



STATE BOARD OF LAND COMMISSIONERS

Dirk Kempthorne, Governor and President of the Board

Ben Ysursa, Secretary of State

Lawrence G. Wasden, Attorney General

Keith L. Johnson, State Controller

Marilyn Howard, Superintendent of Public Instruction

Winston A Wiggins, Secretary to the Board

Final Minutes  
Special Land Board Meeting  
August 17, 2005

A special meeting of the Idaho State Board of Land Commissioners was held on Wednesday, August 17, 2005 in Boise, Idaho. The meeting began at 2:33 p.m. in the second floor conference room of the Idaho Department of Lands. The Honorable Dirk Kempthorne presided via conference phone. The following members were present or participated via conference phone:

Honorable Secretary of State Ben Ysursa (present)  
Honorable Attorney General Lawrence G. Wasden (conference phone)  
Honorable State Controller Keith L. Johnson (present)  
Honorable Superintendent of Public Instruction Marilyn Howard (present)

Secretary to the Board Winston A Wiggins

• **REGULAR AGENDA**

**1. Notice of Rulemaking – Proposed Rule Amending IDAPA 20.03.02, Rules Governing Exploration and Surface Mining in Idaho – Presented by Director Winston Wiggins – approved**

*DEPARTMENT RECOMMENDATION:* Direct the Department to submit the proposed rules and notice of rulemaking to OAR by August 24, 2005 to commence the formal rulemaking process.

*DISCUSSION:* Director Wiggins stated the purpose of the special meeting is to allow the Department to propose that the rules enter the rulemaking process, which means they will be advertised and that there will be an opportunity for public comment. The Department will review all comments and will bring the information back to the Board at the November meeting following publication. This special meeting is being held to allow the Department to submit the rules to the Office of Administrative Rules by the August 24 publication deadline.

Assistant Director Denise Mills provided background information. She directed the Board's attention to the discussion of material change and a wording change in the proposed rule. The proposed rule now states "increases overall estimated permanent closure costs by more than fifteen percent," which is the same language that pertains to reclamation plans, and it is the definition of material change proposed by the Idaho Mining Association. Agreement was reached to use that language.

Assistant Director Mills next directed the Board's attention to Section 071.02(k), which pertains to application procedures and requirements for permanent closure of cyanidation facilities. This section describes the requirements for permanent closure cost estimates for an operator to provide to the Department in its application and provides a basis for the Board to establish a bond amount for permanent closure of cyanidation facilities. One of

the concerns previously expressed was a discussion about administrative costs for the Department to implement permanent closure plans submitted by an operator in the event of a bond forfeiture. This revision reflects more specifically the costs that could be incurred by the Board if the Board is required to complete closure. It describes that the Department will require a permanent closure cost estimate provided by an operator to include all costs pertaining to mobilization, labor, materials, equipment, engineering and demobilization costs. Other incidental costs may be included, but these are the major categories identified as standard costs the Department would experience in an engineering project such as this. The Department has also agreed to the language and amount acceptable to the Department, but not to exceed ten percent of the total estimated closure costs, which is intended to cover the Department costs incurred in association with contract administration. The Department does require these costs for large reclamation bonds.

Next, Assistant Director Mills directed the Board's attention to Section 121.01, submittal of a bond before operating a cyanidation facility. Assistant Director Mills pointed out a number of strikeouts and explained the Department has revised the language in this rule to the language proposed to move forward. The language addresses the statutory requirement to add ten percent on top of the permanent closure cost estimate provided by an operator and states that a requirement for permanent closure bond for closure of cyanidation facilities will be one hundred and ten percent of the cost estimate. She noted with the provisions provided in Section 071.02(k), plus the ten percent additional requirement in Section 121, the intent of the statute has been met.

Assistant Director Mills noted that agreement has been reached on a number of language changes and that an overall general agreement has been reached to allow these rules to go forward for public comment.

Governor Kempthorne noted that general agreement by the participating parties is desirable. The Board felt this consensus could be achieved by providing an opportunity to meet with the involved parties. In addition to Department of Lands staff and the Idaho Mining Association, additional input was received from the Idaho Conservation League, the City of Boise, the Idaho Department of Environmental Quality and Atlanta Gold.

Controller Johnson asked for clarification of how the process works. The rule approved in July was a temporary rule that expired at the conclusion of the Legislature. If the Board approves the recommendation of the Department, a proposed rule will be submitted for public comment. After public comment, a final decision by the Board will be in order to then go before the Legislature. Upon sine die of the Legislature, the proposed rule becomes a permanent rule. Attorney General Wasden stated that is his basic understanding of the process.

Governor Kempthorne stated a couple of additional questions were previously asked. One question pertains to when a cyanidation operation is located on State endowment trust land and closes, is the endowment liable for closure costs in excess of the statutorily mandated performance bond. Another question is if a cyanidation operation located on private land closes, is the State liable for closure costs in excess of the statutorily mandated performance bond. He asked the Deputy Attorney General Clive Strong respond to these two questions.

Deputy Attorney General Strong stated with regard to the issue of State endowment lands, the resolution does not turn upon this statute or the regulations. Instead it turns on the State's ownership of the lands. An example would be the Triumph Mine situation, whereas an owner of the site, even though the State contracted with someone else to conduct

mining operations, the State ended up with the potential liability. So the State's liability on endowment lands rests based upon ownership, not the statutory change.

Deputy Attorney General Strong noted that to the extent the State has some risk of liability, one way to address that risk would be simply through the lease provisions with any operator on State lands. Although the statute sets minimum requirements for the conduct of operations pursuant to the Mining Act, nothing precludes the Land Board, in its proprietary function, from requiring additional assurance if that were determined as necessary.

With regard to private lands, the issue is different. It turns on the statutory language, specifically Idaho Code Section 47-1501(6). In the preface language, the statute sets out the Board's duties and powers. In addition to the other duties and powers of the Board prescribed by law, the Board is granted, and is entitled to exercise, the listed authority and powers and to perform the listed duties. In subsection six, which was added for the cyanidation legislation, it reads "to complete closure activities with respect to a cyanidation facility for which a permanent closure bond has been forfeited." The first part of the language about the grant of authority and the entitlement to exercise powers would suggest that it is a discretionary function of the Board as to whether it would choose to go in and do any following cleanup on the bond forfeiture. The ambiguity comes in the language where it says "and perform the following duties." If the Court were to focus on "perform the following duties," it could be interpreted as a mandatory duty. Deputy Attorney General Strong suggested statutory language to clarify that issue. But he stressed it is a statutory issue and has nothing to do with the rules. He does not believe it has any implications as far as proceeding. The intent, based upon the review of the legislation and the discussion with the parties, was that this was to be a discretionary duty, as indicated by the legislative history. It is not contemplated that there is any difference of opinion amongst the parties as to how this duty, or this action, was to be performed. It is a matter of making sure that the State does not leave itself open to a Court to construe an ambiguity. The bottom line is these rules, in and of themselves, do not have any implication with regard to the risk that the State may have in terms of any bond forfeiture.

Superintendent Howard thanked Deputy Attorney General Strong for researching that question. She commented one of the things we are always concerned with is we really want to anticipate the affect of our actions. While it may not be pertinent right now, it raises an issue that may need to be addressed going forward.

Governor Kempthorne stated another question raised, simply because of the change in statute, concerns the fact that responsibilities previously held by the Department of Environmental Quality are now divided so that the Department of Lands has responsibilities as well. He asked if that in any way causes endowment funds to be utilized, as opposed to general funds, to carry out the new responsibilities. Deputy Attorney General Strong stated the answer is no. The responsibility of the endowment would rest on its ownership, not on the Board's fulfillment of these duties. The capacity in which the Board is acting would be considered. When the Board is overseeing this particular statute, it is acting in a regulatory capacity. In that instance, the Tort Claims Act would be the governing provision that would deal with the liability. On the other hand, when dealing with the siting of an operation on State endowment lands, which is a Trust responsibility, the Trust could be exposed. But it would be because of ownership, not because of regulatory activity.

Attorney General Wasden expressed his pleasure that consensus has been reached on these rules. He commented there is one issue that needs careful attention in any future rulemaking and that is the definition of material change. He expressed concern that there may be unintended consequences. For example, the fifteen percent definition may be an

