

MINUTES
SENATE RESOURCES & ENVIRONMENT COMMITTEE

DATE: Wednesday, February 21, 2024

TIME: 1:30 P.M.

PLACE: Room WW55

MEMBERS PRESENT: Chairman Burtenshaw, Vice Chairman Adams, Senators Guthrie, Den Hartog, Harris, Schroeder, Semmelroth, and Taylor

ABSENT/ EXCUSED: Senator Okuniewicz

NOTE: The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

CONVENED: **Chairman Burtenshaw** called the meeting of the Senate Resources and Environment Committee (Committee) to order at 1:30 p.m.

MINUTES APPROVAL: **Senator Schroeder** moved to approve the Minutes of February 5, 2024. **Senator Adams** seconded the motion. The motion carried by **voice vote**.

MINUTES APPROVAL: **Senator Harris** moved to approve the Minutes of February 7, 2024. **Senator Adams** seconded the motion. The motion carried by **voice vote**.

S 1292

LANDS - Amends, repeals, and adds to existing law to provide for legal representation. **Senator Harris** explained this legislation removed the responsibility of the Office of the Attorney General (OAG) to provide legal representation to the Idaho Department of Lands (IDL) and allowed IDL to hire or contract its own legal counsel. The Attorney General served on the State Board of Land Commissioners (Land Board) and IDL was the administrative and regulatory arm of the Land Board. **Senator Harris** argued that the Attorney General's staff provided support for the Attorney General's efforts as a member of the Land Board, and this could be seen as a conflict of interest and develop distrust with the public.

DISCUSSION: **Chairman Burtenshaw** asked Senator Harris to explain for the Committee, in layman's terms, the position on the Land Board and how that conflicts with IDL. **Senator Harris** responded that the members of the Land Board were Idaho's Governor, Secretary of State, Attorney General, Superintendent of Public Instruction, and the State Controller. Within IDL there were three deputy attorney generals and their staff. Those deputy attorney generals and their staff worked for IDL, but also for the Land Board, through the Attorney General. **Senator Guthrie** asked for an example that illustrated the potential conflict. **Senator Harris** responded that there was legislation passed three or four years ago having to do with mineral leases, and it passed both bodies of the legislature by a wide margin. When it came to enacting that statute, the legal counsel with IDL said it was unconstitutional and they refused to enact it, which left those holding mineral leases in a vulnerable and unsupported position. **Senator Guthrie** asked if those who refused to enact the mineral lease legislation were within IDL, and on what authority did they not enact a legally passed statute. **Senator Harris** responded that the deputy attorney generals within IDL advised IDL not to enact this legislation.

Vice Chairman Adams asked for an explanation of the reduction in funding included in the last paragraph of the Statement of Purpose/Fiscal Note. **Keith Bybee**, Division Manager, Budget Policy Analysis, explained that for the first two years there were cost allocations already in place for attorney general fees at IDL. After the first two years, cost allocations would catch up with actual costs, so the first year of savings would be in fiscal year 2027. **Vice Chairman Adams** asked if continuing to allow IDL to also contract with the OAG meant that there was a risk of double payment. **Mr. Bybee** responded that the costs paid or accrued for services provided by the OAG would fall off after the two year lag between cost allocation and actual costs, or fiscal year 2027.

TESTIMONY:

Raul Labrador, Attorney General, State of Idaho, stated he was not for or against **S 1292**, but he had some concerns. He believed that the way he ran the OAG was different than his predecessor, so this legislation may not address a current problem. He shared that he would not comment on the constitutionality of the legislation because he did not think it was his role, but he would speak behind the scenes about individual legislation and share his concerns. Some of his concerns with this legislation were:

- the loss of impartial, independent advice, as IDL would have influence over the legal advice given by attorneys they could hire and fire
- the impact of influence from outside sources, such as industry lobbyists or influential private individuals, could increase because embedded attorneys would be more likely to condone employee's behavior
- the legislation provided that IDL general counsel could consult with the OAG, although such a consultation would breach attorney client privilege
- the OAG would still be required to represent the Land Board in court
- the possible loss of institutional knowledge
- this legislation might violate Idaho's Constitution, because the constitutional intent of Idaho Code § 58-101, that created IDL, was that the Land Board, and by extension, IDL, receive their legal counsel from the OAG

DISCUSSION:

Senator Schroeder asked about people that had sought advice on a particular piece of draft legislation from his office regarding constitutionality and were rebuffed. **Mr. Labrador** responded that he did not think his office should be getting in the middle of constitutional fights, but these particular people were advised of the constitutional issues his office had with the legislation. **Senator Schroeder** asked if it would have been better if he had asked for an opinion in writing, as was his duty under Idaho Code § 67-1401(6). **Mr. Labrador** responded that he read his duties differently, and that the legislature had their own attorneys that could provide a written opinion. He thought it was a mistake for the executive branch to provide a written opinion on the constitutionality of legislation. **Senator Schroeder** asked Mr. Labrador to expand on his concern about attorneys being beholden to the Land Board. **Mr. Labrador** responded that some of his attorneys understood their role was to explain what the law actually stated, but he also had attorneys that legally tried to justify bad actions. His goal was to educate his staff to provide honest advice, and to stand firm on what the law actually stated.

Senator Semmelroth asked Mr. Labrador to explain his concern that if this legislation was implemented, legislators would lose access to impartial advice, since he stated that his office should not provide advice or speak to the constitutionality of legislation anyway. **Mr. Labrador** responded that if legislators sought advice from his office, they would receive help, but they would not receive a written opinion about constitutionality, because those written opinions have been used against his office in litigation. **Senator Semmelroth** asked if this legislation was implemented and there was a situation where the OAG had a legal clash with IDL, would it not be beneficial for IDL to have their own attorneys, so they are not in conflict with the OAG. **Mr. Labrador** responded that IDL and the Land Board were legally one entity, so having separate attorneys may be a problem.

Senator Guthrie asked if this legislation was enacted, how the transition would work if IDL hired their own counsel, but the OAG represented them in court. **Mr. Labrador** responded that he did not know, and it would depend on the lawsuit and what issues were raised. **Senator Guthrie** asked what authority allowed the Attorney General to prevent a law passed by the legislature from being implemented, as in Senator Harris's example. **Mr. Labrador** explained it was his understanding that after the legislation was passed, the Attorney General and the Natural Resources Division Chief at IDL went to the IDL attorneys and told them they could not implement the statute, because it was unconstitutional. **Senator Schroeder** asked about the conflict between the OAG representing their client, in this case IDL, and also providing them with legal support. **Mr. Labrador** responded that in the case of the OAG and the Land Board and IDL, which in his mind and in the Constitution and in the statute were one entity, there was no conflict. He agreed there may be a perceived conflict.

Chairman Burtenshaw asked if there was anything keeping IDL from hiring outside counsel if they felt that there was a conflict of interest. **Mr. Labrador** responded that in this instance, the statutes do not allow IDL to hire outside counsel. **Chairman Burtenshaw** asked if this legislation was in conflict with statute. **Mr. Labrador** responded that when agencies could or could not hire outside counsel was stated in statute. He added that there were entities, such as the governor, the legislature, and the judiciary, that statute allowed to hire outside counsel, but IDL did not have the statutory authority to hire outside counsel. **Chairman Burtenshaw** asked if this legislation was unconstitutional. **Mr. Labrador** responded that there was a constitutional problem with this legislation. **Chairman Burtenshaw** asked how the problem of having legislation overruled by the OAG could be corrected. **Mr. Labrador** offered to review the legislation passed by the legislature and not enacted with legislators to determine how to get around the court decision that created the issue. He thought they might redraft that legislation or, if necessary, create a constitutional amendment.

Chairman Burtenshaw asked Senator Harris if he would be willing to work with Mr. Labrador on this issue. **Senator Harris** responded that he would work with anyone to fix something that needed to be fixed.

MOTION: **Senator Schroeder** moved to send **S 1292** to the floor with a **do pass** recommendation. **Chairman Burtenshaw** seconded the motion.

DISCUSSION: **Vice Chairman Adams**, **Senator Guthrie**, and **Senator Schroeder** stated they would need further discussion on this legislation before they supported it on the floor.

VOICE VOTE: The motion to send **S 1292** to the floor with a **do pass** recommendation carried by **voice vote**.

**PASSED THE
GAVEL:**

S 1322

Chairman Burtenshaw passed the gavel to Vice Chairman Adams.

INVASIVE SPECIES - Amends and adds to existing law to provide requirements for launch and transport of conveyances and to provide that a portion of annual revenue deposited in the invasive species fund may be made available to counties, cities, and other local entities for certain equipment and supplies. Chairman Burtenshaw stated this legislation amended Idaho Code § 22-1904 to further define "conveyance" as "retail or wholesale products, or water known to carry or have a reasonable possibility of carrying invasive species." It allowed up to twenty percent of the invasive species fund's annual revenue to be made available to counties, cities, or other local entities for equipment and supply costs necessary for the operation of watercraft inspection stations. It created a new section of code that required immediate removal of vegetation and water drainage from conveyances. It also required nonresidential vehicles to carry an invasive species sticker and to be inspected at a watercraft inspection station prior to launch.

DISCUSSION:

Senator Taylor asked how the portion of invasive species funds would be distributed. **Lloyd Knight**, Deputy Director, Idaho State Department of Agriculture (ISDA), explained that ISDA received a number of inquiries every year from entities looking for assistance and this legislation provided a defined amount that would be available. **Senator Semmelroth** asked if this legislation was based on lessons learned from the recent discovery of quagga, or did it reflect challenges in statute that may have delayed the response to the recent discovery. **Chairman Burtenshaw** responded that this legislation was based on both.

Senator Guthrie asked if the revised requirements to drain everything everywhere were too impractical and would not guarantee catching every possible invasive species. **Chairman Burtenshaw** responded that heat killed the invasive species, and it was important to be sure people understood that they cannot enter the state carrying invasive species. **Senator Guthrie** asked if a hot wash would be applicable to the internal components of a watercraft. **Mr. Knight** responded that hot washes had attachments that cleaned the motor in the lower unit, ballast tanks, and spillages, and that they would clean everything within the boat.

Senator Den Hartog, **Vice Chairman Adams**, and **Senator Guthrie** asked questions about how extensive the regulation and enforcement might be if the need for an invasive species sticker was extended into the revised definition of conveyance, and to things such as duck decoys and inner tubes. **Mr. Knight** explained that this legislation did not include the regulations for invasive species stickers, and these were in the Idaho Department of Parks and Recreation statutes; Idaho Code § 67-7008A. He added that they were considering watercraft when they drafted this legislation, and this legislation did not apply to such things as inner tubes that had never been anywhere but up and down the Boise River.

Chairman Burtenshaw shared that the current quagga mussel disaster had cost the state about two million dollars. It had the potential to have a disastrous effect on dams and anything that was a water conveyance, so the purpose of this legislation was to tighten statute and stop this invasive species from moving into Idaho.

MOTION:

Senator Semmelroth moved to send **S 1322** to the floor with a **do pass** recommendation. **Senator Schroeder** seconded the motion. The motion carried by **voice vote**.

**PASSED THE
GAVEL:**

Vice Chairman Adams passed the gavel to Chairman Burtenshaw.

PRESENTATION: **Chairman Burtenshaw** stated in the interest of time, Jeff Raybould would give his part of the presentation, and Mathew Weaver would return to present at a later date.

Idaho Department of Water Resources and Idaho Water Resource Board Update. **Jeff Raybould**, Chairman, Idaho Water Resource Board (IWRB), provided an overview of the activities of the IWRB over the last year. This included the Anderson Ranch Dam raise, the Mountain Home Air Force Base pipeline and pump station, rehabilitation on facilities in Priest Lake, the Lemhi River Basin settlement, the statewide water supply bank, IWRB's aquifer modeling efforts, cloud seeding, manage recharge, financial, and flood management grant programs, their aging infrastructure and loan and grant program, and their regional water sustainability projects.

ADJOURNED: There being no further business at this time, **Chairman Burtenshaw** adjourned the meeting at 2:57 p.m.

Senator Burtenshaw
Chair

Shelly Johnson
Secretary