

# **FINAL REPORT**

## **Natural Resources Interim Committee HCR 31 (2013)**

### Members of the Committee:

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Senator Steve Bair  
Senator Jeff Siddoway  
Senator Lee Heider  
Senator Michelle Stennett

Representative Dell Raybould, Co-chair  
Speaker of the House Scott Bedke  
Representative Mike Moyle  
Representative Marc Gibbs  
Representative Donna Pence

### Ad Hoc Members of the Committee:

Senator Dean Cameron  
Senator Bert Brackett  
Senator Shawn Keough  
Senator Roy Lacey

Representative JoAn Wood  
Representative Ken Andrus  
Representative Frank Henderson  
Representative Paul Shepherd  
Representative Grant Burgoyne

Staff: Katharine Gerrity, Ray Houston, Toni Hobbs, Charmi Arregui

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# **NATURAL RESOURCES INTERIM COMMITTEE**

**2014**

## **FINAL REPORT**

### ***Charge***

The Natural Resources Interim Committee is a two-year committee formed in 2013 pursuant to the authority of HCR 31. The resolution authorized the Committee to undertake and complete a study of various natural resource issues of importance to the state of Idaho. The Committee was directed to make a progress report to the Second Regular Session of the Sixty-second Idaho Legislature and a final report to the First Regular Session of the Sixty-third Idaho Legislature.

## ***Meetings***

The Committee met in Boise on August 6, 2013 and on September 17, 2014.

## ***Scope of Study and Recommendations***

### **August 6, 2013**

During the August 6, 2013 meeting, the Committee received an update relating to the State Water Plan from Mr. Roger Chase, Chairman of the Idaho Water Resource Board. Mr. Chase told the committee that during the 2013 Legislative Session he agreed to review several areas of concern expressed by a number of committee members and determine if changes were necessary. Areas of concern included minimum stream flow policies, aquifer recharge policies, riparian habitat policies, climate variability policies, funding policies and fishery and environmental policies.

Mr. Chase noted that if the board changes one word of the Plan, they have to hold public hearings. He told the committee that the board intends to keep the Legislature informed as they go through the process and that it may be 2015 before formal changes are presented to the Legislature.

Director Gary Spackman, Idaho Department of Water Resources also addressed the Committee regarding well construction standards and statewide water conditions. He told the Committee that the department started a well construction regulatory initiative and is evaluating the minimum surface sealing depths and regulatory process for waivers. They have contracted with a professor from the University of Idaho to evaluate and peer review the department's well logs used to establish minimum surface depths and it is anticipated that a report will be available before the next legislative session.

In terms of statewide water conditions, the director said he is quite concerned about areas that are very dependent on storage water for irrigation, about the results of another low water year and what it might mean for petitions for delivery calls and orders that require mitigation, as well as ground water levels and spring flows in general. He said that we have to carefully watch what is happening on the Snake River with the Swan Falls obligations.

Director Spackman and Mr. David Tuthill, Idaho Water Engineering, LLC, informed the Committee about proposed legislation relating to ground water recharge. Director Spackman noted that during 2012, there was a lot of storage in some of the upper Snake River reservoirs and many of the user groups wanted to divert storage water that they owned for ground water recharge. He said that as part of that effort, there was a request that came to the department to recognize the efforts and benefits that might accrue as the result of recharge in the form of a credit to be used or marketed for mitigation at some later time. Director Spackman said that he looked at the request and could not find any statutory authority allowing IDWR to recognize credits. He said that he therefore denied the petition except for the request that some recognition be given



for existing mitigation obligations. This led him to propose legislation that was presented to the Idaho Water Users Association's legislative committee. He went on to say that the group did not like the legislation but it led them to start a review process and ultimately form a drafting group. The director said that legislation was not ready to be presented during the last session but in the last six to eight months they have made great progress.

Mr. Tuthill added that he believes the legislation that is being developed should provide encouragement for both the public sector and the private sector to conduct managed recharge. In addition, he said we should seek a balance between the Idaho Water Resource Board, as a policymaker, and the Idaho Department of Water Resources, as the administrator.

During the afternoon session of the meeting, Mr. Clive Strong, Division Chief of the Natural Resources Division of the Office of the Attorney General and Mr. Brian Patton discussed the Swan Falls minimum flow and the 2013 Snake River forecast.

Mr. Strong said that curtailment and management are the two options for maintaining the minimum flows at Murphy. Mr. Strong said that curtailment is the consequence of failing to take action to protect the minimum flows. Achieving the minimum flows through curtailment involves a large number of water rights in the ESPA due to the time frame it takes for that water that is curtailed in the aquifer to accrue to the benefit of the spring flows. Mr. Strong added that curtailment is a blunt instrument that has severe economic consequences to the economy as a whole, as well as to individuals, and it does not result in meaningful relief to the power company. Curtailment means that the company may get water in the future when the actual need is more immediate.

Mr. Strong said that, consistent with the Swan Falls Agreement, they are looking at the management actions that need to be taken. Mr. Strong said that during the last legislative session a significant addition was added to the Snake River section of the water plan that lays out the steps that need to be taken in order to manage our way through the minimum stream flows. He said that this means completion of a measurement and monitoring protocol for the Murphy gage that will help the state evaluate what the adjusted flows are under Swan Falls Agreement. In addition to that, he said that the State Water Plan proposes to develop tools for predicting spring flow trends and to develop an adaptive management strategy to ensure Murphy minimum stream flows. He said that as these are developed, the thought is that they will revise Part B of the plan for the Milner to Murphy reach of the Snake River.

Mr. Patton added that the implications on a short term basis of the Swan Falls Agreement combined with the Milner zero flow policy is the use of the Water Resource Board's Palisades storage water to maintain flows at Murphy gage if needed. He said that on a long-term basis, the ESPA must be managed to sustain spring flows sufficient to meet the Swan Falls minimum flows.

Following that presentation, Mr. John Revier with the Office of Congressman Mike



Simpson and Mr. Brad Griff with the Office of Congressman Raul Labrador discussed the recent failure of passage of the Farm Bill.

According to Mr. Revier, the largest portion of debate on the Farm Bill centers around funding levels for food stamps. The 2008 Farm Bill included a total ten-year cost of \$604 billion. The estimates included an assumption that 67 percent of that cost would be spent on the Supplement Nutrition Assistance Program (food stamps). For comparison, the 2012/2013 bill included \$973 billion over ten years with estimates that food stamp programs would take up seventy-eight percent of that amount.

He said that given the unprecedented House action to pass a bill that decouples food stamps and commodity programs, the question is whether Congress should move forward with a traditional farm bill or try something new. Mr. Revier said that on one hand, as food stamp costs escalate so too does the overall cost of the Farm Bill despite the fact that agricultural programs are not growing at a similar rate. The food stamp program is consuming an increasingly larger share of funding in each new farm bill and that distorts the perception of growth in farm programs. On the other hand, he noted, there is concern that decoupling the food stamp program from the agricultural programs will make both of them impossible to pass.

Mr. Brad Griff reiterated Mr. Revier's comments and added that part of the push this year to separate the food stamp program from the Farm Bill was so that both could be reformed. He said that when the vote was taken on the original bill, many people were surprised by the number of no votes but they did see a growing coalition to split the nutrition and agricultural portions of the bill. Traditionally, he commented, the programs have been put together providing incentive for an urban-rural coalition. He added that he thinks the price tag on the bill was just too big for many of those voting with less farm spending and more spending for nutrition.

Mr. Norm Semanko, Executive Director of the Idaho Water Users Association, provided the Committee with information relating to the Food Safety Modernization Act and the Food and Drug Administration's proposed produce rule. He stated that the pending proposed rules set growing, harvesting, storing and processing standards for virtually all fruits, vegetables and nuts, normally eaten raw. The proposed rules impose new federal controls relating to agricultural water, biological soil amendments, health and hygiene, animals in growing areas and equipment, tools and buildings. He said that the rule imposes many conditions on food producers.

Mr. Semanko said that at the start of the growing season, producers of covered crops, including sprouts, leafy greens, melons, tomatoes, peppers, strawberries and onions, among other vegetables, typically consumed in their raw and unprocessed state, must inspect the entire water system under their control to identify any conditions that are reasonably likely to introduce known or foreseeable hazards into or onto covered produce or food contact surfaces. He added that the proposed inspection requires producers to evaluate potential water quality implications arising from neighboring land uses.



Mr. Semanko indicated that all producers of covered crops who use surface water for irrigation must test their water every seven days. If tests reveal E. coli units greater than 235 colony forming units per 100mL for any single sample, producers must immediately cease using the water. He stated that the standard is as stringent as Idaho's water quality standard for recreational waters used for public swimming. Before producers can resume use of the water, he said that it has to be inspected again, the cause of contamination must be corrected and the water must be retested to verify compliance. Another option is for producers to treat the water with chemicals but, as of yet, no chemicals have been developed or approved for such treatment.

Ms. Sharon Kiefer, Deputy Director with Idaho Fish and Game, provided a revenue update. Ms. Kiefer noted that there is roughly a ten percent gap between Fish and Game's appropriation versus license revenue for FY 2013. She said the department does not spend more than its revenue. She said that the department has employed several tools recognizing revenue trends and have held open license funded vacancies for six months, as much as feasible, while still keeping the work going. In addition, they have reduced fish stocking costs. She said they have also shifted some operational activities to federal funding. She said that the gap is expected to increase somewhat due to changes in employee benefits, such as health care costs. She said that the department has a FY 2015 objective of closing the license revenue gap.

Ms. Kiefer stated that in order to offset some of the declining revenue the department is looking at some nontraditional methods for selling licenses. She reiterated that the approach is only conceptual at this point in time. She said that these conceptual methods include a traditional fee increase coupled with enhanced commission discount authority. She noted that the commission is presently allowed some discount sideboards relating to tags. They would like to enhance that authority to extend to licenses. She noted that they would like to provide such authority related to the department's every-year customers, locking in current year prices. She said that they are also looking at opportunities for those customers that buy in volume. She added that they are looking at the possibility of online sales. She said that they would like to change buying behavior, incentivized by a fee increase.

The final speakers of the day were Mr. Tim Luke, Water Compliance Bureau Chief with the Idaho Department of Water Resources, Mr. James Wertz, EPA-Idaho Operations, and Mr. Michael McIntyre, Surface Water Program Manager with DEQ, who testified in regard to suction dredge mining in Idaho, describing the applicable regulatory authority and how the permitting process works.

Mr. Luke explained that suction dredge mining in Idaho is regulated by the Idaho Department of Water Resources (IDWR) as a stream channel alteration (SCA) pursuant to the Stream Channel Protection Act and related rules.

Mr. Michael McIntyre was the next speaker to address the committee detailing the role and responsibilities of the Idaho Department of Environmental Quality (DEQ) as it



pertains to suction dredging in Idaho. He told the committee that, in addition to IDWR's permitting process, there is a general NPDES permit issued by the EPA relating to suction dredging. He said that DEQ's role in the process is the certification of that NPDES permit.

Mr. McIntyre indicated that Idaho's authority comes from the Clean Water Act where the state is authorized, under section 401, to issue water quality certifications of NPDES permits that meet the state's water quality standards. If a permit does not meet standards, the department prescribes conditions so that standards are met.

Mr. James Wertz gave an overview of the EPA's role in suction dredge mining. He said that there are two types of NPDES permits the EPA issues. An individual permit includes municipalities, food processing plants and large mines. There are nearly 200 of these in Idaho. He went on to say that general permits are issued for a specific, similar category of activity for large geographic areas. Examples include pesticide applications, large CAFOs, aquaculture facilities, small suction dredge miners and stormwater. Mr. Wertz told the committee that key roles for EPA Region 10 include development of CWA/NPDES permits in Idaho, compliance inspections and enforcement of CWA/NPDES permit violations.

### **September 17, 2014**

During the September 17, 2014 meeting, the Committee received testimony from Mr. Ron Abramovich, Water Supply Specialist, USDA, NRCS Snow Survey, located in Boise. He addressed 2014 water supplies and the 2015 outlook. Mr. Abramovich addressed the various methods of studying weather and the trends during La Nina and El Nino years. He told the Committee that the early bird forecast calls for colder than normal temperatures in the Midwest and East, and slightly warmer than normal conditions in the Northwest due to the ridging off the coast of Washington. He added that Andrew's (Weather Centre) precipitation forecast at this time was not definitive but showed that it may be normal to slightly above average in our area.

Mr. Donald Smith testified before the Committee providing a miner's perspective of suction dredge mining in Idaho. Mr. Smith addressed the frustrations associated with NPDES permits and working with the EPA. He explained to the Committee how a suction dredge works and the reasons he does not believe an NPDES permit should be required for the activity.

Mr. Tim Luke, Water Compliance Bureau Chief, Idaho Department of Water Resources, also addressed the members relating to suction dredge mining. Mr. Luke explained to the Committee that suction dredge mining is regulated here as a stream channel alteration. He noted that permits are required for most stream channel alterations including suction dredges but they have streamlined the permit process to make it user friendly and affordable.

Mr. James Wertz, Director, EPA-Idaho Operations, also addressed members about



suction dredge mining. Mr. Werntz explained the EPA's involvement in that Idaho is one of four states in Region 10 that do not have the Clean Water Act NPDES Program. However, the Legislature voted in 2014 to look into developing that program and so the state may have the program in the future. Mr. Werntz went on to tell the Committee about the EPA's ongoing efforts to work with the miners on the permitting process, to process applications quickly and to respond to complaints. He also noted that EPA attempts to continually provide the most current information on its website and also highlights open and closed waters that are the most popular for miners.

Mr. J. Brent Olmstead also testified at the September meeting on behalf of Idahoans for Sensible Water Regulation. He explained how they were a new organization comprised of a coalition of industries, municipalities and individuals looking at water regulations in Idaho using sound science and common sense. He indicated that they would be commenting on water regulations as they come up and would be completing cost benefit analyses on proposed regulations. Mr. Olmstead also talked at length about concerns associated with EPA's Fish Consumption Rate.

Mr. Roger Chase, Chairman, Idaho Water Resource Board, provided the Committee with an update relating to the State Water Plan. He advised the committee that over the past year the board's planning committee held numerous public meetings to receive input regarding concerns including future funding, whether fish, wildlife and water quality policies created additional regulatory requirements, and instream flow issues. He reported that a letter had been sent to the Co-chairs of the interim Committee, as well as to legislative leadership, that explained the board had concluded that they did not need to make any changes to the plan based on the issues that were raised. Mr. Chase expressed gratitude for the one-time funds that were appropriated to them during the last session and outlined the projects the money has funded. Finally, Mr. Chase provided an update regarding recharge in the ESPA.

Director Virgil Moore, Idaho Fish and Game, provided the members with updates relating to wolves, sage grouse and the raven control study. In terms of sage grouse, Director Moore addressed the establishment of the Sage Grouse Task Force that was tasked with developing a state-directed alternative to input into the BLM and Forest Service planning process. He noted that at this time that alternative, along with some modifications, is the preferred alternative moving forward through the BLM process. They expect the work to be complete by April 2015. In terms of raven control, Director Moore noted that they had not been able to fully implement the structured evaluation intended because the USDA Wildlife Services had not been able to get through their own processes to allow use of the intended control agent. He stated that they were looking into a possible label change on the chemical so they would actually be able to apply for it. In regard to the wolf update, Director Moore told the Committee that they continue to liberalize wolf hunting season and have a statewide bag limit of five wolves per hunter and five wolves per trapper.

Judge Eric Wildman, Fifth Judicial District, addressed the Committee in regard to completion of the SRBA and a provided a status update relating to the Coeur d'Alene-



Spokane River Basin Adjudication. Judge Wildman told the members that the final decree is somewhere between 275,000 to 300,000 pages in length. The final unified decree was signed on August 25, 2014. He noted that the adjudication in North Idaho was commenced on November 12, 2008. He added that to date, they have received 11,378 state law claims and 447 federal law claims, with the largest group from the Coeur d'Alene Tribe.

Dr. David Tuthill, Idaho Water Engineering, LLC, addressed the Committee in regard to public-private partnerships in regard to water issues. He noted that there are aquifer storage opportunities throughout the state and he sees a great future for private enterprise in water. He also commented on recharge efforts and how there are opportunities for the state to partner with private companies to incentivize recharge under private rights.

Mr. Chris Iverson, Deputy Regional Forester, Intermountain Region, U.S. Forest Service appeared before the Committee to address the Forest Service Ground Water Directive. He said that the draft directive recognizes and specifically acknowledges the role of the state in allocation of water use and the protection of water quality. He told members that the proposed directive would not infringe upon the state's authority, nor would it impose requirements on any private landowners. He indicated that a recurring comment is concern over the directive's use of the word "manage" as it pertains to ground water and said that they specifically mean to inventory and evaluate data and to monitor the effects of Forest Service approved activities with any potential to affect ground water resources on National Forest and Grasslands. He stated that it is not the management of water, but rather the management of the activities they permit, authorize or fund, on the ground water resources.

Mr. Norm Semanko, Executive Director, Idaho Water Users Association, also addressed the Committee about the proposed Forest Service Ground Water Directive as well as the EPA's new proposed Waters of the U.S. rule.

Mr. Semanko expressed concern over the Forest Service rule and the use of the phrase "manage ground water." He commented that a judge would look to the plain meaning of the words used and that needs to be considered. He discussed numerous cases with the Committee. He concluded by noting they are looking forward to seeing whether the Forest Service acts to change the wording of the directive. In regard to the EPA's Waters of the U.S. rule, which could severely impact farmers if canals and ditches are considered covered, the comment period has been extended although the Western Governor's Association and others have asked to add an additional 180 days.

Director Gary Spackman, Idaho Department of Water Resources, also addressed the Committee relating to the recent Idaho Supreme Court decision of A & B Irrigation vs. State of Idaho. He explained Basin Wide Issue no. 17 from the Snake River Basin Adjudication. That issue focused on whether Idaho law requires a remark authorizing storage rights to refill, under priority, space vacated for flood control.



Director Spackman noted that federal on-stream reservoirs are required, under federal law, to be operated for flood control purposes. He added that the state does not determine the timing of federal flood control releases or the timing of physical fill in the reservoir after a flood control release except as it may affect other water rights.

Director Spackman went on to tell the Committee that space is vacated for flood control in on-stream reservoirs when there is a lot of snow in the mountains. Reservoir content is usually high at the beginning of the storage season.

He added that the Bureau of Reclamation holds water rights to store and deliver water for irrigation as required by federal law. Irrigation companies and irrigation districts contract with the bureau for storage water in the reservoirs to be beneficially used for irrigation. He stated that the bureau must attempt to store enough water to deliver to the contract spaceholders their storage allocations and also to empty the reservoirs to make room for the predicted runoff resulting from high snowpack or significant precipitation.

Director Spackman told the members that contracts of spaceholders who are entitled to stored water in reservoirs operated for flood control can have their storage allotments reduced during years of release for flood control and that this is an inherent risk the spaceholders assume in relying on storage water from an on-stream reservoir. The empty space, he said, may not refill due to the timing of the release.

The Director noted that section 42-602, Idaho Code, as noted in the case cited above, gives the Director broad powers to direct and control distribution of water from all natural water sources within water districts. The statute gives the Director a clear legal duty to distribute water but the details of the performance of the duty are left to the Director's discretion.

He went on to say that due to the court's decision, the Director reactivated administrative contested cases to determine when a water right to store and use water for irrigation is satisfied. The Director anticipates gathering evidence and deciding the issue basin by basin.

The Committee has no specific recommendations at this time.

## ***Speakers***

The following is a list of people, groups or agencies that testified or provided comments during the Committee meeting:

Mr. John Revier, Office of Congressman Mike Simpson

Mr. Brad Griff, Office of Congressman Raul Labrador

Chairman Roger Chase, Idaho Water Resource Board

Director Gary Spackman, Idaho Department of Water Resources

Mr. Brian Patton, Chief of Planning Division, Idaho Department of Water Resources

Mr. David Tuthill, Idaho Water Engineering, LLC

Mr. Clive Strong, Division Chief, Natural Resources Division, Office of the Attorney General

Mr. Norm Semanko, Executive Director, Idaho Water Users Association

Ms. Sharon Kiefer, Deputy Director, Idaho Fish and Game

Mr. Tim Luke, Water Compliance Bureau Chief, Idaho Department of Water Resources

Mr. Michael McIntyre, Surface Water Program Manager, Department of Environmental Quality

Mr. James Wertz, Director, EPA-Idaho Operations

Mr. Ron Abramovich, Water Supply Specialist, USDA NRS Snow Survey (Boise, Idaho)

Mr. Donald Smith

Mr. Brent Olmstead, MPIIdaho, Inc.

Director Virgil Moore, Idaho Fish and Game

Judge Eric Wildman, Fifth Judicial District

Mr. Chris Iverson, Deputy Regional Forester, Intermountain Region, U.S. Forest Service