



STATE BOARD OF LAND COMMISSIONERS

C. L. "Butch" Otter, Governor and President of the Board  
 Ben Ysursa, Secretary of State  
 Lawrence G. Wasden, Attorney General  
 Donna M. Jones, State Controller  
 Tom Luna, Superintendent of Public Instruction

George B. Bacon, Secretary to the Board

Final Minutes  
 Regular Land Board Meeting  
 May 19, 2009

The regular meeting of the Idaho State Board of Land Commissioners was held on Tuesday, May 19, 2009, in Boise, Idaho. The meeting began at 10:15 a.m. in the second floor courtroom of the Borah Building. The Honorable Governor C. L. "Butch" Otter presided. The following members were present:

- Honorable Secretary of State Ben Ysursa
- Honorable Attorney General Lawrence Wasden – *via conference phone*
- Honorable State Controller Donna Jones
- Honorable Superintendent of Public Instruction Tom Luna – *via conference phone*

For the record, Governor Otter recognized the presence of a quorum.

• **CONSENT**

**A motion was made by Secretary of State Ysursa to adopt the Consent Agenda in its entirety. Controller Jones seconded the motion. The motion carried on a vote of 5-0.**

**1. Director's Report – approved**

- A. Interest Rate on Department Transactions – May 2009
- B. Timber Sale Activity Report
- C. Timber Sale Official Transactions – April 2009
- D. Legal Matter Summary
- E. Bureau of Surface and Mineral Resources Official Transactions – April 2009
- F. Fire Settlement Information

*DISCUSSION:* Director Bacon referred to item B, Timber Sale Activity Report, and specifically the state timber sales auction results. Bidding is continuing on most of the sales although prices are down.

**2. Timber Sales – Staffed by Roger Jansson, Operations Chief-North, and Kurt Houston, Operations Chief-South – approved**

<u>NORTH OPERATIONS</u>				<u>COUNTY</u>	<u>AREA OFFICE</u>
A. Fenton Creek OSR	CR-10-0380	1075	MBF	Bonner	Priest Lake (Coolin)
B. Rock North Face	CR-10-0381	3900	MBF	Bonner	Priest Lake (Coolin)
C. MNF Big Creek III	CR-20-0279	1200	MBF	Bonner	Pend Oreille (Sandpoint)
D. Blossom OSR	CR-22-5019	1255	MBF	Kootenai	Mica (Coeur d'Alene)
E. Stony 40's Sawlog	CR-30-0556	2315	MBF	Clearwater	St. Joe (St. Maries)

F. Renfro OSR	CR-30-0565	4535	MBF	Shoshone	St. Joe (St. Maries)
G. Dago Pulp	CR-30-0567	2285	MBF	Benewah	St. Joe (St. Maries)

SOUTH OPERATIONS

H. Reservoir Breaks OSR	CR-40-0982	1315	MBF	Clearwater	Clearwater (Orofino)
I. Good Johnson Complex	CR-50-0149	4455	MBF	Washington	Payette Lakes (McCall)
J. Dry Buck Valley	CR-60-0173	5075	MBF	Boise	Southwest (Boise)
K. Kelly North	CR-80-0105	4935	MBF	Madison	Eastern (Idaho Falls)

**3. Easement Request by Lower Valley Energy for Construction of a 115 kV Double Circuit Transmission Line Across Public School Endowment Land – Staffed by Kurt Houston, Operations Chief-South – approved**

*DEPARTMENT RECOMMENDATION:* Direct the Department to complete the final power line easement with the LVE.

*DISCUSSION:* None.

*BOARD ACTION:* Approved.

• **REGULAR**

**4. Joint Meeting with the Endowment Fund Investment Board – Presented by Dean Buffington, Chairman, EFIB, and Larry Johnson, Manager of Investments, EFIB**

A. Monthly Report

- Earnings Reserves are adequate. Each endowment fund has at least two and a half times the 2010 distribution in reserve;
- No meetings of the EFIB board were held in the last month;
- There were no legal issues or areas of concern;
- Three EFIB members' terms expired in 2009: Richelle Sugiyama, Sue Simmons, Tom Kealy. All three members were reappointed. The EFIB currently has a full complement of board members.

B. Investment Report

- The fund gained over 7% in April;
- Fiscal year-to-date through April, the fund has lost about 22%;
- The fund is about even with its benchmark;
- All managers are performing as expected.

C. Distribution Policy

- The EFIB is developing Fiscal Year 2011 distributions and will make a final recommendation to the Land Board at its August meeting;
- The EFIB will meet today to review the Distribution Policy in the Land Board's Asset Management Plan to determine whether to recommend any changes to that policy for consideration by the Land Board at its June meeting. The EFIB welcomes feedback from the Land Board.

D. Semi-Annual Report

- For the first nine months of FY 2009, the total endowment fund balance is down 27% due to a -27.3% return over that period. Receipts from endowment lands declined 15% compared to the same period of FY 2008.

*DISCUSSION:* Secretary of State Ysursa commented the Board is cognizant of the fact that 85% of the fund's net income is derived from timber and timber prices are down. Based on the current economic situation, he asked if the earnings reserve balance will smooth out the distribution for the next few years. Mr. Johnson stated yes; however, a caveat is that the EFIB is expecting a new forecast from the Department of Lands on land revenues and that forecast may change the projection. The EFIB will report its findings to the Land Board in August.

No action was taken on this agenda item.

**5. State Board of Land Commissioners' Grazing Lease Subcommittee Recommendations**  
– Presented by Bob Brammer, Assistant Director, Lands, Minerals, Range

*A transcript will be available upon request.*

*BOARD ACTION:* A motion was made by Controller Jones that the Board of Land Commissioners approve the Grazing Subcommittee's recommendations to modify the lease application process for leases subject to Idaho Code 58-307(1) and 58-310 as set forth in the lease application conflict auction process summary dated May 19, 2009, and then to direct the Department of Lands to develop the appropriate rules to implement the recommendations and bring those rules back to the Board at the next meeting. Secretary of State Ysursa seconded the motion. The motion carried on a vote of 5-0.

**6. Disclaimer of Interest for the Former Bed of the Snake River, Twin Falls County** –  
Presented by Kurt Houston, Operations Chief-South

*DEPARTMENT RECOMMENDATION:* Direct the Department to issue a disclaimer of interest for one parcel totaling 2.26 acres of former riverbed of the Snake River and to require D & J Miller, LLC to pay the remaining processing fee of \$300 to the Department of Lands for this transaction.

*DISCUSSION:* Secretary of State Ysursa noted one question that keeps coming up is the relevance of USGS flow gauges and how that information would be factored into the determination of the ordinary high water mark. Mr. Houston referred to the letter received from Director Tuthill, Department of Water Resources, indicating that given the nature of the data, and the statutory definition, that computational process is not appropriate in this case.

Attorney General Wasden stated the determination of the ordinary high water mark is the ordinary high water mark as it existed at statehood, as opposed to wherever the water is currently. In fact, that is a critical factor in determining whether lands have accreted or changed. Mr. Houston stated that is a beginning point; however, rivers move over time. Current conditions on the ground, as outlined in Idaho Code and case law, are used to make ownership determinations. For clarification, Attorney General Wasden added if there are accreted lands, then that is the issue over which a disclaimer may be taken. The river may move leaving subsided lands underneath the changed river, and the dispute is in regard to those lands vacated by the river. Mr. Houston stated that is correct.

## Audiences with the Board

**Dale Turnipseed** – Mr. Turnipseed stated he was a regional wildlife habitat manager for the Idaho Department of Fish and Game and was responsible for acquiring four miles of riparian habitat adjacent to, and across the river from, the Miller site. Mr. Turnipseed stated the Snake River riparian areas have high wildlife values. During ordinary frequent high water flows, the flooded riparian wetlands provide optimum wildlife habitat. The area has been altered, and one of the biggest alterations has been phragmites, which is an invasive weed used to armor dikes to prevent erosion. This particular site is a phragmites willow site that can be flooded up to two months at a time and still remain, which precludes using it to establish a water mark. The site also has a rock showing a lichen cap. The side

of the rock does not have lichens because it has been scoured by ordinary high water marks. There is a high water line on the top of the rock, and he suggested it should be considered in establishing the ordinary high water mark. In closing, Mr. Turnipseed stated these lands are trust lands that should be managed and retained for the citizens of Idaho.

**David Erickson** – Mr. Erickson stated he is a retired fisheries biologist. While serving two terms on the Idaho Water Resource Board, he became familiar with stream and lake issues, especially as related to the interface between public and private values. He has lived in this area for more than forty years and knows this section of the river well.

Mr. Erickson requested that the Land Board table the Miller disclaimer until such time that a professional third party survey of the ordinary high water mark can be conducted. He noted that the Department of Lands made their determination of the ordinary high water mark in December 2006. After seven years of drought, he feels this point in time does not define an ordinary occasion in which to define an ordinary high water mark. To the contrary, he stated by correlation of decades of flow data from the gauging station one mile downstream, and by testimony of local citizens and resource professionals, this land is often under water during years of normal precipitation.

Mr. Erickson referred to photos taken three weeks ago showing features of the river during an interlude from drought.

Photos referenced:

- (1) Mr. Phil Smith standing at the Department of Lands' stake, which defines their judgment of the ordinary high water mark. The stake is two feet under water.
- (2) More than two acres of land under water in April 2009. The high bank, which defines the confines of the Snake River, is against a lava outcrop.
- (3) Historical channel created by the morphology of this section of the river.
- (4) Another picture showing the same thing against the high bank. The water is all the way back. Flooded timbers that Fish and Game use for water fowl surveys is under water during winter months.
- (5) Point of land in contention shown; water can be seen in the timber.
- (6) Tag established by Corps of Engineers to define wetlands demarcation. The tag was five to six inches under water.

Mr. Erickson stated whether the tag is under water or during drought periods, the disclaimer acreage in question contravenes IDL's criteria that disclaimed lands must be fit for traditional agriculture. Clearly the land is not fit for agriculture now nor has it been in the past. Mr. Erickson stated this disclaimer is founded on a faulty ordinary high water mark proposed by a private party in pursuit of public resources. IDL accepted this determination without detailed analysis, and therefore the disclaimer should be denied until a dependable and scientific ordinary high water mark can be established. Mr. Erickson stated the crux of the matter comes back to the original determination made December 2006.

**Phillip Smith, Jr.** – Mr. Smith became aware of what was going on in this area on August 27, 2006, when he observed trees being leveled and stacked, which he considered to be habitat destruction of the bed of the river. The Idaho Department of Water Resources stopped the activity late that afternoon. Mr. Smith then asked the Department of Lands to visit the site, and Mr. Tim Duffner became involved. Mr. Duffner, with the land owner, made a high water mark determination on December 14, 2006. Based on comments from the surveyor, Mr. Smith questioned whether the river was even considered.

Mr. Smith stated it has been almost three years since that time and many meetings, conversations, phone calls and emails have occurred. Although dialogues have been cordial, he does not feel his questions have been answered. He and Mr. Erickson met with Mr. Duffner and Deputy Attorney General Kahle Becker to ask how the high water mark determination was made, and they felt Mr. Duffner's response was vague and did not answer the question. Mr. Smith does not agree with

the level that the Idaho Department of Lands has marked on the bank. He stated everyone who has visited the site believes this property is the bed of the river. While he understands the Heckman Cattle Company case regarding the impingement of soil, etc., he contends the land cannot be used for agriculture.

Mr. Smith agrees with the Department of Lands and the Department of Water Resources on the lichen level on the rock. He also supports the letter from Director Tuthill, Department of Water Resources. He asked the Board to either table or deny the Miller disclaimer request pending further evaluation and a survey by a licensed surveyor.

**Kevin Lewis, Idaho Rivers United** – Mr. Lewis stated Idaho Rivers United requests that the Board deny the disclaimer of interest and direct the Department of Lands to develop policies to better protect the public trust interests of Idaho and provide a public process to allow full participation of Idaho's citizens in any and all future disclaimer discussions and/or actions.

Mr. Lewis stated the real problem is trying to figure out where the high water mark was at statehood and then how to work to present day from that point. While he acknowledges this is a tough decision, he believes the Department tends to rely too much on Heckman and Supreme Court decisions. He feels this is a case where historic photos and historic gauge records should be use to synthesize where the ordinary high water mark may have been based on flow. He believes the existing delineation is too low.

*DISCUSSION:* Governor Otter asked about the Department's use of flow gauge data. Director Bacon stated it was one of the factors used. He noted that the Idaho Legislature has stepped in over the years and has defined in Idaho Code how to determine the ordinary high water mark. He asked Mr. Duffner to come forward to answer questions.

Mr. Houston stated the Department did not use flow data to determine the ordinary high water mark. The decision was based purely on physical evidence on the ground.

Mr. Smith (from the audience) stated the flow gauge is about one mile downstream and has been in that position since 1946.

Governor Otter asked if there is a flow gauge upstream as well. Mr. Houston stated yes.

**Dan Miller, Disclaimer Applicant** – Mr. Miller purchased the land about three years ago. Before he entered into the negotiation he discussed this issue with the former landowner, Laura Powers. Ms. Powers stated the land had been used as a cow pasture in the past. She also stated over the last 30-40 years the land had flooded maybe four times. Although he never validated Ms. Powers' statements, he feels she has indicated a different impression than what has been presented today. During the time he has owned the property, it has flooded twice in the last three years. He does not believe that should set the high water mark. He has worked closely with state agencies and the Corps of Engineers. The land has been identified as wetlands so basically the soil cannot be disturbed anyway. Based on that fact, Mr. Miller stated he does not understand what the issues are. The site has been surveyed, re-surveyed, checked and re-checked many times over the last year.

Secretary of State Ysursa asked Mr. Miller what the description in his deed says. Mr. Miller stated the land was surveyed when he purchased it. The surveyor established the mean high water line. Today the deed says mean high water line, which is lower than what was negotiated with the Department of Lands. Mr. Miller stated right now the deed says it is his land.

Governor Otter asked Mr. Miller if he owns the upland. Mr. Miller stated he has 33 acres and it is all one piece, including this land.

**Tim Duffner, Area Manager, South Central Supervisory Area, Department of Lands** – Mr. Duffner stated he has been to the site on numerous occasions since September 2006. The purpose of each visit was to either work with other agencies or the landowner in determining the high water mark or to reaffirm his conclusion on where he placed the high water mark. He stated Mr. Smith is correct that in one of his earlier emails he did say this is a difficult site. However, Mr. Duffner stated the more times he visited the site, the more comfortable he became with his decision. Over the last two and a half years, Mr. Duffner has visited the site at least once or more each month. He acknowledged that river flows in 2006 were high and the site was flooded. Most recently the site was flooded in the last month or month and a half. Each time Mr. Duffner stated he continued to study the vegetation to determine the species, whether the vegetation was wetland obligates or dry land species or whether they were marsh plants. He observed a frontage segment of bull rush and cattail that was clearly excluded to the river. He studied the bank shape and the bare ground. The escarpment and the property that is described, the area where the meander line is on an upper bench well back from the river, was placed in a re-survey in 1915 and that bank drops down to a lower bank and low flat, which does flood. Continuing across the low flat, there is another low setback with willows, reed, canary grass and wetland. However, that vegetation is not growing in the swamp trees or out to the edge of this slip.

Mr. Duffner acknowledged that the first time he was on this site it was heavily disturbed. The landowners had made a choice to clear the area for aesthetic purposes. Flood lines were quite bright at that time. While those flood lines will be back again, if the site had been visited even a year later those flood lines would be dull. Mr. Duffner also observed waterlines, lichen lines, trash lines, etc. He stated a year after his first site visit he continued to look for lichen lines on the remaining trees. The line mentioned on the rock is very bright and distinct and would also occur on the trees so he continued to look for that on the remaining trees in the lower bench. He could not find any. In fact, after two years of no water on site, lichen was growing all the way to the very base of the trees where the grass and soil are actually against the bottom of the trees so there is no indication of an ordinary high water mark on either the trees or along the base of the upper bank.

Mr. Duffner stated one of the other features to look for is man-made features. In the past Mr. Smith and his group have been concerned about possible alterations that have affected river flow. Mr. Duffner did not find any evidence of an alteration that he felt would have impacted the river. He did, however, find the remains of two fences, one at each end of the property, that apparently had been used when the property was grazed. The prior landowner had maintained the fences and the posts carried out to what Mr. Duffner considered the ordinary high water mark. Although the fences have not been maintained since approximately the 70s, the end posts still project and come to the point that Mr. Duffner considers the ordinary high water mark. The posts are covered with lichen and old stains. Clearly they have withstood a lot of water and time. If the posts had been below the ordinary high water mark, they would have been taken out at some point during the last 30-40 years; however, they still exist today.

Mr. Duffner did interview the prior landowner. She indicated the area did flood but the floods were infrequent and short. The two that she could remember were 1996 and 1997. Mr. Duffner stated he has never argued that the land does not flood. He will, however, continue to argue that the ordinary high water mark is properly placed.

Secretary of State Ysursa asked Mr. Duffner how many years he has worked for the Department. Mr. Duffner stated thirty years. Secretary of State Ysursa asked Mr. Duffner how many times he has had to set ordinary high water marks. Mr. Duffner stated he has worked with ordinary high water marks since 1987 around Payette Lakes, on the Payette River, Salmon River, Boise River, Lower Payette River and Snake River. In addition, owners would often ask the Department to identify the high water mark because they were considering a project. For the record, Secretary of State Ysursa noted this is not Mr. Duffner's first time performing this function.

Governor Otter asked about the use of structures for delineation or identification of the ordinary high water mark. He noted that maintenance of the fence posts could have ceased due to enactment of the Navigable Waters Clean Water Act in 1971 or the Wetlands Act in 1991 and not necessarily that the landowner was trying to stay out of non-riparian areas. Mr. Duffner stated that could have been a reason that maintenance ceased.

Mr. Kevin Lewis, IRU, commented that he did a quick review of Heckman. In an earlier discussion cattle grazing was mentioned. Mr. Lewis noted in Heckman the court stated whether cattle could roam on soil does not aid in the determination. The determination has to do with agricultural purposes and refers to the existence of vegetation and soil suitable for raising agricultural crops. The issue of whether cattle at one time may have grazed the property is irrelevant.

Secretary of State Ysursa asked Director Bacon who the Department's expert would be on this topic. Director Bacon stated as far as technical expertise and experience on the ground it would be Tim Duffner. As far as legal theory and knowledge, it would be Steve Schuster.

Director Bacon stated Idaho Code specifies what is needed to identify and establish a high water mark. In this case that has been done in great detail by Mr. Duffner. In addition, the Department of Water Resources has provided a second opinion validating Mr. Duffner's location.

Secretary of State Ysursa stated the Department should continue its due diligence. The Board recognizes that this is also a private property issue.

Attorney General Wasden stated he is not comfortable making a decision on this matter today. He believes the Board needs additional information to make certain the right decision is made in this instance.

*BOARD ACTION:* A motion was made by Attorney General Wasden that the Board hold this matter subject to call by any member of the Board and in no instance to be a period greater than August 2009 before the Board reconsiders this matter. Attorney General Wasden stated he would like to personally view this site. Controller Jones seconded the motion. The motion carried on a vote of 5-0.

*\* Attorney General Wasden left the meeting at 12:04 p.m.*

**7. Settlement Offer – United States of America, v. 45.43 Acres of Land Situate in Ada County, State of Idaho; State of Idaho, United States District Court Case No. 08-0463 – Presented by Steve Schuster, Deputy Attorney General**

*DEPARTMENT RECOMMENDATION:* Deputy Attorney General Schuster recommended that the Board give the Department of Lands authority to make a counter offer of \$10,000 and to negotiate a final resolution, if necessary, with the approval of the Director.

*DISCUSSION:* None.

*BOARD ACTION:* A motion was made by Secretary of State Ysursa that the Board accept Deputy Attorney General Schuster's recommendation. Controller Jones seconded the motion. The motion carried on a vote of 4-0, with Attorney General Wasden being excused for this vote.

**8. Off-Site Land Board Meetings – Cost Estimates – Presented by George Bacon, Director**

*DEPARTMENT RECOMMENDATION:* That the Board direct the Secretary to establish two regular meetings of the State Board of and Commissioners outside of Boise, with the June 2009 meeting in McCall and the October 2009 Meeting in Moscow.

*DISCUSSION:* None.

*BOARD ACTION:* A motion was made by Secretary of State Ysursa that the Board arrange to have the October 2009 meeting in Moscow at the approximate estimate of \$2100-\$2200. Controller Jones seconded the motion. The motion carried on a vote of 4-0, with Attorney General Wasden being excused for this vote.

- **INFORMATION**

No Land Board action is required on the Information Agenda.

- ❖ **Request for an Audience with the Board: Jean-Pierre Boespflug, Tamarack Resort**

Mr. Boespflug stated he was before the Board today to offer a ray of hope. The Board has undoubtedly read the news and understands that Tamarack Resort is in a very difficult situation, not only regarding the revenue from the endowment property, but also for the State of Idaho in general. The property was generating \$8 million in fiscal revenue for the State of Idaho in addition to \$250,000 for the endowment. It was providing work for around 1,000 construction and resort personnel. In fact, based on this project, the workforce in Valley County between 2003 and 2007 increased 32%. At the present time, however, the project has started layoffs.

Mr. Boespflug stated he is here today to say that the process is reversible. Tamarack Resort still has a core of employees working. Dismantlement has not occurred. He stated we are, however, in the last 45-60 days where something can be done. Mr. Boespflug stated the solution is to find a buyer with expertise and cash to be able to deal with a property like this. He has been working on this for a year, and it has been very difficult. The reason he is at this again is because he wants to see the community survive and to see that all of the money put into the project goes at least somewhere to create some kind of legacy for Idaho. What matters is that the people are not in a situation where they have something very difficult to endure as they did with the demise of logging in the area.

Mr. Boespflug stated with the bad news, there is one ray of hope. The ray of hope is that the lenders and owners are finally cooperating with a set of terms and are showing interest. The key reason is Judge Owen on the first of May ordered mediation between Credit Suisse and the owner. At the beginning of last week the six members of the Credit Suisse committee and three members of the Tamarack board were locked up in a tower in LA with a very experienced mediator. The result is terms being set that change the situation, and that is the encouraging part.

Mr. Boespflug stated work is not done. The fact that there could be an offer on the table and an agreement between the buyer, Credit Suisse and Tamarack, or a preliminary agreement, is just the beginning. The offer will be pennies on the dollar. As can be imagined, nothing else will work. After that, there will be a process of agreement with the other creditors that will either be a negotiated agreement, a short sale, or a process that may require a chapter 11. In addition, there will be a process where the buyer will want to talk with everyone. And clearly the largest stakeholder after Credit Suisse is the State of Idaho.

Mr. Boespflug advised the Land Board and the Department of Lands that he is putting them on notice that they will be contacted, and it is very important that requests for information be processed quickly. While active dialogue is taking place during the permitting time, Mr. Boespflug would like to restart a dialogue with the State of Idaho offices as well. Information requests will not come from him but from the new buyer. This is a high stakes process which is not settled right now. It is time to work hard and try to settle it in a positive direction in the next 45 days.

Secretary of State Ysursa complimented Mr. Boespflug on his vision. He stated no one could have predicted the catastrophic economic situation that happened, as well as Credit Suisse's own problems. He thanked Mr. Boespflug for addressing the Board. Governor Otter concurred with Secretary of State Ysursa's comments.

