

MINUTES
Approved by the Committee
Committee on Federalism
Tuesday, May 09, 2023
9:00 A.M.
Room EW42
Boise, Idaho

Members in attendance (* via remote): Cochairs Senator Burtenshaw and Representative Boyle; Senators Lakey*, Harris*, Carlson*, and Just; Representatives Horman, Dixon (1), Monks, and Mathias; LSO staff Kristin Ford, Katharine Gerrity, and Jennifer Kish.

Other attendees: Jonathan Oppenheimer - Idaho Conservation League.

NOTE: Presentations and handouts provided by the presenters/speakers are posted to the Idaho Legislature's website <https://legislature.idaho.gov/sessioninfo/2023/interim> and copies of those items are on file at the Legislative Services Office in the State Capitol. Recordings of the meeting may be available under the committee's listing on the website

WELCOME AND INTRODUCTIONS

Cochair Boyle called the meeting to order at 9:04 a.m.; a silent roll call was taken. Cochair Boyle invited committee members to introduce themselves.

OVERVIEW OF BUREAU OF LAND MANAGEMENT PROPOSED RULE - FEDERAL REGISTER / VOL. 88, NO. 63, PGS. 19583-19604

Cochair Boyle called Dirk Mendive, Regional Director for Congressman Fulcher, to the podium for his overview of a proposed federal rule from the Bureau of Land Management (BLM). Proposed rule [Federal Register / April 3, 2023 / Vol. 88 / No. 63 / Page 19583](#) "Conservation and Landscape Health" would, "pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, and other relevant authorities, ... advance the BLM's mission to manage the public lands for multiple use and sustained yield by prioritizing the health and resilience of ecosystems across those lands." He explained that the rule's intention is to elevate conservation to the same level of use as livestock grazing, timber harvesting, mineral extraction, recreation, and energy development. The proposed rule focuses on four main areas: conservation leases, areas of critical environmental concerns (ACECs), land health standards, and tribal consultation/indigenous knowledge. Federal lands are governed by standards of FLPMA, which mainly focus on multiple use and sustained yield. The BLM contends that land is often degraded and fragmented and the agency cannot provide for its health and resilience; therefore, conservation may be the best use to improve the health of the land. He expressed Congressman Fulcher's concerns about the rule circumventing the authority of Congress through FLPMA to regulate the use of federal lands, the elevation of conservation over multiple use, the lack of details about the application process or the expiration of the designation, the possibility of land-locking designated areas, a lack of public input on the proposed rule before publication, and the proposed rule as a method to achieve the 30 x 30 goal of President Biden's Executive Order. Mr. Mendive conveyed the congressman's desire for the proposed rule to be withdrawn. Mr. Mendive noted that the public comment period was open until June 20, 2023, and he encouraged committee members and the other stakeholders to express concerns through that process. He noted that the BLM currently had meetings scheduled for public comment in Denver, Albuquerque, and Reno, and two virtual meetings.

- Cochair Burtenshaw inquired about a direct link to the BLM website's public comment for this rule. Mr. Mendive noted that there was a direct link within the rule as published in the federal bulletin and that written letters could be submitted also.

- Sen. Harris asked whether the Republican-controlled U.S. House of Representatives could prevent the proposed rule from being enacted. Mr. Mendive explained that the House could review the rule's authority under the Congressional Review Act but only *after* the rule was enacted.
- Sen. Lakey inquired whether states could pursue legal action against the proposed rule or whether any other type of action could be recommended. Mr. Mendive encouraged members and stakeholders to express any concerns through the public comment methods available.
- Rep. Mathias asked whether Congressman Fulcher agreed with the purpose statement of the proposed rule regarding the degradation and fragmentation of lands, and if so, what Congressman Fulcher proposed in order to combat those issues. Mr. Mendive stated that Congressman Fulcher disagreed with the manner in which the BLM was circumnavigating Congress to address the issue.

PANEL DISCUSSION

At 9:54 a.m., the agenda turned to the panel discussion portion of the meeting. Members representing the multiple use areas presented their stance on the proposed rule.

Russ Hendricks - Legislative Director, Idaho Farm Bureau: expressed concern that the proposed rule would limit grazing opportunities for its members; noted that the bureau does not see conservation itself as a use but rather as a method to manage other activities; echoed the concerns that the rule bypassed Congressional authority; feared additional backlog with permits that already hampers members.

Lori Lusty - Sr. Environmental Engineering Manager, Simplot Corporation: expressed concern that lands would no longer be open to multiple uses such as mineral extraction if designated as conservation areas or an ACEC; concerned that compensatory mitigation may become a factor for land use ([handout](#)).

Sandra Mitchell - Executive Director, Idaho Recreation Council: concerned that any conservation designation would severely affect recreational use and would hamper many rural communities who benefit from recreation-derived money.

Brian Patton - Executive Officer, Idaho Water Resource Board: concerned that access to BLM land for aquifer recharge efforts may be hampered.

Jerry Hoaglund - Owyhee County Commissioner: concerned about impact on county roads and their maintenance, as well as funding for the roads; concerned about additional permitting requirements as a county.

- Sen. Just recalled when a stream's minimum flow was elevated to equal status of other water uses and inquired how well that process has worked. Mr. Patton explained that, in general, only the Idaho Water Resource Board could hold a minimum stream flow water right. Due to the time the rule was enacted, the board's rights are often the more junior right to other rights and, in general, the system was working well.

Following the panel discussion the committee took a short break.

IDAHO CRITICAL MINERALS, NATIONAL SECURITY, AND ENERGY/TECHNOLOGY TRANSITION

At 10:40 a.m., Claudio Berti, Director and State Geologist for the Idaho Geological Survey, began his presentation on [Critical Minerals, National Security, and Energy/Technology Transition](#).

- Rep. Dixon asked whether the demand for critical minerals was driven by renewable energy or basic electronic technology. Mr. Berti responded that it was driven by both. Rep. Dixon inquired whether test drilling had occurred in his district and whether the results were successful. Mr. Berti did not know that information but would look into it.
- Cochair Boyle inquired about efforts by the Idaho Geological Survey in regard to water. Mr. Berti explained that his office works in collaboration with agencies to provide data for water models and aquifers, providing geological data about how the ground will/will not retain water due to its composition. Recently, his office has been able to collaborate with oil and gas companies regarding exploration in the Weiser Basin.

- Rep. Horman commented on the paradox that the United States relies heavily on other countries, some with horrible social injustices, yet Idaho has such a vast resource of minerals that have not been tapped. Mr. Berti commented that minerals within the United State were able to be extracted safely and conscientiously.
- Sen. Lakey asked whether geological mapping of rare earth elements has been done nationally. Mr. Berti reported that it has; it is a federal effort driven by the states to understand what resources exist within the United States and the best methods to extract them. He noted that other countries (Canada and Australia) are doing the same. Sen. Lakey asked whether the length of time it typically took to get a new mine up-and-running was improving. Mr. Berti commented that he could not speak on it from the mining perspective but noted a timely process is needed to proceed correctly with studies and permits. He noted that a shortage of skilled engineers and laborers exists and added that very few schools were still in operation that train specifically for mining.
- Sen. Lakey inquired whether it was economically viable to recycle EV batteries to reclaim materials. Mr. Berti explained that, while it was technologically possible, it was currently not economically feasible.

ENVIRONMENTAL, SOCIAL, AND GOVERNMENTAL (ESG) UPDATE

At 11:40 a.m., Julie Ellsworth, Idaho State Treasurer, updated the committee on current topics. Ms. Ellsworth provided [letters](#) submitted by her office or signed onto with other state treasurers expressing concern about topics such as ESG requirements negatively influencing the economy and economic freedom, the de-banking of certain industries, and the recent Federal Housing Finance Agency policy charging higher fees on those with good credit to cover those with poor credit. She commented on session legislation that provided policy for unbiased investment and prevented credit card companies from enacting ESG coding on purchases.

At 11:50 a.m., the committee recessed for lunch.

EXPLORATION/PRODUCTION OF IDAHO CRITICAL MINERALS AND REGULATORY CHALLENGES

At 1:10 p.m., Ben Davenport, Executive Director for the Idaho Mining Association, provided his presentation on [Idaho Mining](#).

- Cochair Burtenshaw expressed frustration regarding the permitting process for a new mine as experienced by a colleague. Mr. Davenport responded that the hurdles experienced by his colleague were not unique -- the permitting process was lengthy and sometimes expensive. He hoped that supply chain issues experienced during the COVID pandemic would enlighten others about the need to extract minerals within our own country. He desired better communication and collaboration between agencies to correct inefficiencies in the process. He echoed Mr. Berti's recognition of the lack of skilled mining laborers and engineers due to the lack of trade training schools. Cochair Burtenshaw asked whether placing the permitting process under the purview of the state, rather than at the federal level, would be more efficient. Mr. Davenport responded that he would be in favor of such a proposal.
- Rep. Monks inquired about the percentage of mines operating on public land as compared to private land. Mr. Davenport did not know that data and noted that mining had to be operated where the minerals were located, which didn't always fall on private land.
- Cochair Boyle asked which state agencies were involved in the permitting process. Mr. Davenport listed the Idaho Department of Lands (land leases, reclamation, financial assurance packages, abandoned mine fund), the Idaho Department of Environmental Quality (air, solid waste, water), and the Idaho Department of Water Resources (dams, mine tailings), as being the regulatory agencies on mining. He reported that the Idaho Mining Association also worked with the governor's Office of Energy and Mineral Resources, as well as the Idaho Department of Parks and Recreation, the Idaho Department of Fish and Game, and the Office of Species Conservation.

- Sen. Just asked how the permit process could be improved. Mr. Davenport noted that all areas could be improved but specifically identified: time lines for approval, the amount of data required to be collected could be limited, and the fear of litigation being brought should not cause delay.

U.S. DEPARTMENT OF EDUCATION TITLE IX PROPOSED RULE OVERVIEW AND POSSIBLE CONFLICTS

At 1:42 p.m., Megan Wold, attorney with Cooper & Kirk, provided an overview of a proposed rule by the Office of Civil Rights under the U.S. Department of Education that would set "...a standard that would govern a recipient's adoption or application of sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity. The proposed regulation would clarify Title IX's application to such sex-related criteria and the obligation of schools and other recipients of Federal financial assistance from the Department... that adopt or apply such criteria to do so consistent with Title IX's nondiscrimination mandate."

Ms. Wold explained how the *Bostock v. Clayton County* ruling that discrimination "because of sex" as outlined in Title VII of the Civil Rights Act of 1964, which protects employees against discrimination because they are gay or transgender, was intended to include gender identity and sexual orientation. As such, the proposed rule would apply to Title IX (section 106.41(b)), which would prevent blanket bans on transgender participation in sports. She summarized the Idaho Fairness in Women's Sports Act ([Chapter 62, Title 33, Idaho Code](#)) that ensures opportunities continue for girls and women competing in athletics by not allowing boys and men to participate on girls or women's teams because of their inherent differences (physiological, chromosomal, and hormonal). This act is currently the subject of an injunction. Additionally, she summarized Idaho's SB1100 (2023), which requires schools to maintain separate restroom and changing facilities for one biological gender, unless it is a one-person facility.

Ms. Wold proffered that Idaho's option was to consider not accepting federal monies in order to avoid the rule.

- Cochair Boyle inquired about the amount of monies accepted from the federal government for education purposes. Rep. Horman reported the amount to be approximately \$250 million for K-12; for higher education, the numbers would be more difficult to track (Pell grants, appropriated/nonappropriated, etc.). She noted that more information could be obtained from the LSO Budget and Policy Division.
- Rep. Dixon asked Ms. Wold to discuss the *Pruitt v. Oklahoma [Burwell]* verdict. Ms. Wold explained that in certain instances federal funds came with certain strings attached and it was acceptable to attach conditions to funding but it had to be an option to *all* states to accept or deny funds and it could not be coercive.
- Rep. Horman expressed concern about the lack of defined terms in the proposed rule. She inquired how the committee should proceed in expressing its concerns. Ms. Wold suggested that the committee respond through the public comment process. She proposed that the committee express its concern on the effect on women's sports and the lack of defined terms.
- Rep. Dixon asked about the limits of agencies creating rules for states to abide by. Ms. Wold expressed concern that enumerated powers were being trampled.

COMMITTEE DISCUSSION AND ADJOURNMENT

- Sen. Just requested an update on the status of the public land study completed for the committee the previous interim. Cochair Boyle plans to have that as an item on a future agenda.
- Rep. Horman solicited committee feedback about submitting a letter as part of the public comment process on both the BLM and the U.S. Department of Education proposed rules. Rep. Monks, Rep. Dixon, and Sen. Carlson expressed support of such an idea. Sen. Lakey was in support and inquired whether a discussion about joining other states to threaten legal action should occur. Cochair Burtenshaw expressed the need for expediency to respond on both due to the time period for accepting public comment. **Rep. Horman moved that the committee prepare**

public comments for submission in response to the U.S. Department of Education, Office of Civil Rights, Title IX proposed rule and the BLM proposed rule as published in the Federal Register, Vol. 88, No. 63, Pgs. 19583-19604; Cochair Burtenshaw seconded the motion; motion passed by unanimous voice vote.

With no further business, the meeting was adjourned at 2:30 p.m.