Approved by
the Federal Lands Interim Committee

MINUTES
FEDERAL LANDS INTERIM COMMITTEE
August 9, 2013
Capitol Building – East Wing – Room EW42
700 West Jefferson Street
Boise, Idaho

Co-chair Senator Chuck Winder called the meeting to order at 9:00 a.m.

Members present included: Co-chair Senator Chuck Winder, Co-chair Representative Lawerence Denney, Senators Bart Davis, John Tippets, Sheryl Nuxoll and Michelle Stennett and Representatives Mike Moyle, Eric Anderson, Terry Gestrin (sitting in for Representative Stephen Hartgen) and Grant Burgoyne. Representative Stephen Hartgen was absent and excused. Staff members present were Katharine Gerrity, Ray Houston and Toni Hobbs. Others present included Senator Lee Heider; Aaron Calkins, Office of Congressman Raul Labrador; Professor Jay O'Laughlin; Professor Donald J. Kochan; Steve Strack, Idaho Attorney General's Office; Andy Brunelle, Idaho Capital City Coordinator, U.S. Forest Service; Kurt Wiedenmann, Bureau of Land Management; David Groeschl and Emily Callihan, Idaho Department of Lands; Commissioners Skip Brandt and Jim Chmelik, Idaho County; Scott Hauser, Upper Snake River Tribes Foundation; Tim S. Olson and Steve Rector, Nez Perce Tribe; Russell Westerberg and Raeleen Welton, Kootenai Tribe; Anita Hamann, Division of Financial Management; Rick Keller and Dennis Tanikuni, Idaho Farm Bureau; Scott Phillips, State Controller's Office; Jonathan Parker and Bill Myers, Holland and Hart; Lee Juan Tyler, Shoshone Bannock Tribes; Lynn Tominaga, Idaho Ground Water Appropriators; Brenda Tominaga, Idaho Irrigation Pumpers Association; Julie Hart, Westerberg & Associates; Gregg Servheen, Idaho Fish and Game; Angela Rossmann, Ada County Fish and Game League; Pat Barclay, Idaho Council on Industry and the Environment; Robin Nettinga, Idaho Education Association; Derek Farr, Backcountry Hunters and Anglers; Tom Flynn, Outdoor Alliance; China Gum, Idaho Freedom Foundation; Jack Lavin, Society of American Foresters; Jim Nunley, Idaho Wildlife Federation; Mike Medberry, Central Idaho Recreation Coalition; Jonathan Oppenheimer, Idaho Conservation League; Steve Allred; Robert Forrey; Jack Oyler; Larry Lundin; Steve Gurnsey; Alex Neiwirth; Pat Sullivan, Sullivan and Reberger; Anne Olden; Justin Dala; Robin Fehlau; Mark Hill; Megan Dixon; Joe Hatch; and Bill Howell.

NOTE: All copies of presentations, reference materials, and handouts are on file at the Legislative Services Office and are also available online at the Legislative Services Office website: http://www.legislature.idaho.gov.

Co-chair Senator Chuck Winder called the meeting to order at 9 a.m. and requested a silent roll call. **Co-chair Winder** reminded the committee members of their charge pursuant to HCR 21. He added that there is a narrow, specific task given to them and they don't expect HCR 22 will produce any short or long-term results from that effort. The committee's charge is based on HCR 21. He noted that the committee will have until the 2015 Legislative Session to complete their work and that no final recommendations will be made until that time. **Co-chair Winder** thanked Mr. Michael Bogert and others

for the work they completed relating to the background information prepared and submitted for distribution to the committee prior to the meeting. **Co-chair Winder** thanked all in attendance for their interest in the issues.

Co-chair Denney also thanked those in attendance for their interest in the committee's work and noted that the issues to be considered are not new. He stated that the scope of the committee's review is reflected in HCR 21 and that the committee intends to complete their charge and report back to the 2014 legislature with a progress report but that no recommendations will be made until 2015.

Co-chair Winder added that the committee intends to conduct two additional meetings prior to the next legislative session.

The first speaker to address the committee was **Mr. Jay O'Laughlin, Ph.D., Professor of Forestry & Policy Sciences and Director of the Policy Analysis Group, College of Natural Resources at the University of Idaho**. **Professor O'Laughlin's** presentation focused on the history and analysis of federally administered lands in Idaho and the commitment to rural communities. **Professor O'Laughlin** reminded the committee that the Legislature created the Policy Analysis Group in the College of Natural Resources at the University of Idaho in 1989 and he has had the privilege of chairing that group.

Professor O'Laughlin displayed a map for the committee depicting the acquisition of the United States of America. He noted that Idaho was part of the Oregon Territory. He stated that at one time, 80 percent of all land in the United States was property of the federal government and today that percentage is 29 percent. Most of these federal lands are in the western United States. Only two states have a higher percentage of federal land than Idaho, those being Utah and Nevada.

Professor O'Laughlin told the committee that Congress started making reserves of these lands dating back to the creation of two of our national parks, Yellowstone and Yosemite, late in the 19th century. Shortly thereafter, Congress gave the president power to set aside forest reserves. Early in the 20th century the reserves were renamed the national forests.

Professor O'Laughlin stated that Presidents Harrison and Cleveland started to set up the forest reserves by setting aside some areas. President Theodore Roosevelt, in his first message to Congress, said that the reserves would inevitably be of greater use in the future than the past and additions should be made whenever practicable. **Professor O'Laughlin** added that President Roosevelt did expand the forest reserves by quite a bit, close to its present state. He continued that Roosevelt also said that the usefulness of the national forests should be increased by a thoroughly businesslike management.

Professor O'Laughlin showed the committee another graphic depicting the national forests, and the extent of national forests in Idaho, roughly 39 percent of the state. Idaho leads the western states in the extent of national forest land. Bureau of Land Management (BLM) lands comprise nearly 22 percent of the state. Approximately five percent of Idaho is comprised of state endowment lands which were land grants at statehood from the public domain, part of a bargain that the state would not tax the remaining federal lands within the state. **Professor O'Laughlin** said that these lands have been a center of controversy for more than a century.

Professor O'Laughlin then addressed a book authored by Professor Char Miller in 2012 through the Oregon State University Press entitled "*Public Lands – Public Debates – A Century of Controversy*" as well as several other books relating to the Sagebrush Rebellion. Professor Miller wrote that the assertion that

the Forest Service would enact a science-based managerial ethos for the national forests provoked a series of Sagebrush Rebellions.

Professor O'Laughlin showed the committee a 1908 political cartoon depicting Forest Service Chief Gifford Pinchot and his so-called Cossack Rangers administering the forest service reserves by promulgating regulations on the cowering stockman, irrigationists, miners and settlers.

Professor O'Laughlin told the committee that the former long-time researcher for Resources for the Future, Marion Clawson, said in the early 1980s that he rejected any idea that we today are less imaginative and resourceful than men and women who pressed for the establishment of the national forests, national parks, and grazing districts.

Professor O'Laughlin said that in 2004-2005, Professor Miller was commissioned to crisscross the country to deliver more than 70 public lectures relating to the benefits and controversies of these lands as the Forest Service celebrated its 100th anniversary. Hot-button issues that arose during those lectures included clearcutting and riparian habitats, grazing and water quality, salmon, fire – prescribed, wildland and arson, endangered and threatened species, genetically modified organisms, such as trees, declines in rural timber economies and maintenance of trailhead facilities. **Professor O'Laughlin** said that Professor Miller identified three paths that could redefine the structure and mission of the Forest Service, evolutionary dynamics, devolutionary progress and revolutionary impulse. He said, however, that the real focus of any transformation of the structure and perspectives of the Forest Service lies in Congress and the executive branch.

Professor O'Laughlin next turned attention to Idaho's Federal Lands Task Force, appointed in 1996 by the Idaho Land Board, to look at alternative methods of federal land management in the state. **Professor O'Laughlin** told the committee that in 1998, the task force returned findings as follows: The current processes result in uncertain decision making, community destabilization and environmental quality deterioration and that significant process changes are necessary and that those proposed by the Forest Service and BLM are inadequate. The task force recommended one or more pilot projects to test action alternatives. **Professor O'Laughlin** said that at the same time the task force was conducting its work, he was working on his publication entitled "*History and Analysis of Federally Administered Lands in Idaho."* **Professor O'Laughlin**'s publication was provided to the committee and is available on Legislative Service's website. Alternative governance models are also provided in the publication.

Professor O'Laughlin addressed a number of key alternatives they identified. The first was a "no action" model, proceeding with existing plans and directions - ecosystem-based management, the second was to change the ownership of federal lands. He said that unless you change the rules, however, transfer would not make any difference. He told the committee that the real key is changing the rules under which the lands are managed. Because the director of lands knew his group was working on the report, he was asked to serve on the task force. Ultimately they selected the collaborative, the trust and the cooperative models as pilot projects.

Professor O'Laughlin showed the committee a number of graphics depicting where the power relating to the federal lands is – that being the Congress and the executive branch. He added that there are also a number of important environmental laws that bring the judiciary into involvement as well. He added that when lands and resources produce market-valued outputs and benefits, those are shared with local governments via what is known as the 25 percent fund, where 25 percent of the revenues are shared with the counties which has been in effect since 1908. In addition, in 1976, Congress passed the

Payments in Lieu of Taxes Act.

Professor O'Laughlin noted that he would focus his discussion relating to the alternatives to the trust land management model. He told the committee that in the contiguous 48 states, 45 million acres of land grants to the states are managed under this model. In Idaho, about 4.5 percent is managed under this model. He went on to say that these lands provide billions of dollars for education and other public purposes and stated that trusts work. He pointed out the arguments for and against the trust alternative model set forth in the PowerPoint presentation as well as in his publication.

Professor O'Laughlin stated that his trust "football play" diagram is quite a bit different than the current system. He noted that environmental laws still provide a basis for public involvement in decision-making processes. Trustees have the policy authority for managing trust lands. He continued by telling the committee that one of the purported weaknesses of the model is public involvement. He said that the task force suggested this could be modified by adding local advisory councils of individuals from local government agencies, industry representatives and environmental organization representatives who could work with the trust land managers to hear appeals from people, to provide advice and to co-manage environmental policy analysis.

Professor O'Laughlin proceeded to address the pilot project implementation approach. He pointed out the "*Breaking the Gridlock*" report in the handouts as well as on LSO's website. This document was also a product of the Federal Lands Task Force. In 2000, a working group identified areas in the state where pilot projects should be considered. He said that five areas were identified: the Priest Lake Cooperative, the St. Joe Ecosystem Stewardship Project, the Clearwater Basin Stewardship Collaborative, the Central Idaho Ecosystem Trust and the Twin Falls/Cassia Resource Enhancement Trust. **Professor O'Laughlin** stated that the Department of Lands website has a page devoted to the work of the task force.

Professor O'Laughlin told the committee that the Clearwater project advanced further than the Twin Falls/Cassia project. He said that a bill was written and introduced into both houses of Congress in 2003. Then Congressman Butch Otter, now our Governor, introduced the bill in the House and Senator Larry Craig held a hearing on the matter in the Senate.

Professor O'Laughlin stood for questions. **Senator Stennett** asked what would happen with agreements that are already in place, such as the roadless rule and other types of compacts. **Professor O'Laughlin** responded that answer would fall on the committee – to keep what works and to ask Congress to fix what doesn't work. He added that the roadless agreement is a fairly successful program that should probably be protected. We are recognized as a national leader in handling our roadless areas.

Senator Stennett followed up by asking whether there is any precedent or history relating to shifts in responsibilities when changes are made in regard to use of federal lands. She provided an example of existing lease agreements. **Professor O'Laughlin** said that is a difficult question because there are many such compacts and arrangements, treaties with the tribes for example and these are crucial things. He added that the bottom line is that the United States Constitution gives Congress the power to decide what to do with these lands. They could override any existing compact. He is not sure whether they could override any sovereign nation treaties. Congress could change the Mining Law of 1872 if they wanted to. He went on to say that there is a whole host of things that need to be considered which makes this process a long-term commitment by all of the committee members.

Representative Burgoyne stated that if we try to look at this issue as business people might look at an

investment, it occurs to him that the regulatory environment is extremely important to valuing the investment, the costs and potential benefits. He asked whether federal environmental laws exist to create a better environment throughout the United States generally with respect to both private and public lands, or are the federal laws a way of self-regulating the agencies of the federal government with respect to the management of the federal government's lands. He said that leads to a further question which is, in the event federal lands were transferred to a state, to what degree should federal environmental laws go with them. **Professor O'Laughlin** responded that he does not have an opinion and that these are difficult issues. He added that some facts could be brought to the committee by having federal agency managers come before the committee, several being scheduled for this meeting, to address their budgets. He has been told that at least half of their budgets are spent on planning and analysis. He said that this is something that our state lands do not do, so it is somewhat of a special purview and responsibility that falls on federal lands.

Representative Burgoyne followed up by asking about potential liabilities should federal lands be transferred to the state. He asked whether anyone has quantified the potential environmental liabilities. He commented specifically about the mines on federal lands. **Professor O'Laughlin** responded that he is not aware of any such quantification, although he said that doesn't mean it hasn't happened.

Representative Denney asked whether any of the pilot projects were attempted. **Professor O'Laughlin** responded that there was a hearing held by Senator Craig on the Clearwater Basin Pilot Project. He added that project has now evolved into a collaborative project that has the support of Senator Crapo and that has received federal dollars to move forward.

Senator Davis asked the professor whether he was aware of the letter to the President by the Conference of Western Attorneys General regarding the failure of the federal government to make payments to the state of Idaho for statutorily mandated distributions. **Professor O'Laughlin** responded that he was aware of the letter.

Senator Davis followed up by asking whether the professor was aware of any initial reaction by the federal government regarding their breach of their statutory duty to make payments to the state of Idaho. **Professor O'Laughlin** indicated that he was not aware of any response from the federal agencies.

Representative Anderson noted the Priest Lake Project, asking if Congress were to look at what the state has been doing on one side of Priest Lake for the past 100 years, comparing that to the federal holdings on the other side of the lake, whether that might be a persuasive argument that the state has shown great strides in management. **Professor O'Laughlin** responded that it would be an ideal location to do a comparison, the east side of the lake being managed by the state as endowment lands and the west side being managed by the federal government, largely as Forest Service land. He added, however, that under the current organizations of state land management and federal land management it is comparing apples and oranges because the missions of the organizations are so different.

Representative Anderson noted even the private lands held in the state have to abide by all federal law, whether clean water or clean air. He added that the state has taken primacy over some of those issues. He said that if there was a transfer to the state, he is certain we would still have to abide by those laws. **Professor O'Laughlin** agreed with that observation. He added that he would use the term "cooperative federalism" rather than "primacy" which is the way the Clean Air Act and Clean Water Act operate. The state still has to get approval from the Environmental Protection Agency for state programs. He said that the Endangered Species Act would also still apply.

Representative Anderson asked how long ago the Priest Lake Project was discussed. **Professor O'Laughlin** stated that the task force met from 1996 and 1998 identifying pilot projects. The working group then came on board in 1998 to 2000 to look for areas in which those pilot projects might occur.

Professor O'Laughlin moved on to the second portion of his presentation, "Keeping the Commitment to Rural Communities." He told the committee that he was invited to address the U.S. Senate Committee on Energy & Natural Resources regarding this issue on March 19 of this year.

Professor O'Laughlin began by explaining what the Secure Rural Schools and Community Self-Determination Act of 2000 (SRS) provides. He added that some know it as the Craig-Wyden bill. He said this is a hot issue in Washington now because the authority for the payments has expired. There is activity surrounding SRS in both Congress and the Senate at this time.

Professor O'Laughlin said that Professor Miller in his book said that national forest timber harvests soared through the 1960s through the late 1980s when harvests began to fall off. The falloff was triggered by lawsuits in the Pacific Northwest relating to Spotted Owl habitat and aquatic species which essentially halted timber production on the national forests. **Professor O'Laughlin** said that is a bit of an overstatement in that 2.5 billion board feet (BBF) a year of timber are being harvested on the national forests. It is far less than the average 12 BBF between the 1960s and 1980s.

Professor O'Laughlin stated that for the counties dependent on the 25 percent revenue sharing formula in effect since 1908, this was not good news. The purpose of the payments is to make up for the fact that the counties cannot tax federal land in their jurisdictions. In some counties, roughly 90 percent of their land is federal land. He went on to say that payouts over a decade declined by an estimated 80 percent, making the funding of schools and road maintenance very difficult.

In 2000 Congress passed the SRS law which continued to subsidize the rural economies. Counties could opt for either receiving 25 percent or receiving monies pursuant to the SRS formula, which is based on an average of three years in a selected period during the 1980s. **Professor O'Laughlin** said he does not believe there was a single county that did not opt for payment under the SRS. The law was to expire in 2006. It was extended three times since then, but it has now expired resulting in a flurry in Congress in its attempt to determine what to do.

Professor O'Laughlin showed a graphic depicting timber harvest in Idaho. Federal timber sales are less than ten percent of harvests. Idaho produces a lot of lumber, being one of the top ten producers in the country. Now, most of our timber comes from state and private land. He said that in the 1980s and earlier, the timber industry was twice as big as it is now and growth in the industry is constrained by timber supplies. He went on to say that Professor Miller notes that demand for wood products has increased every year over the past 50 years and so we have outsourced to other countries.

Professor O'Laughlin stated that in his testimony to the Senate committee, he told them that unless SRS is reauthorized there will be consequences to rural counties. In addressing potential alternatives to SRS, **Professor O'Laughlin** told the committee that the timber sales program could be rejuvenated, sharing 25 percent of the revenues with counties, continuing the policy from 1908. Another option would be to change the Payment in Lieu of Taxes (PILT) formula and essentially make property tax equivalency payments. The final alternative he suggested was to test some pilot projects specifically involving the trust land management model.

In regard to rejuvenating the timber sales program, **Professor O'Laughlin** said that Chief Tidwell of the Forest Service testified that we need to do accelerated restoration. In 2012 we harvested 2.5 BBF and the chief wants to increase that to 3 BBF in 2013. **Professor O'Laughlin** noted that if the Forest Service had adequate resources it could harvest 6 BBF. **Professor O'Laughlin** in his testimony suggested that those resources should be made available. He noted that revenue sharing is only one reason to increase the program. He went on to say that by actively managing our forests we get a triple win in that we would have improved forest conditions, especially wildfire resiliency, we would create consumer wood products and byproducts and we would create jobs in rural communities.

Professor O'Laughlin said that he concluded his testimony to the Senate by asserting that the federal land management system is broken and needs to be fixed. He told the committee that extension of SRS and PILT is appropriate for fulfilling past promises until a more permanent system can be developed, tested and implemented. He went on to say that rejuvenating the timber sale program provides a triple win and that given appropriate policy direction, resource managers can and will work with fellow citizens to figure out what sustainable forest management looks like on the land. He also told the committee that for lands that do not produce timber, some form of payment from a property tax equivalency system seems like a reasonable approach to alleviate some current fairness problems. He concluded by reiterating that trust land management is the country's oldest and most durable model and is worth testing in several places.

In providing additional details relating to trust land management, **Professor O'Laughlin** addressed our endowment lands. In the Senate committee testimony, **Professor O'Laughlin** was asked by Senator Lisa Murkowski (R-AK) whether he could elaborate on how the state trust land model could be adapted for National Forest System (NFS) lands. **Professor O'Laughlin** said that he responded by first identifying some principles that serve as general guides for managing land under the trust concept. Those included clarity, accountability, enforceability, perpetuity and prudence. He added that only enforceability appears to be evident on the NFS timberlands, the result of extensive litigation primarily involving procedural failures, rather than substantive environmental issues, which have placed the courts as de facto land and resource managers. He said that we have judges, not trained in resource management, making decisions as to how the land should be managed.

Professor O'Laughlin testified that in contrast with trust principles, NFS objectives are unclear, managers are generally unaccountable for their actions, at least 65 million acres of NFS timberlands, out of a total of 190 million acres, are in a condition that cannot be perpetuated. The decision process is imprudent because the National Forest Management Act (NFMA) relieves the Forest Service from having to employ efficiency guidelines that ordinary businesses follow.

Professor O'Laughlin told the committee in brief that trust components are as follows: the settler, which would be the United States Congress, decides what lands would be placed into the body of the trust, which is known as the corpus, and also defines a mission statement for the lands. Our state trust lands are managed to provide maximum long-term financial return to the beneficiaries, which are primarily the public schools. He said that beneficiaries would have to be identified. He added that additional components would be the trustees, who have the policy authority for the trust land management, and the trust asset managers.

Following the Senate hearing, and in response to a question from Senator John Barrasso (R-WY) relating to what rules the professor would suggest changing to increase timber production while also addressing

wildfire/forest health problems, **Professor O'Laughlin** suggested changing the National Environmental Policy Act (NEPA) and the National Forest Management Act (NFMA). The latter act was sponsored by Hubert H. Humphrey who was quoted as saying that he wanted to "get forestry out of the courts and back into the woods." **Professor O'Laughlin** testified that, in his opinion, the act has been a dismal failure and has only given new opportunities for litigants.

Professor O'Laughlin stated that he told the Senate committee that if trust managers had to deal with all the same rules that NFS managers must comply with today, society should not expect outcomes that are much different. He said that we have overstocked forests waiting to burn in large and uncontrollable wildfires with tens of millions of timberland acres in an unsustainable condition, managed passively rather than actively.

Professor O'Laughlin said that we do have some alternative governance approaches in place and that we didn't ask for anything novel in asking for pilot projects. Those approaches now in place include the Quincy Library Group Pilot Project in northern California, started in 1998 and now expired, and the Stewardship End Result Contracting, started in 1999, expiring this year. A downside of the stewardship approach is that it does not provide for receipt of the 25 percent funds. Additional models include the the Valles Caldera Trust in New Mexico, which was constituted in 2001 on NFS lands, and the Collaborative Forest Landscape Restoration Program, put into place in 2009. Idaho receives $4 million a year for ten years through this program for the Clearwater Collaborative. There is also a project managed as a trust involving the National Park Service at the Presidio in California.

Professor O'Laughlin stated that he believes the collaborative model offers great hope to get people together in agreement on how they want the national forests run and what we should do with these lands.

According to **Professor O'Laughlin**, we have had a big increase in wildfires in the western states beginning in the 1980s. The record year was last year. **Professor O'Laughlin** displayed a table comparing wildfires in Idaho, the 11 western states and the United States depicting the fact that Idaho had more acres burn in 2012 than any other state in the nation, 1.7 million acres.

Professor O'Laughlin stood for questions. **Senator Stennett** recalled **Professor O'Laughlin**'s testimony relating to the Idaho Department of Lands and trust managed lands in the state as well as the department's responsibility to get the greatest benefit and resources from the land for the various beneficiaries, but not for the general public. She asked where the general public is in the equation. **Professor O'Laughlin** responded that these lands are not public lands, but rather lands that are owned by the beneficiaries and are not managed for the benefit of the general public. Some consider this a strike against the trust land management model.

Senator Tippets asked whether an increase in timber harvest would increase the quality of wildlife habitat. **Professor O'Laughlin** stated that the quality of elk habitat would be increased.

Senator Tippets stated that when you are considering the quality of wildlife habitat, you would generally consider the impact on a variety of species. **Professor O'Laughlin** responded that it would benefit some other species, but it would also disbenefit some species. He added that we have 20 million acres of national forests in Idaho. Some are roadless and they are so for good reason and probably will remain that way. He said that we have 4 million acres of national forests in the wilderness that are not going to be managed for timber production. These will provide a diversity of habitats.

Senator Tippets asked if the state managed federal lands, whether that would relieve the burden of going through the NEPA process. **Professor O'Laughlin** stated that if the lands came with all the strings attached that federal land managers have to follow, primarily NEPA and NFMA, we should not expect any other managers could do any differently than is being done now. The real key is what Congress would attach if transferring ownership to the state. He said that point is key and needs to be looked at.

Senator Davis said that he understands the SRS funding is different than funding under the federal Mineral Leasing Act and asked whether his understanding was correct. **Professor O'Laughlin** stated that he was not familiar enough with the Mineral Leasing Act to respond.

Representative Burgoyne stated that he understood the professor to say that the original Forest Service idea was a type of localized collaborative decision-making for the benefit of the local good and that now we make national decisions with respect to our forest lands. He asked whether the professor has a view as to whether state versus federal ownership is the issue, or whether it the model that matters. In other words, do we need reform at the federal level or a transfer of lands to the state, a transfer possibly subject to the same environmental laws that current managers are subject to. **Professor O'Laughlin** responded that we do have environmental laws that apply to all landowners. He said that what is important in regard to all these laws is how they are implemented. He added that these statutes all give the implementing agencies the authority to write their own regulations to implement these acts. He said that from many perspectives, including his own, the Forest Service, under the NFMA, has done its own agency a disservice by stepping beyond what Congress expected by making regulations very difficult. He said that he doesn't think the issue is *who* owns the land, but rather how they manage the land under the laws and the regulations that are in place.

Representative Burgoyne asked the professor if the issue is whether we should have localized collaborative management, whether under a federal system or a state system. **Professor O'Laughlin** responded that he wasn't sure how to answer that. He said that if we have a trust land management system, involving the public is not so important. Very few people have standing to sue our Department of Lands regarding how our state lands are managed.

Representative Gestrin stated that since timber harvests have decreased, fires have increased and economies have gone with that. He said that in the late 1990s, they had the opportunity to decouple the counties and schools from land management. He went on to say that what that would have done at the time would have been to guarantee an entitlement to counties and schools. He said that his county diverted in the direction under the Craig-Wyden bill. He said that the reason it sunset in six years was so they would continue the discussion because to them it was about jobs, economies and local communities. They wanted to keep their small towns vibrant. He asked whether the professor would agree that the economies and the jobs are equally important as the livelihood of the forests, reduction in fire risk and all the other issues that were brought forward. **Professor O'Laughlin** agreed and said that by actively managing the forests we can provide what people want, including jobs.

Representative Gestrin said that what we need to do is determine outcomes, and to move these issues out of courts. Land managers aren't managing for the benefit of wildlife, forest, habitat or local communities. They are managing to keep things out of court. **Professor O'Laughlin** responded that he believes the expiration of SRS has resulted in an opportunity. There are federal lands in every state, even though this is largely a western issue.

Senator Stennett noted that in many rural communities a large employer is either the Forest Service or the BLM. When making a shift, we have to keep in mind we don't want to take away jobs in an effort to create jobs. She said that they really need to see a model to see what kinds of jobs would be created. She added that the public should have some right to have a say in regard to their economies and asked whether there is anything in the trust model that provides for that input. **Professor O'Laughlin** responded that our state endowment lands are managed under a mandate to produce the maximum long-term financial benefit for the beneficiaries. Long-term implies many things including sustainability, and one of the pillars of sustainability is social acceptability. He said that if we were to establish new trusts, the settler, Congress, could establish them in such a way as to include public involvement. He noted the possibility of local collaborative councils.

Representative Burgoyne asked whether the professor had any views about the virtues or demerits of transferring public lands from the federal government to the state. **Professor O'Laughlin** stated that he does not, but in reflecting on the question he would say that it is evident each state has devised its own way to administer the trust lands that were granted.

Representative Anderson commented that Priest Lake provides a multiple use management style. They also manage for wildlife in taking out diseased trees. **Professor O'Laughlin** agreed and commented that the department has also refrained from certain actions there to retain scenic beauty.

Co-chair Winder called a short recess for the committee.

The next speaker to address the committee was **Mr. Donald J. Kochan, Professor of Law at the Chapman University School of Law in Orange, California**. **Professor Kochan** provided the committee with a presentation focused on public lands and the federal government's compact-based "duty to dispose" as well as a legal analysis and case study of Utah's HB 148 relating to the Transfer of Public Lands Act and perspectives on Idaho's opportunities.

Co-chair Winder noted that **Professor Kochan** was recommended to the committee as a source of information because of his third-party study and the White Paper he has prepared regarding federal land issues around the West.

Professor Kochan completed a study in 2013 relating to Utah's HB 148 – The Transfer of Public Lands Act. He stated that who does or should own public lands in a state has long been a source of contention, controversy and confusion. Many states, such as Utah and Idaho, are looking anew at the federal government's obligation to dispose of certain property holdings it has in the western United States. He went on to say that by examining state enabling acts and promises made at statehood in Utah and other states, his presentation will try to explain why the federal government may have a duty to dispose of certain public lands under a theory of contractual obligation created by these compacts at statehood. He said that, in particular, his presentation will look at Utah as a case study.

Professor Kochan told the committee that in Utah's HB 148, Utah demanded that the federal government extinguish title to certain public lands by December 31, 2014, and transfer the same to the state of Utah. The state of Utah maintains that the federal government made promises to it at statehood that federal ownership of lands within the state would be of limited duration and that the lands would be disposed of into private ownership or returned to the state.

Advocates of Utah's act, according to **Professor Kochan**, claim that federal retention of the lands

deprives the state of revenue that would come from the state's receipt of a guaranteed percentage from the proceeds of sale and also the state's ability to tax property after disposal into private hands. He said that whether the state has authority to demand the federal government extinguish title depends on the proper interpretation of the Property Clause, U.S. Const., Art. IV, Sec. 3. The Property Clause provides, in part, that "(t)he 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; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state." He said that the meaning of the Property Clause is at the core of the debate but is not the only thing that we need to look at because it does not necessarily speak to the compact duty to dispose.

Professor Kochan went on to say that there are legitimate arguments to support Utah's HB 148 and he is of the opinion that critics of the law overstate their legal case against it. He said this is a story about promises made and not yet kept. He said that the key question he will be analyzing is whether the enabling documents establishing the state of Idaho and other states like Utah create duties. We must look at the terms of the agreement between the federal government and Idaho in context and in their entirety and ask whether the terms express a promise coupled with an expectation that the federal government would dispose of certain lands deeded to it by the state for the limited purpose of facilitating disposal. He added that there is no precedent against the demand made by Utah and that being contemplated by other states and that it is an open legal question. He said that cases cited against the law deal with completely different facts and situations. None of the cases address the issue of whether the federal government is obligated to dispose on the basis of promises made.

Professor Kochan next addressed the specific points of Utah's Transfer of Public Lands Act (TPLA), HB 148. He said that there were three basic parts codified in the act. The first part of the act provides the scope of the act by defining terms and identifying expectations, the second part sets forth a demand and the third part sets forth pre- and post-extinguishment planning and management provisions that describe the entities that will govern and prepare for a transition of ownership into state hands.

Professor Kochan briefly addressed the scope provisions and noted that each state would have to decide which lands would be included and which lands would be exempted. He went on to say that the demand is the heart of the TPLA. In the demand, Utah provided that on or before December 31, 2014, the federal government shall extinguish title to public lands and transfer title to the public lands to the state. Finally, he noted that the planning and management provisions largely address how the lands would be managed following transfer.

Professor Kochan noted that in 2013, Utah took further action to continue to support its HB 148 with a resolution reiterating its commitment, and focusing on expectations and another house bill that does much of the same. He added that the expectations theory will be a large part of his focus.

Professor Kochan said that there has been a history of longstanding and enduring conflicts leading up to states calling for the transfer of federal land into state ownership. Utah's TPLA is yet another chapter in federal/state tensions and the battle for control of public lands. He said that it is distinct in demanding that the federal government choose to live up to an obligation.

Professor Kochan told the committee that throughout the 20th century, there were increasing legislative and regulatory movements toward federal retention of public lands, culminating in the Federal Land Policy and Management Act of 1976 (FLPMA) which provided a Congressional declaration that the policy of the United States is that public lands be retained in federal ownership unless it is determined that

disposal of a particular parcel will serve the national interest. He said that it could be argued that disposal theories are consistent with FLPMA. If there has been a promise made to the states that the land would eventually be disposed of, then the idea of living up to that commitment and respecting agreements would be consistent with the national interest.

Professor Kochan noted that over the years we have had other legislation that looks somewhat like the TPLA, such as that during the Sagebrush Rebellion, although not crafted in exactly the same way. The professor then pointed out the case of *United States v. Nye County*, 920 F. Supp. 1108 (1996) where Nevada attempted to claim title based on the Equal Footing Doctrine. The court in that case held that Nevada went too far because the state claimed ownership outright rather than demanding that the federal government fulfill a duty to dispose or return property to the state. This case, he said, has only limited precedential value because it is only the opinion of one federal district court.

Professor Kochan next focused on a legal analysis of Utah's HB 148, particularly the compact duty to dispose. He added that other theories to consider are the Equal Footing Doctrine, general principles of federalism and a *Pollard*-based interpretation of the Property Clause, a U.S. Supreme Court case limiting the interpretation of the more far-reaching Property Clause.

Professor Kochan told the committee that Utah's Enabling Act (UEA) was approved in 1894, and of particular interest are section 3 and section 9. Utah ratified its Constitution in 1895. **Professor Kochan** summarized the duty to dispose theory, quoting from his White Paper. He stated that the question becomes whether the federal government accepted a duty to dispose of lands it acquired in the UEA and whether the state of Utah can enforce the duty by demanding the federal government live up to its obligation. He went on to say that such a duty would include disposal in a manner that would timely allow the state to obtain, receive and enjoy the benefits of tax revenues and other contributions after the land is unlocked from the limitations on the imposition of taxes against the lands while under federal ownership, and also obtain benefits that flow to the state generally from private ownership and investment.

Professor Kochan commented that the UEA and the Idaho's Admissions Act represent bilateral compacts and should be interpreted as binding contractual agreements and as solemn compacts between sovereigns. Promises were made with corresponding obligations, duties and expectations. **Professor Kochan** cited a number of cases wherein these principles are acknowledged. **Professor Kochan** also said case law supports the theory that even though such a compact does not specifically set forth remedies for breach, there are anticipated remedies for breach.

Professor Kochan stated that sections 3 and 9 of the UEA should be read in conjunction with each other and the whole agreement. He noted that this is important because in section 3 there is some "forever disclaim" language that critics of the act point to, which should be read in conjunction with the other provisions. **Professor Kochan** noted that rules of construction have to be considered and require giving effect to the whole agreement. He cited to a number of case examples.

The professor said that the basic claim regarding section 3 is that the "forever disclaim" language eliminates the ability of the states to ever get the land back. **Professor Kochan** said that a holistic analysis would give effect to the language that follows the disclaimer that provides "until the title thereto shall have been extinguished." He said that this provision shows that the state has an expectation that at some point they will be extinguished. He noted that Idaho has a corresponding provision in Idaho's Constitution, Art. XXI, section 19 wherein, following a disclaimer to public lands, it

provides “until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States.” **Professor Kochan** reiterated that context matters.

Professor Kochan proceeded to discuss why the “disclaim” language is overstated by critics. He stated that the very nature of the acquisition of lands came with an encumbrance attached – a compact and promise made between sovereigns where the federal government committed itself to disposal and that it would exercise its disposal obligations in a manner so that both a percentage of the proceeds from the sales would be shared with the state and the state thereafter would have the capacity to tax such lands when disposed into private hands.

Professor Kochan proceeded to address the reason the federal government took land and why we have this “forever disclaim” language. He said that the federal government needed the certainty of clean title to lands so that it could dispose of the properties to willing buyers and the state agreed it did not have the power to interfere with the process of disposal or with rights granted through disposal. He added that the United States would directly realize and control the gains from the disposals and could use the proceeds in accordance with its commitments to the original states, such as paying off Revolutionary War debts. He said that Utah would also benefit in that it would receive a percentage of such sales pursuant to section 9 of the UEA. He added that the state was anticipating sales. He said that in consideration for a percentage of the proceeds, the state agreed to help facilitate by disclaiming rights to the unappropriated lands so as to give the seller in the disposal market the valuable commodity of certain title.

The professor noted that by reading sections 3 and 9 together, they generate a duty to dispose. He noted that if the federal government could retain the property, the state would never get any benefit from section 9.

According to **Professor Kochan,** Idaho has a corresponding provision in sections 19 and 7 of its Admission Act. Section 19 provides the temporary nature of federal ownership, setting up the expectation, and section 7 provides for the consideration. He added that courts should err on the side of an interpretation that ensures each party receives the benefit of the bargain struck in the written instrument.

Professor Kochan then stood for questions. **Senator Davis** said that in looking at the phrase “which shall be sold”, he realizes that the professor would like the committee to use historically tested and proven statutory construction methods and he doesn’t intend to dismiss that analysis with his question. However, he said, in looking at that language on its own, his understanding of what he believes the professor would like their understanding to be is that “which shall be sold” means that the federal government has a duty to sell. He asked if that is correct. **Professor Kochan** responded it is an alternative explanation for a duty or an expectation, but it is not the only language that supports that point. **Senator Davis** asked the professor to elaborate on the alternative explanations. **Professor Kochan** responded that he considers the “shall be sold” language as a separate argument. The “shall be sold” language could be interpreted as a mandatory obligation for the federal government to sell or could also be part of the evidence of an expectation on the part of the state that the property would be sold.

Senator Davis then asked whether the professor believes another reading of the language in the provision alone, without the other ancillary factors that influence his White Paper, could be that there would be payments to the state as it is sold. **Professor Kochan** responded that is the alternative interpretation of the reading. He said that is one interpretation but he believes the better interpretation

is the mandatory language.

Senator Davis asked whether there is any parole evidence or legislative history at the congressional level or in Idaho or Utah that takes the phrase "which shall be sold" and interprets it as a "shall" duty instead of an "as it is sold" duty. **Professor Kochan** responded that it was beyond the scope of his White Paper to look for any parole evidence or legislative history regarding the mandatory nature of the phrase. He added that is something that would be fruitful should any legal case be brought forward which relied on that theory but that he does not believe the compact duty to dispose depends on that phrase.

Representative Burgoyne referred to the clean title argument and said that he does not find that in the words of the Idaho Constitution and asked whether the professor did. **Professor Kochan** responded that there are no "clean title" words in the Constitution but if you look at the totality of the agreement he believes it is a fair and necessary interpretation of the UEA.

Representative Burgoyne followed up by stating that the professor is not then making a strict constructionist argument but rather bringing in things external to the document. **Professor Kochan** stated that it is a matter of interpreting the document in its totality and harmonizing the provisions and he does not believe that is looking at extraneous sources. He added that his interpretation is colored by the overriding ethic of disposal that existed at the time as well as the realities of the situation in terms of the uncertainty of title that existed during the admissions of the states.

Representative Burgoyne said that he understands that an additional argument to support the approach of Utah and Idaho is represented by Idaho's HCR 22, a compact-based perception and asked whether that was correct. **Professor Kochan** responded that he spoke of a compact-based duty to dispose.

Representative Burgoyne then asked the professor if he was familiar with Idaho's HCR 22 and whether the following quotation from the resolution was accurate:

"WHEREAS, in 1780, the United States Congress resolved that "the unappropriated lands that may be ceded or relinquished to the United States, by any particular states, pursuant to the recommendation of Congress of the 6 day of September last, shall be granted and disposed of for the common benefit of all the United States that shall be members of the federal union, and be settled and formed into distinct republican states, which shall become members of the federal union, and have the same rights of sovereignty, freedom and independence, as the other states: and that upon such cession being made by any State and approved and accepted by Congress, the United States shall guaranty the remaining territory of the said States respectively. (Resolution of Congress, October 10, 1780)"; "

Professor Kochan responded that is part of the Resolution of Congress of 1780. **Representative Burgoyne** then asked whether it was not the case that the language quoted comes from a draft resolution that was not ultimately passed and that the last portion of the quotation relating to cession by any state was not in the final resolution actually adopted by Congress. **Professor Kochan** said that may be correct.

Senator Tippets asked whether during the time the enabling acts were being considered for Utah and Idaho, was there any evidence that the states could receive federal land that had not been disposed of

and that the state could retain title to that land. **Professor Kochan** said he does not know of any evidence of automatic reversion to the states if the federal government failed to fulfill its duty.

Senator Tippets then asked, if we accept the assumption that the federal government had a duty to dispose of the land but failed to and the land reverted to the state, would the state have a duty to dispose of the land. **Professor Kochan** answered that he does not know of any obligation of the states to dispose or to retain.

Senator Davis referenced the theory of anticipatory repudiation. He then asked whether Congress, in enacting FLPMA in 1976, which provides that the federal government will never sell federal land, could be viewed as triggering an anticipatory repudiation which could form the basis of an additional argument. **Professor Kochan** responded that he has not studied how the states would argue that point.

Professor Kochan then addressed Utah's expectation in entering into an agreement with the federal government. He said that the parties' interests within the UEA require the existence of some duty to dispose on the part of the federal government. At the time the UEA was entered into there was an ethic of disposal which can be found in a number of scholarly papers.

The professor said that the disposal ethic continued throughout the 19th century. Utah and Idaho became states during this period. He cited from *Miller v. Robertson*, 266 U.S. 243 (1924), where the Supreme Court said that "(t)he intention of the parties is to be gathered, not from a single sentence, but from the whole instrument read in the light of the circumstances existing at the time of negotiations leading up to its execution."

Quoting from Farnsworth's treatise on contracts, **Professor Kochan** told the committee that "(i)t seems proper to regard one party's assent to the agreement with knowledge of the other party's general purposes as a ground for resolving doubts in favor of a meaning that will further those ends, rather than a meaning that will frustrate them." Contracts Section 7.10, at 513 (1990).

Professor Kochan, referring to his White Paper, pointed out some post-admission statements from Andrew Jackson who described the commitment to dispose in agreements with the original states as "solemn compacts." The professor then noted Utah's Constitutional Defense Council Report which also addresses the circumstances existing at the time of the UEA and the policy of disposal.

Professor Kochan then addressed the importance of precedent in our legal system and told the committee that the meaning of precedent and dicta are critical to the effective functioning of our court system. Only precedent, not dicta which is unnecessary to the decision in the case and not precedential, is binding. Courts sometimes speak more broadly than they need to. He went on to reference a law review providing that a holding consists of those propositions along the chosen decision path or paths of reasoning that are actually decided, based upon the facts of the case and that lead to the judgment, adding that if not a holding, a proposition stated in a case counts as dicta.

Professor Kochan told the committee that the claims of unconstitutionality of TPLA under existing "precedents" are unfounded. He went on to cite to the Legislative Review Note for Utah's HB 148 which references numerous U.S. Supreme Court cases and asserts that the power over property belonging to the United States is vested in Congress without limitation. **Professor Kochan** said that a lot of people have accepted an interpretation of the Property Clause as being a very broad power. He said that the case references cited in the Note are based on dicta and therefore are not controlling. He reiterated that

those interpreting opinions must be diligent in evaluating possible uses of dicta in the face of its overuse. He added that the statement by courts that states cannot interfere in federal affairs while the federal government owns property does not necessarily say anything about whether the federal government has a duty to dispose of that property in some manner and at some point in time. It is the latter duty that is embodied in the demand made by the state of Utah in the TPLA.

Professor Kochan stated that all of the cases are about states not interfering when the federal government has discretion to act. He said that there is a difference between interference with administration of federal holdings or interference with the disposition process and a quite distinct demand for some disposition by the federal government in adherence with its own promises. Broad and lofty statements against the TPLA do not resolve the matter and he believes the matter calls for further understanding and legal analysis. The cases do not definitively resolve the matter of a compact duty to dispose and there is no precedent to say it is clearly constitutional and authorized, although he thinks there is a strong case under the law for enforcing the duty to dispose. He concluded by stating that there is no prohibition of the disposal of federal lands.

Senator Stennett referred to the professor's discussion involving the Equal Footing Doctrine and how that came into play when we were seeking statehood, part of that being that the federal government would use the same process with each state. Reciprocally, she said, once a state was admitted, it knew it would be held to federal law. She asked when a state, like Utah or Idaho, decides that now they have a right to except themselves from what other states have done under the position that they have a different interpretation of how those lands should have been administered or sold. **Professor Kochan** clarified that the Equal Footing Doctrine is a separate potential legal defense. He said that is beyond the scope of the White Paper but he believes it is something that should be explored. In terms of whether the Equal Footing Doctrine obligates all states to be treated alike with no state having special privileges, he thinks that would be an overly broad interpretation of the doctrine. He said that he doesn't believe Utah or Idaho would be asking to be treated differently because every state has federal land and other states may also have similar compacts. Every state has a right to have their compacts respected.

Senator Stennett asked about the definition of "unappropriated lands." When we are talking about transferring lands, she asked what lands we are referring to. **Professor Kochan** said that at the time of entry into the Union, it meant those lands not yet designated and it would include the rugged lands in Idaho but it would be up to the state legislatures in terms of how they want to approach a transfer, what they would want to make a demand for. Utah had some exceptions but he doesn't believe the duty requires exceptions.

Senator Davis said that, assuming the language in the various cases is "cherry picked" as suggested, and that it is in fact dicta, if the dicta is to be read in its totality, does the sum of the dicta suggest a likely direction of the United States Supreme Court. **Professor Kochan** responded that he would not try to predict where the Supreme Court would go. He does not, however, believe that the sum of dicta becomes so heavy that you cannot get out from underneath it. He does not think the respect in reading the dicta is strengthened by the volume.

Representative Burgoyne asked, in regard to the disposal argument, whether disposal is mandated to go to the state or private individuals and entities. **Professor Kochan** responded that there is no background history that indicates where the land must end up. The federal government could do a number of things. It could purchase the land and the state would receive a percentage of the price paid. Alternatively, the federal government could transfer the land to the state or sell to private interests.

Representative Burgoyne then asked whether the federal government is obligated to charge for the land in disposing of it. **Professor Kochan** said that he believes there is an argument that they are obligated to exercise good faith in meeting their obligations under the contract. **Representative Burgoyne** asked whether the federal government has the authority to charge a fair market value for the land and whether there is any authority to not charge for disposal of the land. **Professor Kochan** said that he doesn't know of any authority other than he believes the state would be on solid ground under the compact-based duty to dispose to have an expectation to receive a percentage of the proceeds of sale and that the federal government would have an obligation to exercise good faith. If they don't exercise good faith, the state could claim that it was denied the benefit of the bargain.

Representative Burgoyne said that, assuming the federal government has a duty to dispose, the federal government could charge the state of Idaho 100 percent of fair market value and then remit 25 percent of that to the state, thus the state would have paid 75 percent of fair market value for the land, or the federal government could dispose of those lands to private individuals and entities for 100 percent of fair market value and bypass the state of Idaho completely. He asked how the states can put themselves ahead of individuals and entities to receive these lands. **Professor Kochan** responded that the state is the recipient of the benefit of the bargain and has already been promised something. The states are trying to enforce a preexisting right which gives them priority. **Representative Burgoyne** followed up by stating if the federal government chose to dispose of lands to an individual at fair market value, the state would get its 25 percent and that would fulfill the obligation. He asked for the legal rationale allowing states to lay claim to the land ahead of others. **Professor Kochan** responded that the rationale is based on the federal government's noncompliance with a contractual duty. The states are telling the federal government that it must live up to its contractual obligations and if it chooses not to, the only way for the states to get the benefit of the bargain is for the federal government to dispose of the land to the states. There is no preexisting obligation to individuals. The preexisting obligation would put the states ahead of individuals.

The committee adjourned for lunch at noon and reconvened at 1:30 p.m. at which time **Mr. Steve Strack, Deputy Attorney General, Natural Resources Division,** addressed the committee regarding the Idaho Constitution and the founders' understanding of state and federal authority over public lands. **Mr. Strack** also addressed past efforts by Idaho and other states to study or obtain the transfer of federal lands and conclusions that were drawn, as well as the constitutional and other legal requirements for management of any transferred federal lands.

Mr. Strack told the committee that Idaho is one of the states admitted without an enabling act, although we did submit several draft bills to Congress, the Mitchell Enabling Bill and the Platt Enabling Bill. Senator Mitchell introduced his bill in 1888 which would authorize Idaho to form a state government. He said that Mitchell's bill differed in that it provided Idaho would receive 6 million acres of desert land for reclamation and it also provided that Idaho would get 25 percent of the net proceeds of the sales of public lands lying within the state, as opposed to the standard five percent provided for other states. The Mitchell Enabling Bill was substituted with the Platt Enabling Bill.

Mr. Strack said that Senator Platt's bill was more standard and provided that Idaho would get the standard amount of land, not the 6 million acres of desert land for reclamation, and it specifically required Idaho to disclaim title to all public lands. It also provided, in terms of school lands, that those lands embraced in permanent reservations for national purposes would not be subject to grants, nor any lands embraced in Indian, military or other reservations be subject to the grants until the

reservation was extinguished. He said that it did put the delegates to the Idaho Constitutional Convention on notice that there was a possibility of permanent reservations of land in Idaho. He said this bill was never enacted, it was simply a draft, but that the delegates did look to both of the draft bills for guidance.

Mr. Strack testified that the idea of permanent reservation is interesting in that the chairman of Idaho's Constitutional Convention, Judge William Clagett, had a very expansive history throughout the West, being Montana's delegate to Congress for a number of years and was a member of the Nevada Assembly. He moved to the Silver Valley in 1883 and practiced mining law. **Mr. Strack** told the committee that Judge Clagett is credited with the creation of Yellowstone National Park and was, therefore, familiar with the idea that there would be some federal lands that were not disposed of.

Mr. Strack noted that public lands were a subject of discussion during Idaho's constitutional debates, centering around four primary issues. Those issues were whether or not the state could require an oath or affirmation for a public land acquisition, whether the state could regulate grazing on the public domain, school land grants and how those related to the federal title, and the disclaimer of public lands that eventually made it into the constitution.

In terms of discussions relating to oaths and affirmations, **Mr. Strack** told the committee that excerpts from the debates involved showed that the delegates did not believe they had anything to do with the disposal of public lands, that it was a matter for Congressional action. The delegates ultimately decided to drop the issue of oaths and affirmations and leave it out of the Idaho Constitution.

According to **Mr. Strack**, a matter of some contention involved debates relating to the regulation of grazing on public lands. He said that there were problems with grazing in northern Idaho because sheep grazers from Washington with large herds of sheep would drive them over to Idaho. The sheep would eat all the available pasturage and then be taken away. Small farmers in northern Idaho were being crowded off the public domain. The legislature wanted to address this issue and wanted to regulate grazing activity upon the unoccupied public lands of the state. **Mr. Strack** referenced a statement by Judge Clagett during debates where he noted that when Idaho gets to be a state, as to the public lands, the United States becomes a private proprietor. **Mr. Strack** said that Judge Clagett added that the state cannot in any way pass laws that are inconsistent with the laws of the United States or that would undertake to control the lands, because that would be inconsistent with the laws of the United States. **Mr. Strack** told the committee it was a correct statement of the law then and it is still correct today.

Mr. Strack went on to say that documents show that Judge Clagett essentially restated the Supremacy Clause by stating that there are certain powers which may be exercised by the United States and by the state concurrently, and they do not conflict necessarily at all. Judge Clagett went on to say that when the United States has ceased to be the local sovereign in the state, when it is here as a landed proprietor, those lands are subject to the use of the state, provided it is not in conflict with any of the laws of the United States and whenever a state law comes in conflict with the United States on any right or title whatever, it has to be governed by the supreme authority of the United States. **Mr. Strack** said that the delegates realized they could regulate grazing on the lands because grazing was an activity and states can regulate activities where Congress has not acted, but they also realized they could not affect the title to the lands. Grazing provisions were not included in the constitution essentially because delegates did not want to raise a red flag in Washington D.C.

Mr. Strack stated that the third area where discussions involving public lands occurred during debates

by the delegates was in regard to school lands. **Mr. Strack** noted that there was never any indication that delegates believed they were *entitled* to school lands or any other public lands based on its admission into the Union. **Mr. Strack** said that every reference he saw in the constitutional debates, in the 2,000 pages he reviewed, was that the delegates viewed school lands as a gift from Congress to the state. He said that there are many references to gifts, lands that have been given and lands that have been donated. He added that delegate James Reid and others recognized that Idaho would likely get additional lands after statehood, which it did, but the delegates viewed those as grants, not as a state right, entitlement or exchange for the disclaimer.

Mr. Strack noted that as to the disclaimer clause itself, there was very little discussion about it. He said that it was just viewed as a pro forma action. Delegates were following the lead of other states that had adopted similar disclaimer clauses. The delegates looked to the Colorado Enabling Act and acts from Montana and North and South Dakota and saw that Congress was uniformly requiring a disclaimer clause in constitutions. Delegate Heyburn moved for adoption of a disclaimer clause and the only debate that came up was whether it was definite enough. He stated that they then added that the ordinance would be irrevocable without the consent of the United States and the people of the state of Idaho. **Mr. Strack** told the committee that the documents do not indicate that there was any controversy about this clause. A contrast to Idaho's debates relating to this clause occurred in California where they did have controversial debate over such a clause. **Mr. Strack** told the committee that Congress had the power to impose a disclaimer regardless of what the states did and that is what happened in California. Our disclaimer clause is set forth in the Idaho Constitution, Article XXI, Section 19. He said that there is no indication that the delegates viewed the disclaimer as any kind of conveyance.

Mr. Strack, after reviewing the constitutional debates, went to some secondary sources to see if he could find any writings by the delegates that could shed some more light on what they thought about the disclaimer or the other provisions that relate to public lands. He said that the best source he found was the Congressional Record because several of the Idaho delegates went on to represent Idaho in Congress. He said that one such individual was Senator George Shoup, who is noted as saying in 1897 that "(w)e of the west are not opposed to forest reserves if they are well and properly located…we do want to protect and will protect our timber if the reserves are only established in the right place." **Mr. Strack** said that Shoup, as a former delegate to the Constitutional Convention, did not appear to believe that the reserves were a violation of any compact between Idaho and the United States.

Mr. Strack noted that in 1904, Senator Weldon Heyburn stated that "I am not opposed to creating forest reserves for proper purposes, but I insist that they should be created upon the ground and not upon the maps." This was at the time President Roosevelt was setting aside millions of acres of reserves throughout the West. Heyburn didn't want to include lands that were suitable for settlement.

According to **Mr. Strack**, Senator Fred Dubois, who was not a member of the Constitutional Convention but did attend, stated in 1905 that "I am a strong advocate of the policy of forest reserves, and specifically endorse the National Administration in its proposed reserves in our state." **Mr. Strack** said that there was no indication that he thought there was any violation of a compact.

Mr. Strack said he then looked to see what the legislature was doing in response to the forest reserves to see if the legislature ever indicated that it believed setting aside these reserves was a violation of a duty to dispose. He said that he found the first reserves were opposed by the legislature because they included lands that were suitable for settlement, development and mining. The legislature did not suggest the reserves should be rescinded entirely, with the exception of the Sawtooth Reserve because

it had a number of grazing lands but not because they violated the admission agreement between Idaho and the United States. He said they appeared to be focused on the size of the reserve, not the reservation itself.

Mr. Strack said that HJR No. 7, from 1907, appears to be the closest example of an assertion that the federal regulation of national forests is inconsistent with state sovereignty. That resolution protested the forest reserve policy of the federal government because it has resulted in the practical transfer of jurisdiction over more than one-third of the state to a bureau of the government which has substituted rules and regulations inconsistent with the legal rights of the citizens of the state under the general laws by which the state presumed to be governed." He said that this may be another response associated with grazing because the Forest Service did regulate grazing to some extent. He added that in the same resolution, the legislature went on to state that they favor the creation of forest reserves, properly located and administered. **Mr. Strack** noted that is difficult to square with the notion that there was an understanding at the time that there was a compact that required the disposal of all public lands in Idaho.

Mr. Strack said that as time went on, the legislature actually started urging Congress to reserve more lands, examples being in the Sawtooths, the Thunder Mountain region of Valley County, the Nez Perce National Forest and the Moores and Grimes Creeks watersheds. He said that additional efforts went on until 1993 when essentially all the land suitable for forest purposes was put aside in a national forest.

Mr. Strack concluded this portion of his presentation by reiterating that there is nothing to suggest that the delegates thought Idaho would have acquired public domain lands as an aspect of state sovereignty, except for Idaho's disclaimer. He said that the delegates plainly anticipated the United States would continue to dispose of public lands to bona fide settlers, although they knew that many lands would not be settled without reclamation. **Mr. Strack** stated that after statehood, the delegates, while often expressing concern about the size of forest reserves, never expressed concern that reservations per se violated the federal government's duty to dispose of public lands.

Mr. Strack proceeded to discuss past efforts to secure the transfer of federal lands to western states. He said that many of these efforts served as a backdrop prior to Idaho's Constitutional Convention. Going back to 1828 there was a big effort by the then western states, including Indiana and Missouri, claiming public lands should be ceded to the western states. Congress's eventual response in 1841, pursuant to a compromise, was to give them 500,000 additional acres each and divide proceeds from sale of the remaining federal lands among all states based on population. This policy lasted for a period of time. **Mr. Strack** said that the debates in Congress are almost identical to the debates we hear today, for and against the Utah legislation. He added that it was basically the eastern states versus the western states. Those in the east argued that the benefits of the lands should flow to all the states, not just the states in which they are found.

Mr. Strack told the committee that the other thing the states wanted in the 1820s was the gradual reduction of prices, but that didn't occur until 1854 in the Graduation Act. In the 1820s, states also wanted unsold lands to be ceded to the state after 30 years. That act reduced the price from $1.25 per acre to a graduated reduction with the lowest cost being $.125 per acre after 30 years, but did not provide for eventual cession to the states. He said that the Homestead Act superseded the Graduation Act in 1862.

Mr. Strack stated that in 1891, the western states, including Idaho, were pushing Congress to donate all

the agricultural and grazing land within each state, to each state. Idaho urged for such action in order to unite the control of both water and land under one authority to allow for the fullest development of irrigation systems needed for reclamation. He said that this action was the precursor to the Carey Act of 1894, which authorized the General Land Office to transfer up to one million acres each to Idaho and other western states, with Idaho ultimately acquiring three million acres, for state-managed reclamation projects. He said that this was an example of a successful effort by the state to acquire at least some public land.

Mr. Strack determined that in 1902, when Congress passed the Reclamation Act, there were two competing proposals. The first was to cede all public lands to states for reclamation under state sovereign authorities and the second was to retain federal ownership of public domain to allow the United States to fund reclamation under the Property Clause. He said that states were opposed to the first alternative because they wanted the federal government to take the lead on reclamation. He added that in conjunction with the Reclamation Act, instead of five percent of proceeds going to the states, after the act was put in place the 95 percent that goes to the United States is placed into a reclamation fund which is directed to each state for reclamation.

According to **Mr. Strack**, the next proposal was in 1929, known as the Hoover Proposal. At that time, President Hoover proposed to cede all unallocated federal lands to the states, except mineral rights. This proposal also excluded the national forests. Idaho's Senator William Borah was quoted as saying: "It was like handing the states an orange with the juice sucked out of it." The states opposed the proposal.

Mr. Strack said that beginning in 1945, a senator from Wyoming introduced a bill to cede all the public lands to the states. There were several similar bills, none gaining any traction. However, he said that in 1947, it led to a series of hearings throughout the West exploring the possibility of transferring forest service grazing lands to states or selling them to stockmen. The hearings were very contentious. He said that the Idaho Legislature responded with a Joint Memorial in 1947 which provided, in part as follows: "Whereas the federal government is the principal land owner in the 11 western states…and is best able to promote the conservation, development and use of these lands in the general public interest; and Whereas there is a persistent effort on the part of certain western Congressmen who appear to favor special interests wherein the public lands would be sold into private ownership; Whereas the livestock producers, farmers, sportsmen, and businessmen of eastern Idaho…Demand that the public lands remain in their present ownership for the following reasons: Watershed protection, recreation, hunting and fishing…private ownership cannot maintain adequate fire-fighting facilities." "Thus we respectfully urge the President and the Congress of the United States to preserve public lands in Idaho in their present ownership…"

Mr. Strack then moved on to discuss the Sagebrush Rebellion of 1977 – 1981, which originated in Nevada, followed by Wyoming, Utah and New Mexico. He said that this was basically a response to FLPMA. He told the committee that Idaho did not join in as some of the other states did. He said that the state did establish an interim committee to complete a study of all matters relating to the management and control of the unappropriated public lands in the state of Idaho. Ultimately, that committee voted to take no stand regarding the state of Idaho taking control of the unappropriated public lands and recommended additional study. **Mr. Strack** told the committee that there was a federal court case involving the state of Nevada stemming from a moratorium that withdrew the land from disposal. He said that Nevada made a contractual argument, asserting that the moratorium violated its expectation. The district court rejected the argument that the United States holds public lands in trust temporarily for the purpose of disposal to the state and its citizens and held that federal retention does not violate the

Equal Footing Doctrine, which it stated guarantees equality of political rights and sovereignty, not equality of property or economic matters. On appeal to the Ninth Circuit, the case was dismissed because FLPMA had been enacted and there was no longer a case in controversy. He cited to another case where litigation also was not successful. He said that transfers have only been achieved through legislation.

Mr. Strack went on to comment on a bill introduced by Senator Orrin Hatch that would have authorized states to apply for transfer of BLM and National Forest lands, provided they agree to manage for multiple-use. This bill never made any serious headway. In concluding, **Mr. Strack** told the committee that in 1996, Nevada amended its constitution to remove the disclaimer to federal lands and it remains uncertain whether the amendment is effective without federal concurrence.

Mr. Strack commented briefly on the Federal Lands Task Force, previously addressed by Professor O'Laughlin. He said that it shows we have looked at various approaches. At that time the legislature wanted a study to explore a different model for gaining some control over federal lands. He said that the purpose of the task force wasn't to assume control but to find methods to collaborate and streamline the decision process and avoid conflicts and litigation. **Mr. Strack** noted the efforts of the Clearwater Basin Collaborative. He reiterated that progress has been made, as was in the past, due to Congressional action in the establishment of the Collaborative Forest Landscape Restoration Program. Litigation has not been successful. Congress has responded when states have made a good case for cession, the Carey Act being a good example. He said that today the debate remains between the public land states and the nonpublic land states that want the benefit of such lands to flow to all the people. He said that the Supreme Court has stated that the lands are held in trust for all the people of the United States, not one specific state.

Mr. Strack went on to discuss the constitutional and statutory requirements for state management of transferred federal lands. He reviewed the history of the Idaho Constitution, Article IX, Section 8. **Mr. Strack** told the committee that it has been the advice of the Attorney General's Office that the state can accept grants of land for purposes other than the endowment, that are not subject to Article IX, Section 8. He said that we have a lot of examples of this, one being Farragut State Park. Other such grants could be for multiple-use purposes.

Mr. Strack then stood for questions. **Representative Burgoyne** asked why Nevada thought it was necessary to amend its constitution to remove the disclaimer clause. **Mr. Strack** responded that he assumes it was to open up its options, but he thinks it is interesting that this occurred at the same time they were supporting the federal government through their amicus action in a case brought by one of their citizens relating to grazing on federal land where they recognized federal title to land in Nevada.

Senator Winder said that one of the values in any land transaction involves the minerals and natural resources that go along with it. In a private transfer of property, normally mineral rights are called out one way or another. He asked if any findings were made in regard to surface and subsurface rights. **Senator Winder** asked, at the time we waived our rights to our lands, whether it was just surface land or was it surface and subsurface, including all mineral rights with it. He followed up by asking if there was any discussion about the separation of the two types of rights. **Mr. Strack** responded that there was no discussion of that, probably because it does not appear that the delegates viewed the disclaimer as relinquishing anything. They viewed the lands as federal lands. He added that certainly they would have understood at that point that whatever public lands the United States owned, it owned all of the rights to the land.

The next speakers were **Mr. Andy Brunelle, Capital City Coordinator, U.S. Forest Service, and Mr. Kurt Wiedenmann, Bureau of Land Management,** who provided the committee with information relating to the responsibilities associated with management and use of federal lands in Idaho.

Mr. Brunelle told the committee that he would provide them with information relating to the scale and extent of Forest Service responsibilities in regard to the national forests in Idaho. Forty percent of the land base in Idaho is part of the National Forest System land with seven national forests. He said that within the state of Idaho, the Forest Service has about 2,300 permanent full-time employees. The breakdown in employment responsibilities, according to **Mr. Brunelle**, includes roughly 1,800 tied to the National Forest System, 40 handling law enforcement, 200 involved with regional support services, 90 with the National Interagency Fire Center, 90 involved in research and 80 associated with the Job Corps.

Mr. Brunelle said that with respect to the national forests in Idaho, an annual budget that covers everything except fire suppression is roughly $158 to $160 million dollars annually. He said that the budget also covers their 1,000 seasonal employees on staff at the present time. He noted that the $160 million is augmented every year by wildfire suppression costs, over and above fire preparedness. He showed the committee a graph depicting wildfire suppression costs from 2007 to 2012. He pointed out that in 2007 and 2012 Idaho had a great deal of fire activity and fire suppression costs were between $165 and $175 million. He noted that the range is $20 million to $175 million annually, depending on the year. **Mr. Brunelle** said that so far in 2013, they are at about $36 million in fire suppression costs.

Mr. Brunelle moved on to address some laws and regulations that govern their land management. He noted that Professor O'Laughlin has already covered some of the key laws that have had an impact on their longstanding timber program that began after World War II and ran until the early 1990s. He drew the committee's attention to the Wilderness Act, the National Environmental Policy Act, the Endangered Species Act and the National Forest Management Act and reiterated that these acts have impacted the timber program.

Mr. Brunelle said that the national forests are managed for multiple use with substantial requirements for public disclosure and participation on proposed actions. They also have to ensure habitat is available for fish and wildlife species that are well distributed throughout the national forests. He said that over time, the combined effect of all of these laws and regulations, as well as related case law, culminated in a significant impact historically on timber sales, with precipitous drops in production starting about the early 1990s. By the mid-1990s, production was below 200 MMBF. Since then, with some variation, it has been in the 100 to 150 MMBF range. **Mr. Brunelle** pointed out the Caribou-Targhee Forest. He said they were on a departure from sustained yield forestry in the 1970s and 1980s and were intentionally cutting as much as they could because of all the bug-killed trees around Island Park. The plan was to over-harvest for a sustained amount of time and then bring it to an end. This fact, he said, also added to the reasons harvests dropped.

Mr. Brunelle told the committee that since 2000, when the National Fire Plan was enacted, Congress increased funding and articulated national goals and policies toward a focus on reducing the risks and impacts of wildfire on communities and other resources. Since 2001, they have now tripled the amount of land on which they are conducting hazardous fuels treatment. He doesn't know how long it will be sustained because a lot of stimulus money that is no longer available went into the program.

Mr. Brunelle noted that we face a continued trend of longer, hotter forest fire seasons. One of the

contributing factors is the decades of successful fire suppression which allowed more brush and trees to accumulate, what is referred to as the paradox of success. Large fire years started in about 1988. The drier forests in southwest Idaho are more prone to the larger fires. **Mr. Brunelle** reminded the committee of the Trinity Ridge fire of 2012, a person-caused fire that started in early August. Even though they hit the fire hard with retardant they continued to lose the fire line due to dry fuels. The fire grew as much as 20,000 acres in a single day, topping out with roughly 146,000 acres.

Mr. Brunelle next addressed the uses and benefits on national forests to give the committee an idea of all the different and sometimes competing uses. He chose a number of uses to specifically address, including special uses, facilities and roads, and recreation. He showed the committee a graph depicting the 4,200 special use permits on Idaho national forests issued in 2011. Types of permits that are managed include those for outfitters and guides, recreation residences, water facilities, telecommunications and road and trail easements. He said that many are permanent or semi-permanent on the landscape, but at the same time they issue permits for special events that only last for a few days.

Mr. Brunelle then addressed the national forest road system with nearly 21,000 miles of roads that are open to motor vehicles. In addition, there are 11,000 to 12,000 miles of roads that are closed and stored for future use, primarily timber management, when appropriate. He said that most of these are in the Idaho Panhandle, Clearwater and Nez Perce forests. These are historically the most productive for tree growth and commercial logging. As recently as two years ago, the amount of road maintenance they were able to conduct due to stimulus funding was 100 percent of the roads, but typically they get to between 40 and 60 percent. He also noted the 829 bridges that are present on Idaho's forest road system. He said they have a duty to inspect and maintain the bridges and to replace them when needed.

Mr. Brunelle moved on to a discussion about recreation use and facilities in the national forests in Idaho. Use is very high with downhill skiing being one of the big uses, but there is a wide variety. He said that in response to public demands and needs, they have all sorts of recreation facilities, with the Boise Forest having more than all the others. Facilities, which number roughly 1,000 statewide, include campgrounds, trailheads, winter sports, picnic and day use, fire lookouts, cabins, boating, fishing and swimming. He added that off-highway motorbike and ATV use has been a growing trend, with registrations growing rapidly until the recession hit. Levels are now somewhat flat but continue to be highly used. In response to that, the Forest Service has a motorized trail system of about 12,800 miles and another 10,000 miles for non-motorized use, 3,000 of such miles are in wilderness.

Mr. Brunelle said that with the extent and scale of forest use, they don't maintain or manage these lands alone. There is state and local involvement in national forest management. The state has been a cooperating agency on NEPA projects such as the Idaho Roadless Rule, and on some of the travel planning. Idaho Parks and Recreation has also invested in recreation infrastructure. He said that the Forest Service has a long-standing cooperation with Fish and Game on fish and wildlife management. He said that in recent years, they have worked closely with counties in developing community wildfire protection plans, prioritizing thinning projects in wildland-urban interface. He added that over the last twelve years or so they have had six Craig-Wyden Resource Advisory Committees that recommend projects where funding can be used. He also noted the forest collaborative groups in Idaho. He said we have about eight groups, including the Clearwater Basin Collaborative.

Mr. Brunelle stood for questions. **Representative Burgoyne** asked whether the federal government has ever attempted to quantify environmental liabilities on its lands in Idaho. **Mr. Brunelle** responded that,

with respect to some of the legacy issues, they probably have some estimates between the BLM and the Forest Service relating to the extent of abandoned mines. He said that there are also numbers for national legacy issues dealing with the road system. **Representative Burgoyne** requested that information be provided to him. **Mr. Brunelle** responded they would work on that but that it will take some time to put together. **Co-chair Winder** asked that the information be sent to LSO to be forwarded to the committee members.

Representative Denney asked what the approximate annual growth in board feet is in the national forests in Idaho. **Mr. Brunelle** responded that he did not have that information but thinks Mr. O'Laughlin may have that number.

Senator Stennett asked about law enforcement within the forests and also about maintenance expenses relating to special use permits. **Mr. Brunelle** stated, in regard to law enforcement, he doesn't have a lot of information readily available but he will work to get additional information. He said that he does know they have some cooperative agreements between their law enforcement branch and some counties in the state. He said they provide some grants to counties for specified work. In regard to special uses and maintenance, **Mr. Brunelle** responded that it would depend on the type of use. For a commercial use, responsibilities would be with the permit holder but he said he believes it would differ for an activity like grazing. He said that the Forest Service typically asserts ownership of fences, etc.

In response to **Representative Denney's** earlier question, **Professor O'Laughlin** told the committee that the annual growth in board feet on the national forests in Idaho, referencing a chart from his presentation, is about 800 million cubic feet per year, and that is for all the ownerships. However, the national forest system has 80 percent of the growing stock inventory, so the growth would be somewhat less than 80 percent of the total because the forests are older and not growing as quickly as they are in other ownerships. **Co-chair Winder** asked the professor to define what he means by board feet in relation to cubic feet. P**rofessor O'Laughlin** said that a board foot is 12x12 inches and one inch thick, and that there are approximately five board feet in one cubic foot.

Mr. Kurt Wiedenmann took the podium for his presentation to the committee relating to BLM land. He said that the BLM has similar land mandates as the Forest Service. He noted that the BLM has roughly 12 million acres of public land in the state and 37 million acres of subsurface mineral estate. They have four district offices, 12 field offices and approximately 1,000 employees, of which 700 are permanent. The BLM in Idaho has a budget of approximately $139 million, of which about $22 million is for fire operations. Last year BLM lands generated about $10 million in revenue, primarily from such things as recreation use, special use permits and land and realty management. He added that the BLM does have the authority to sell land through their range program and through timber management.

Mr. Wiedenmann went on to tell the committee that the BLM is mandated to provide for multiple use. BLM is to maintain healthy and sustainable lands for future generations. He said that multiple uses include such things as outdoor recreation, wildlife habitat, forest products, minerals, energy production, domestic livestock grazing, cultural resources and special places, such as wilderness areas.

Mr. Wiedenmann stated that the BLM also has resource advisory councils and that there are four in Idaho with membership including a cross section of Idahoans. Typically these councils have representatives from varying interests including energy, tourism, commercial recreation, environmental, archeological and historic and also include elected officials, tribes and the public at large. The councils provide for citizen involvement in public land decisions. He said that the councils have been around for

decades.

Mr. Wiedenmann continued by addressing planning. He said that the BLM is also regulated through the Federal Land Policy and Management Act (FLPMA) to have comprehensive resource management plans. There are programmatic plans that guide them in how they are going to manage BLM lands, objectives and desired future conditions. He said they have 25 completed and are currently in the revision process for five of the plans. He noted that the plans are also done with full public involvement. The plans are often controversial and involve litigation.

Mr. Wiedenmann then discussed the Wild Horse and Burro Program. He said that in Idaho, we have about 650 wild horses in six Herd Management Areas and that one wild horse gather was held last fall. He said that this program is also controversial and results in some litigation.

Mr. Wiedenmann went on to say that, similar to the Forest Service, the BLM is involved in travel management, primarily involving recreation. He said there are 12 plans in place across the state. This includes providing appropriate access and conservation. He noted that public involvement is a key factor in planning. He said that ultimately the plans designate road systems that are open and those that are closed.

Mr. Wiedenmann stated that the BLM also has a National Landscape Conservation System throughout the United States. In Idaho, we have one national monument, one national conservation area, six wilderness areas, 16 wild and scenic rivers, five national scenic and historic trails and 43 wilderness study areas. These are generally areas set aside by Congress or Presidential Proclamation. Study areas have to be held in that status until either designated wilderness or released by Congress.

Mr. Wiedenmann told the committee that they also have a responsibility for tribal trust and meeting tribal treaty rights. He said that the BLM consults regularly with the Shoshone-Paiute, Shoshone-Bannock, Nez Perce, Coeur d'Alene and Kootenai tribes. He said that typically, the issue of concern is the protection of cultural resources on the public lands relative to tribal ancestral lands.

Another area of BLM involvement, according to **Mr. Wiedenmann,** involves threatened and endangered species. Within BLM land, between mammals, snails, fish and plants, they have 17 listed species which require consultation with regulatory agencies. He understands that some level of consultation would be required under state ownership. He said that there are additional species that are proposed for listing such as Slickspot Peppergrass and Sage Grouse. He said that they recently completed an EIS in cooperation with the Forest Service and are in the process of analyzing the Governor's alternative. He added that 90 percent of BLM land contains Sage Grouse priority habitat.

Mr. Wiedenmann noted that last year, the BLM suppressed 367 wildfires that burned 683,000 acres, burning nearly twice the ten-year average. He said they accomplished 109,000 acres of hazardous fuels reduction work, almost exclusively in wildland-urban interface areas. He said their base budget for fires is about $22 million which does not include suppression costs for large suppression efforts.

Mr. Wiedenmann told the committee that given fires, there is also the need for emergency stabilization and rehabilitation, the objective being to stabilize burned areas and prevent wind and water erosion, slow invasive species and reestablish desired species composition and habitat. He said that last year they received about $7 million for the program.

Mr. Wiedenmann said that the BLM's Domestic Livestock Grazing Program is a large program. The vast majority of their lands in Idaho have been determined to be grazing lands. He said that last year the BLM authorized over 983,000 animal unit months (AUMs), with the public land grazing fee being $1.35 per AUM as established by Congress, compared to the state fee which is $6.36 per AUM. He noted that this program involves a lot of controversy, typically with conservation groups, with particular focus on Sage Grouse. They are in litigation now in regard to these issues.

Mr. Wiedenmann noted the variety of infrastructure that exists on public lands, such as transmission lines, pipelines, roads, trails, bridges, recreation sites, communications sites and buildings. Permit holders generally have to maintain the infrastructure. The BLM is also working on an EIS regarding a large transmission line proposal, the Gateway West Transmission Line, with a decision expected soon.

According to **Mr. Wiedenmann**, the BLM paid the state of Idaho $26.3 million in PILT for FY 2012. The BLM also made a mineral royalty disbursement to the state in the amount of $4.6 million.

Mr. Wiedenmann said that mining and minerals is also a large program in the BLM. There are over 26,000 active mining claims with 1,400 new claims filed since January. He said that phosphate mining produces $2 billion in products and employs over 1,200 locally. Idaho supplies roughly 15 percent of the nation's phosphate.

Mr. Wiedenmann concluded his remarks by addressing abandoned mine lands in the state. He said that there is an estimated 8,000 to 16,000 abandoned mine lands in the state, with an additional 5,000 abandoned hardrock mines. He added that they do not have a complete inventory. The numbers reflect abandoned mine lands on both BLM and Forest Service land. He said that the BLM holds the liability for cleanup for those abandoned mines on BLM land to meet EPA regulations and ensure public safety.

Mr. Wiedenmann stood for questions. **Representative Gestrin** asked whether he knows how many years PILT was fully funded by Congress. **Mr. Wiedenmann** responded that he did not have that information but would get it.

Representative Burgoyne asked whether he knows of any quantification of monetary liability with respect to the abandoned mines. **Mr. Wiedenmann** responded that he would work with Mr. Brunelle to get that information to the committee.

Following a short break, **Mr. David Groeschl, State Forester/Deputy Director, Forestry & Fire, Idaho Department of Lands**, provided the committee with the final presentation of the day relating to a hypothetical transfer of federal land and an analysis of potential impacts of legislation similar to Utah's HB 148.

Mr. Groeschl reminded the committee that the Idaho Department of Lands (IDL), during the 2013 Legislative Session, was asked to analyze Utah's HB 148 and to look at several key items. The two items they were asked to analyze were what portion of the federal estate in Idaho, excluding certain lands, would potentially transfer to the state of Idaho and what the possible costs and revenues would be if managed under the existing trust land model.

Mr. Groeschl said that in February, 2013, IDL provided a rudimentary analysis to the chairmen of the House and Senate Resources Committees. He said they used information from the BLM and Forest Service in doing so. He said the analysis used the active management model of 2.4 million acres of state

endowment trust lands to come up with the potential management costs and revenues associated with managing a portion of federal lands in Idaho.

Mr. Groeschl reminded the committee that the trust model has a very clear mission, to maximize the long-term return to the beneficiaries. He said that he thinks there is sometimes a misunderstanding as to the nature of that management. He said that some believe that if the lands were trust lands, the public would be locked out of those lands. **Mr. Groeschl** told the committee that is not the case, that there is considerable disbursed recreation on state trust lands including hunting, fishing, hiking and horseback riding. He acknowledged that sometimes roads are gated closed due to wildlife issues, recovery issues and some may be only seasonal. **Mr. Groeschl** went on to say that while we have to comply with federal laws, one law that the state does not have to comply with, that the federal agencies do, is NEPA. Although we do not have a NEPA process, the state does take the public's concerns into account in managing state trust lands.

Mr. Groeschl reiterated that Priest Lake is a good example of a place where they have grizzly issues, critical bull trout habitat and concerns about the scenic area on the east side of the lake. He said that IDL does, however, try to accommodate those concerns and issues to the extent possible while keeping in mind the primary mission of management of the trust land. He said that trying to obtain every objective on every acre is not possible and it leads to gridlock.

Mr. Groeschl showed the committee a map depicting Idaho's 53.5 million surface acres of federal land, with 34.5 million acres being managed by the federal government. In Idaho, 20.4 million acres of land are managed by the Forest Service, 11.7 million acres are managed by the BLM and 2.4 million acres constitute other federal land such as Corps of Engineers, Department of Defense and the Bureau of Reclamation.

Mr. Groeschl said that in doing the rudimentary analysis, IDL looked at what amount of federal lands in Idaho would be transferred to the state under assumptions similar to those used in Utah's HB 148. He said that numerous federal ownerships and special designations would be excluded, such as wilderness lands, roadless lands, National Grasslands, Bankhead Jones lands, national recreation areas, wild and scenic river areas, etc.

Mr. Groeschl said IDL came up with a total of 16.4 million acres that would be transferred to the state under specified assumptions, which represent 48 percent of the total acres of federal land in Idaho. Of this figure, 9.5 million acres are owned by the BLM, predominantly rangeland without significant revenue potential, and 6.9 are owned by the Forest Service and represent roughly one-third of Forest Service land in the state. He said that he would focus most of his remaining presentation on Forest Service land.

Mr. Groeschl showed the committee a map depicting the potentially transferrable lands. He told the committee that he thought it was important to depict the lands in that there has been a concern that they would be seeking wilderness lands, roadless lands and other special designations. He reiterated that in the analysis, all of those special designations were excluded. The lands that were identified are lands that are primarily adjacent to state and private land, typically in lower elevations. The lands already have roads and are also where IDL believes the state would achieve the most landscape scale benefits. He said that there would be places where they could take care of forest health, decrease fuels, protect communities, create jobs and produce a steady supply of raw materials.

Mr. Groeschl continued by discussing standing timber volume on all federal forest lands in Idaho. He said that there is roughly 168 BBF of standing timber volume on all federal lands in Idaho, including on special designations. In the analysis, if seven million acres of Forest Service land were transferred to the state, there would be an estimated 68 BBF of standing timber on those lands. **Mr. Groeschl** recalled that a question was asked earlier about forest growth, which Professor O'Laughlin told the committee was roughly 800 cubic feet. He said that on seven million acres, that portion would be about 1.5 BBF of growth per year.

Mr. Groeschl then addressed the issue of costs. He said the data IDL worked with was from FY 2012. Fire suppression costs for BLM and Forest Service were approximately $195 million and land management costs were approximately $275 million. He said that the numbers do not include Forest Service costs associated with research, the Forest Service portion of the National Interagency Fire Center or other Forest Service regional office employees. The total for BLM and Forest Service for fire suppression and land management is $470 million. He said that if we want to determine what portion of costs would apply to 16.4 million acres of land, the total would be in the neighborhood of $223 million.

Mr. Groeschl then moved on to potential costs for Idaho to manage transferred lands under existing state authorities. He reminded the committee that Idaho would still have to meet federal laws under the Clean Air Act, the ESA and the Clean Water Act. In terms of the seven million acres of Forest Service land from the analysis, it is assumed that it would take about 10 to 15 years to bring the land under full management. He said the state would need time to allow for industry to make the investments to bring the mill capacity up to the level that could absorb the additional volume without flooding the market. **Mr. Groeschl** recalled earlier questions about liabilities and commented that abandoned mines, as well as other legacy issues, could pose a potentially large liability. He said that the state would probably not want to take on that liability, perhaps by excluding those liabilities from transfer to the state.

Mr. Groeschl reiterated again how the state trust lands are open for public recreation. He said that their concern is that when recreation becomes concentrated, there is at times resource damage and the state does not have a mechanism to cover the costs of those "fixes" unless they charge a fee or add an amount to tags for off-highway vehicles. He said they would have to look at ways to accommodate recreation. He also commented on the fire protection piece of the analysis. He said in their analysis, IDL took into account the fact that the state would be responsible for these costs upon a transfer. He pointed out that they would incur some immediate costs without having the immediate benefit of the revenue while bringing those lands under management.

Mr. Groeschl said that another element they did not incorporate into the analysis at this time was payment to the counties but that element could be built in.

Mr. Groeschl told the committee that using the assumptions and numbers as presented, if the state acquired 16.4 million acres of land, it could generate a net profit of $51-75 million annually for public schools or other identified institutions after the lands were brought fully under state management.

Mr. Groeschl said that the process could also accommodate the collaboratives, which have done a great job of involving local interests to achieve consensus and move forward. He said they face challenges, however, in that trying to get projects through NEPA can be very daunting.

Mr. Groeschl said that in terms of fire suppression, IDL protects six million acres of land and spends an average of $15 million annually for pre-suppression and suppression costs. In the event the state had to

provide for fire suppression on an additional 16.4 million acres, the state would have to spend an estimated additional $45-50 million a year to do so.

Mr. Groeschl said that on the forest management side, IDL estimated that they would harvest somewhere in the neighborhood of 800 million to a billion board feet a year, which is within the historic range, off the 6.9 million acres of forest land. He said this projected harvest represents less than growth. **Mr. Groeschl** said that harvest would generate gross revenue of $160-200 million a year, using a very conservative price per thousand board feet of $200 per thousand board feet. He said that they used a high management cost of 40 percent, noting that their current costs are not that high. **Mr. Groeschl** told the committee that the analysis showed that after 10 to 15 years, they could net about $51-75 million annually. He said that this does not take into account the rise in employment associated with the increased economic activity. He said that some studies have indicated estimates that for every million board feet harvested, 13 family wage value jobs are supported and that if you multiply 13 by the estimated harvest of 800 million board feet, that would represent roughly 10,000 additional jobs. He added that does not account for the indirect benefit to suppliers and others. He noted that multiplier is about 1.6.

Mr. Groeschl stood for questions. In a response to a question from **Senator Stennett, Mr. Groeschl** said that the estimate of $50-75 million, which IDL believes to be a conservative number, would be generated as lands are brought under management over a 10 to 15 year time period. He added that there would be some initial costs up front while the mill infrastructure is developed and staff is brought on board.

Senator Stennett followed up by asking **Mr. Groeschl** to confirm that at the present time the federal government brings in about $60 million through the existing infrastructure that doesn't have to come on line over a period of time. She said that we are talking about losing quite a bit in order to get to the $50-75 million in 10 to 15 years. She asked whether the state can financially afford to handle costs in the interim while the lands are coming under management. **Mr. Groeschl** responded a considerable amount of revenue is brought in from recreation on specially designated areas which were excluded in the analysis. If those areas stayed within federal ownership, a significant part of that revenue would remain. **Mr. Groeschl** went on to say that the revenue stream he is predominantly talking about is from active forest management and he thinks if management is phased in, the revenue would more than offset the costs. He said that, in terms of our trust lands, for every dollar they spend they typically generate three to four dollars in revenue. He would anticipate that they would try to do the same thing in the case of a federal land transfer.

Senator Stennett referenced the suggested exempted lands and noted that national recreation areas were included, asking for confirmation. **Mr. Groeschl** confirmed that they would be excluded.

Senator Stennett asked for clarification on how a land transfer would occur. She asked if they would be asking for everything to be transferred and then there would be a return of excluded lands or would they only ask for the acreage that the state wants to manage. **Mr. Groeschl** responded that when IDL did the analysis, they simply looked at the anticipated costs and revenue if they were to bring the lands under state management under a trust model. He said that it was less important to them who actually owned the land. He said that to him, the more important question was the framework under which the lands are managed, not who actually owns them. He said that they selected lands that would be suitable for active management. He added that what they have all wrestled with is that the existing framework is broken due to conflicting laws, NEPA and litigation. He noted that either the state or federal

government could manage under a trust model. **Senator Stennett** commented that she believes jurisdiction, ownership and control is a huge part of the conversation and she is concerned about that fact.

Representative Burgoyne said that he is interested in the potential unknown liabilities, including environmental liability, with respect to federal lands. He quoted from IDL's report relating to the state's reservation of a right to reject lands eligible for transfer based on potential environmental hazards and asked how those contaminated lands would be identified. He also asked what it would cost to identify those lands. **Mr. Groeschl** responded that in all of the land transactions that IDL currently does, they do a Phase I environmental assessment to try to determine what the potential environmental risks are and whether there may be liability. They would do such an assessment in this scenario as well and then would determine whether they wanted to move forward with some of the lands. He added that he thinks the greatest potential liability would be abandoned mines. **Representative Burgoyne** asked what a Phase I environmental assessment would cost on a per-acre basis. **Mr. Groeschl** said he doesn't have that figure with him but he could provide that information.

Representative Burgoyne said that he has been told that the state spends about $575 per acre in fire suppression and that the federal government spends about $205 per acre. He asked whether the figures are accurate. **Mr. Groeschl** said that he would have to confirm what is spent on a per-acre basis. He added that there are times when cost per acre would be higher under state protection due to factors such as more homes in the interface of state and private land. In addition, BLM costs on rangelands can be less than the state's suppression efforts on forested lands.

Representative Burgoyne recalled the presentations regarding the endowments that took place several years ago in the Natural Resources Interim Committee. He said that they were told repeatedly by representatives of IDL and representatives of the beneficiaries that there was only one thing they were allowed to look at when it came to land management of endowment lands, and that is how much money they would return for the beneficiaries. He asked how we could have the obligation to do only one thing which is to make money for the endowments, and then on the other hand manage lands for activities such as recreation. **Mr. Groeschl** responded that they do not have their rangelands or timberlands closed to disbursed recreation. He said that those lands are typically intermingled and sometimes adjacent to Forest Service lands. He said that they accommodate such things as recreation but that their primary mission is still maximizing revenue over the long term. He said that they do not find that allowing hunting, fishing and horseback riding on the trust lands impinges on their ability to maximize revenue. If there is significant resource damage from concentrated use, they try to work with local organizations and groups so that they understand the mission of state endowment lands and so that they can self-police themselves. He said they also partner with Fish and Game and Parks and Recreation to obtain grant money to rehabilitate such areas, potentially close trails and do signage.

Senator Nuxoll asked why it would take so long to bring forest management fully on line. **Mr. Groeschl** responded that it largely has to do with capacity of mills and current efficiency. He said that right now the harvest in the state is about a billion board feet a year with the state providing about 30 percent of that amount. The federal government provides about 10 percent and the rest comes from private industry. He said that if they were to harvest an additional 800 million board feet a year, the mills right now do not have the capacity to absorb that additional volume over a short period of time. He said that they would also have to come before the legislature and ask for additional spending authority to be able to hire foresters, staff and contractors to do the work on the lands.

Senator Nuxoll then asked whether they are using state figures for the fire suppression estimates. **Mr. Groeschl** said they used what the state pays now for pre-suppression and suppression and applied that proportionately to the potential additional acres.

Co-chair Winder asked whether there is demand for the additional board feet that might be cut. **Mr. Groeschl** responded that demand does exceed supply in the state. He said that we import from other states and Canada. He said that he doesn't know the exact amount and that it varies year to year with some years being as much as 100 to 200 million board feet a year. He said that he believes if the additional volume was available, the industry would probably fill that vacuum. **Co-chair Winder** asked for an update on that for a future meeting.

Co-chair Winder commented that the impact of mining and minerals and the associated costs and liabilities are not included in the analysis. **Mr. Groeschl** said that they will incorporate that into additional analysis, including the absorption and marketability of that additional volume.

Co-chair Winder asked how they would manage the additional lands relative to people, facilities and equipment and whether the presentation today included those costs. **Mr. Groeschl** said that they factored in some additional capital outlay and expenses. He said that when you look at the forested lands they would potentially manage, they are adjacent or intermingled with existing state land. He said IDL has 14 offices which might need to be expanded to accommodate the additional staff. **Co-chair Winder** asked that the information also be included in the analysis. **Mr. Groeschl** said they would look at the possibility of additional staff and contracted resources to meet that need.

Co-chair Winder said that at some point in future meetings, they will need to have stakeholders come before the committee and also provide for public testimony. He asked for committee suggestions for future meetings. **Senator Stennett** said she thought it would be helpful to hear from the collaboratives, particularly the Clearwater and how they work with the various groups and entities. **Co-chair Denney** suggested involving the local governments, referencing a questionnaire that Montana sent to county commissioners. He also would like to hear from Idaho's Congressional delegation and he thinks it is important to hear from them. **Senator Tippets** stated that he believes when public testimony is taken, that will identify additional issues they will need to consider. He said that he believes there may be an advantage to allowing some time for public testimony early on in the process. **Senator Tippets** disclosed that he may have a potential conflict of interest and requested that it be recorded in the minutes. He went on to say that his employer has leases on federal land and operates mines on federal land. **Representative Burgoyne** also said he looks forward to public input and comment and suggested that the committee have a public comment period in the morning and again in the afternoon to accommodate schedules. **Co-chair Winder** told the committee that they may meet in various regional areas and take testimony.

The committee adjourned at 4:30 p.m. following a motion by **Representative Anderson** and a second by **Senator Tippets**.