq.*, without discussion, as the basis for the conclusion that livestock districts may not include federal lands. That federal statute is the Taylor Grazing Act, enacted in 1936 to regulate grazing on the public domain.

There is no express preemption of the state law providing for the establishment of livestock districts in the Taylor Grazing Act. Nor is there any express preemption of the primary purpose for formation of a livestock district: to establish civil liability for owners of livestock who allow their livestock to run at large on the land of another within a livestock district. ORS 607.044, 607.045(1). In fact, the Taylor Grazing Act provides that:

Nothing in this subchapter shall be construed as restricting the respective States from enforcing any and all statutes enacted for police regulation, nor shall the police power of the respective States be, by this subchapter, impaired or restricted, and all laws heretofore enacted by the respective States or any thereof, or that may hereafter be enacted as regards public health or public welfare, shall at all times be in full force and effect: *Provided, however,* That nothing in this section shall be construed as limiting or restricting the power and authority of the United States.

43 USCA § 315n. In addition, the Act provides that "[f]ences * * * necessary to the care and management of the permitted livestock may be constructed on the public lands. * * * Permittees shall be required by the Secretary of the Interior to comply with the provisions of law of the State within which the grazing district [formed under the Act] is located with respect to the cost and maintenance of partition fences." 43 USCA § 315c. Thus, the Taylor Grazing Act contains an express general savings clause for state law, 43 USCA § 315n, rather than any express preemption. Furthermore, the Act also contains a specific savings clause with respect to state fencing laws. 43 USCA § 315c.

The absence of any Congressional intent that the Taylor Grazing Act result in express or field preemption of state livestock district laws is reinforced by the BLM's rules implementing the Taylor Grazing Act. In particular, 43 CFR § 4120.5-2 states:

Insofar as the programs and responsibilities of other agencies and units of government involve grazing upon the public

lands * * * the Bureau of Land Management will cooperate, to the extent consistent with applicable laws of the United States, with the involved agencies and government entities. ***The authorized officer shall cooperate with State, county, and Federal agencies in the administration of laws and regulations relating to livestock, * * * including***

(a) State cattle and sheep * * * [livestock districts] in control of stray and unbranded livestock * * * .

(Emphasis added.) And 43 CFR § 4140.1(c)(3) prohibits:

(3) Violation of State livestock laws or regulations relating to the branding of livestock; breed, grade, and number of bulls; health and sanitation requirements; ***and violating State, county, or local laws regarding the stray of livestock from permitted public land grazing areas onto areas that have been formally closed to open range grazing***.

(Emphasis added.)

In short, it is clear that under the Taylor Grazing Act there is neither express nor field preemption of the state laws that provide for the formation of livestock districts and make it illegal for the livestock of one owner to stray onto the property of another.(6) The Taylor Grazing Act specifically provides for concurrent state jurisdiction. The only remaining question is whether, under the third prong of preemption analysis, there is an actual conflict between Oregon's livestock district laws and the Taylor Grazing Act.

B. Conflict Preemption

In the context of conflict preemption, state law is displaced only to the extent that it actually conflicts with federal law, and a federal court should not extend its invalidation of the application of state law further than necessary to dispose of the case before it. ***Dalton v. Little Rock Family Planning Services***, 516 US 474, 116 S Ct 1063, 134 L Ed2d 115 (1996).

In 1982, a U.S. District Court held that the "open range" provisions of Oregon's laws were preempted. ***Bilderback v. United States***, 558 F Supp 903 (D. Or., 1982). ***Bilderback*** involved a "frisky but otherwise undistinguished Forest Service pack horse" that "trotted" onto Highway 20 in the Willamette National Forest and was hit by a car. *Id.* at 904. The occupants of the car brought suit against the United States for negligence. The United States defended in part based on its claim that Oregon's open range law allows livestock to roam at large except where livestock districts are established.

In response to this defense, the court stated:

In this case, it appears that the Willamette National Forest is not an exclusive federal enclave. It is not clear whether the state of Oregon ceded jurisdiction. It is certain, however, that Congress did not accept, or has since renounced, exclusive jurisdiction over the forest. The provisions of Title 16 U.S.C. 480 provide that the states retain civil and criminal jurisdiction over the national forests. The Supreme Court has interpreted this statute to mean that the states have legislative jurisdiction over the national forests. Thus, Oregon open range law would apply to the Willamette National Forest unless it conflicts, in the supremacy clause sense, with some federal law governing the forest under the property clause.

Id. at 905-06 (citations and footnote omitted). The opinion then goes on to find that the provisions of Oregon law allowing livestock to roam at large outside of livestock districts conflicted with several regulations of the Secretary of Agriculture concerning the control of livestock in the national forests. *Id.* at 906.

Under ***Bilderback***, there is no doubt that Oregon's early common law of open range under ***Walker v. Boomingcamp***, 34 Or 391, and ***Campbell v. Bridwell***, 5 Or 311, does not apply within the National Forests. In this case, however, we are faced with the preemption question turned essentially 180 degrees: that is, whether Oregon's ***livestock district*** laws (requiring control of livestock and providing for the disposition of strays) apply on federal lands where federal regulations largely appear designed to accomplish the same purposes as state law. While, under ***Bilderback***, Oregon's open range laws conflict with federal laws governing the national forests, the opinion in ***Bilderback*** does not reach or concern Oregon's laws concerning the control of livestock within livestock districts. And under ***Dalton v. Little Rock Family Planning Services***, 516 US 474, any conflict between Oregon's law of open range (outside of livestock districts) may not be extended to Oregon's livestock district laws generally.

In 1978, the Office of the Regional Solicitor, U.S. Bureau of Land Management, provided written advice to the Oregon State Director of the BLM to the effect that "federal lands may not be included in the 2000 acres required to form a livestock district." Memorandum from Lawrence E. Cox, Assistant Regional Solicitor, to Oregon State Director, Bureau of Land Management (September 15, 1978). The basis for the Regional Solicitor's advice was the Oregon Attorney General's 1948 Opinion. Specifically, the Regional Solicitor advised that:

[i]t is clear that the [Oregon] Attorney General found a direct conflict between Oregon law with regard to the creation of livestock districts and the Taylor Grazing Act. * * * We are not aware of any court decisions or subsequent opinions of the Attorney General directly on the question of exemption of federal lands from livestock districts under Oregon law. Accordingly, we conclude that in Oregon federal lands may not be included to form a livestock district.

Memorandum, at 4. The Regional Solicitor went on to note:

If it were to be held that a valid district could be created even though it * * * included federal lands, it would not follow that grazing on federal lands would be precluded. As we understand it, the BLM issues leases and permits for grazing on federal lands. The leases or permits do not authorize the lessee or permittee to graze on private lands lying contiguous to or in the vicinity of the federal lands.

* * * * *

While inclusion of BLM lands in a grazing district may result in BLM grazing leases and permits becoming less desirable as the lessee or permittee would have to exercise a degree of supervision over his livestock so as to prevent them from going upon private lands, there appears to be no reason why BLM should cancel such leases or permits.

Memorandum at 4-5 (citation omitted). The Regional Solicitor then concluded with the advice that "[i]t is * * * our opinion that state and local action pursuant to the Oregon Livestock District Law would not preclude grazing on federal lands." *Id.* at 6.

In short, the Regional Solicitor advised, based on this office's 1948 Opinion, that federal lands could not be included in an Oregon livestock district. We have already concluded above that notwithstanding the 1948 Opinion, there is no express or field preemption of Oregon's livestock district laws. Furthermore, there is nothing in either the ***Bilderback*** decision or in the 1978 advice of the Regional Solicitor that shows any conflict between the livestock district laws and federal law. If anything, the Regional Solicitor's advice supports a conclusion that there is no conflict. We now turn to our own analysis of whether a conflict exists.

As noted above, there is no federal law that expressly prohibits the inclusion of BLM lands within a state livestock district. As a result, any conflict preemption would not affect the validity of a livestock district unless the conflict extended to all of the purposes or powers of the district. If there is at least some purpose or power of a livestock district that does not conflict with federal law, then there is no basis for invalidating the district on the basis of preemption. ***Dalton v. Little Rock Family Planning Services***, 516 US 474.

Under Oregon's livestock district laws, one of the central purposes of such districts is to prohibit livestock from running at large. ORS 607.044 establishes civil liability for owners of livestock who allow their livestock to run at large on the land of another in the district. Similarly, ORS 607.045(1) provides that:

No person owning or having the custody, possession or control of an animal of a class of livestock shall permit the animal to run at large or to be herded, pastured, or to go upon the land of another in a livestock district in which it is unlawful for such class of livestock to be permitted to run at large.

As noted by the BLM's Regional Solicitor, in the context of federal lands, these state statutes prohibit a federal lessee or permittee from allowing livestock under his or her ownership or control from running at large on adjoining or nearby non-federal lands. The statutes also work in the other direction, to prohibit a person grazing livestock on non-federal lands from allowing livestock under his or her ownership or control to run at large on federal lands.(7) Conditions in federal grazing allotments generally prohibit grazing outside of the designated federal allotment. 43 CFR § 4140.1(b)(1). And 43 USCA § 315b prohibits grazing on federal lands without a permit or license. Because ORS 607.044 and 607.045 prohibit the very activities prohibited by federal law, state and federal laws concerning the control of livestock on BLM lands are in concert; there is no conflict, and there is no preemption.(8)

Consequently, we conclude that there is no general preemption of ORS chapter 607 by federal law, and that a livestock district may include federal lands, at least for the purpose of making it unlawful under state law for livestock on federal lands to run at large onto non-federal lands (or vice versa). To the extent it concluded otherwise, we reverse our 1948 opinion, 24 Op Atty Gen 122 (1948).

II. Challenging the Validity of a Livestock District

It is now 23 years after the formation of the Greensprings Livestock District. We are asked whether the passage of time has any effect on a challenge to the district's validity. Although we concluded above that the district lawfully included federal lands at the time of its formation, we also address this question due to the potential for similar, recurring issues with respect to other districts.

There is a statutory limitation on actions challenging the validity of governmental subdivisions. ORS 12.270 provides that:

any proceeding which establishes or alters the boundaries of a governmental subdivision previously or hereafter initiated and purported to be effected in accordance with applicable legal requirements shall be conclusively presumed valid for all purposes one year after the purported effective date of the action. No direct or collateral attack on the action may thereafter be commended.

The conclusive presumption created by ORS 12.270 is limited to actions establishing or altering the boundaries of a governmental subdivision that are "purported to be effected in accordance with applicable legal requirements." *Id.* The meaning of this limitation is not entirely clear. In ***Perkins v. City of Rajneeshpuram***, 300 Or 1, 7, 706 P2d 949 (1985), the Supreme Court applied the statute to prohibit a collateral attack on the city's validity. In that case, the challenge was based on the fact that a separate challenge to Wasco County's decision authorizing an incorporation election was still pending.

In cases preceding the adoption of ORS 12.270, challenges to the validity of the formation of governmental entities were barred so long as there was substantial compliance with statutory notice requirements. ***State ex rel v. Port of Bay City***, 64 Or 139, 143, 129 P 496 (1913) (substantial compliance with notice requirement held to bar subsequent challenge to the validity of port); ***Wasco County PUD v. Kelly***, 171 Or 691, 711, 137 P2d 295 (1943). In ***Wasco County***, the Hydroelectric Commission included lands in the People's Utility District (PUD) that were not eligible for inclusion under the PUD statutes. Nevertheless, the Supreme Court held that the unlawful inclusion of ineligible territory "would not invalidate its legal existence. * * * The owners of such lands had due opportunity to protest to the Commission against their inclusion, and, having failed to avail themselves thereof, they cannot now be heard to complain." *Id.* at 711 (citations omitted). *See also* ***Southern Oregon Co. v. Port of Bandon***, 91 Or 308, 178 P 215 (1919) (landowner could not later complain that lands included within port district were ineligible for inclusion). ORS 12.270 appears to be a codification of this common law, and we believe that a court would interpret the limitation "purported to be effected in accordance with applicable legal requirements" in that statute as requiring that the statutory notice provisions for formation of the entity have been followed.

We have not been presented with any facts indicating that the Jackson County Board of Commissioners failed to publish notice of a hearing on the proposed formation of the Greensprings Livestock District, as required by ORS 607.013 (1973). As a result, we conclude that ORS 12.270 applies and that a direct or a collateral challenge to the validity of the district is barred by the passage of time.

III. Application of State Criminal Laws on Federal Lands

Violation of the livestock district laws is punishable as a misdemeanor. ORS 607.992. Under the provisions of the Taylor Grazing Act and the BLM regulations set forth above, states retain criminal jurisdiction over the public domain lands (i.e., BLM administered lands) to enforce laws relating to public health and welfare.

At least as to the prohibitions in ORS 607.044 and 607.045, there is no actual conflict between federal and state law, for the reasons discussed above. A person unlawfully allowing livestock to run at large on federal lands that are within a livestock district may therefore be prosecuted under ORS 607.992, as may a federal permittee or lessee who allows livestock to run at large off of his or her federal allotment onto non-federal lands.

With regard to the other provisions of ORS chapter 607, we note that the preemption analysis of actual conflicts is extremely fact-specific. As a general matter, so long as enforcement of state law does not actually conflict with federal law, or frustrate the purpose of the federal law, there is no preemption. In order to give any more definitive advice, we would need a specific set of facts. In this light, it may be useful for the district and Jackson County to explore whether a cooperative agreement with the BLM could provide some certainty regarding the respective roles of federal and state law enforcement on BLM lands. Such agreements appear to be authorized under 43 CFR § 4120.5.

IV. Role of Attorney General

The Oregon Department of Justice does not act as legal counsel to the livestock districts or counties of this state. Livestock districts and counties are entitled to seek and rely upon advice from their own attorneys. The legal opinions stated herein

are given solely for your use and benefit.

DAVID SCHUMAN

Deputy Attorney General

HM:RMW:AV/llm/JGG124EC

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1. According to the Supreme Court:

Stock running at large are animals that roam and feed at will, and are not under the immediate direction and control of any one. They may be in an enclosure which may restrain the limits in which they shall wander and feed, or they may be on an unfenced range, relatively without limit, where they may roam and feed at will; but in either case they are not subject to the direction and control of any one. So to speak, they are master of their own movements, going whither they will without personal direction or control. * * * But stock or sheep in charge of a herder and subject to his control, whether in an enclosed field or upon a range, is not stock running at large, as the places whither they wander and feed, or lie down to rest, are selected by him, and subject to his direction and control.

Keeney v. Oregon Ry. & Nav. Co., 19 Or 291, 292-293, 24 P 233 (1890). *See also* ***Parker v. Reter***, 234 Or 544, 383 P2d 93 (1963).

2. Hood River County and Multnomah County both contain significant amounts of federal lands, implying that the legislature recognized that livestock districts could include federal lands.

3. Although we believe that the statute is unambiguous, and that a court would not reach the next level of inquiry under ***PGE*** into legislative history, we have reviewed the legislative history of the 1957 Act that introduced the prohibition on the inclusion of lands enclosed by federal lands. There is one reference to the subject of federal lands. Mr. Larry Williams of the Oregon Cattlemen's Association (the primary sponsor of the bill) stated:

All federal lands are open range. Even though livestock districts are scattered within these lands, they are open also. The federal courts have jurisdiction over the state courts in this matter.

Minutes, Oregon Senate Committee on Agriculture (HB 786), May 7, 1957. This testimony also suggests the sponsor's understanding that livestock districts can and did include federal lands, but that on federal lands the range remained open due to the supremacy of federal law. This statement corresponds generally with the 1948 Opinion in that it evidences an understanding that the legislature had already included federal lands in statutorily-created livestock districts, but that in such cases federal law continued to control the regulation of livestock on federal lands. It does not suggest any legislative understanding or determination that counties (or the legislature) were not authorized to include federal lands within such districts.

4. In contrast to the Oregon statutes, the Idaho Legislature has provided that:

Notwithstanding any other provision of law to the contrary, no herd district established before or after July 1, 1983, shall:

(a) contain any lands owned by the United States of America, and managed by the department of interior, bureau of land management, or its successor agency, upon which lands the grazing of livestock has historically been permitted.

Idaho Code § 25-2402. Relying on this statute, the Idaho Supreme Court found a herd district ordinance invalid as to federal lands purportedly included in the district. ***Miller v. Miller***, 745 P2d 294 (Idaho 1987).

5. *See, e.g.*, 20 Op Atty Gen 523 (1942) (concluding that land owned by United States may be included in state soil conservation district if federal government consents to its inclusion).

6. As to there being no field preemption under the Taylor Grazing Act, *see* ***United States v. Hatahley***, 220 F2d 666, 671 (10th Cir, 1955) *affirmed in part and reversed in part*, 351 US 173, 76 S Ct 745, 100 L Ed2d 1065 (1956).

7. ORS 607.045(1) does not prohibit a person holding a federal grazing allotment and also owning or leasing non-federal lands that adjoin their federal allotment from allowing his or her livestock to run at large between the federal and non-federal lands.

8. Courts in other states that have considered this question have reached the same conclusion. *See* ***Ricca v. Bojorquez***, 473 P2d 812 (Ariz 1970) (upholding Arizona statute providing for formation of livestock districts that include BLM lands); ***In re Kalfell Ranch, Inc.***, 887 P2d 241 (Mont 1994) (state grazing district includes large areas under jurisdiction of BLM).

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