

From: [Will Tiedemann](#)
To: [Rulemaking](#)
Cc: [Jonathan Oppenheimer](#); [Marie Kellner](#)
Subject: ZBR Rulemaking Comments, IDAPA 20.03.05 Riverbed Mineral Leasing in Idaho
Date: Friday, June 16, 2023 2:37:33 PM
Attachments: [ICL Comments RE IDAPA-20.03.05 ZBR Rulemaking.pdf](#)

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Hello,

Please see attached for ICL comments RE: ZBR Rulemaking Comments, IDAPA 20.03.05 Riverbed Mineral Leasing in Idaho.

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June 16, 2023

Attn: Marde Mensinger – Rulemaking
P.O. Box 83720
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RE: Zero Based Regulation (ZBR) Rulemaking Comments, IDAPA 20.03.05 Riverbed Mineral Leasing in Idaho

Dear Idaho Department of Lands:

I am writing on behalf of the Idaho Conservation League (ICL) to submit comments on the on-going ZBR negotiated rulemaking process for IDAPA 20.03.05 Riverbed Mineral Leasing in Idaho (the Rules). Since 1973, the Idaho Conservation League has had a long history of involvement with water quality issues. As Idaho's largest state-based conservation organization we represent over 25,000 members and supporters who have a deep personal interest in ensuring that our water quality is protected throughout the state.

We thank you for the opportunity to submit comments and ask that you please send us any response to public comments on this opportunity from the Idaho Department of Lands (IDL). Please feel free to contact us if you have any questions or require additional information.

Sincerely,

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Need for Public Notice Prior to Issuance of Exploration Locations

Pursuant to *Kootenai Env'tl. All. v. Panhandle Yacht Club*, 105 Idaho 622, 625 (1983), the Idaho Department of Lands, the public must be informed and have a meaningful opportunity to provide comment **prior** to the encumbrance or alienation of public trust resources: “public trust resources may only be alienated or impaired through open and visible actions, where the public is in fact informed of the proposed action and has substantial opportunity to respond to the proposed action before a final decision is made thereon. **Moreover, decisions made by non-elected agencies rather than by the legislature itself will be subjected to closer scrutiny than will legislative decision making.** In the present case, this standard has been complied with. Notice of the proposed permit was published in the Coeur d'Alene press, and public hearings were held before the State Department of Lands. The hearings involved oral as well as written testimony. Not only was testimony received but documentary evidence such as maps and photographs were introduced...” (**emphasis added**).

The position emphasized by IDL during negotiated rulemaking meetings is that approval of Exploration Locations is a ministerial action, and that application for lands that have not been withdrawn pursuant to Idaho Code 47-703 must be approved. Contrary to this interpretation, the Idaho Supreme Court has found that public input is necessary **prior** to any decision that alienates, impairs, or encumbers public trust resources. ICL appreciates that public comment is required in the procedures for Riverbed Mineral Leasing, however it must also be applied to Exploration Locations, which similarly encumber navigable rivers, albeit for a shorter time frame than a lease.

Need for Public Trust Doctrine Analysis for Riverbed Mineral Leases, Exploration Locations, and Casual Exploration

Because riverbed mineral leasing alienates and/or encumbers the beds of waterways held by Idaho in trust for its citizens, Idaho must conduct an analysis under the Public Trust Doctrine before issuing Exploration Locations or Riverbed Mineral Leases. ICL is concerned that the proposed rules do not satisfy the Land Board's trustee obligations, because they do not require a public versus private benefit analysis or an analysis of the cumulative effect of the individual permit on public trust resources taking into account other past, present, and reasonably foreseeable future actions.

In Idaho, the state owns the beds of all navigable bodies of water below the natural high-water mark for the use and benefit of the public.¹ The state holds these lands in trust for the public, but it may grant permits for the use of trust resources². Alienations or encumbrances of the beds of navigable waters, however, must be consistent with the state's public trust obligations, which require the state to preserve public interests, including property values, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality³.

¹ *Kootenai Env'tl. All.*, 105 Idaho 622, 625 (1983).

² *Idaho Forest Indus. v. Hayden Lake Watershed Improvement Dist.*, 733 P.2d 733, 739 (Idaho 1987).

³ *Kootenai*, 105 Idaho at 632.

In considering the issuance of a grant to a private corporation to use surface waters of a navigable lake, the Idaho Supreme Court announced that conveyances of trust lands must ensure that: 1) the grant would aid trust purposes like navigation and commerce; and 2) the conveyance would not substantially impair the public's rights in the lands. The court supplied factors to weigh in applying this two-part test, including: 1) the effect of the proposal on traditional trust purposes; 2) the extent to which an individual project affects the resource both on its own and in conjunction with any other existing effects; and 3) the degree to which private interests are favored over public interests⁴. Prior to conveyances or encumbrances of trust lands, the state must ensure the two-part test is satisfied, taking into account the factors established by the court.

In 1996, the Idaho⁵ legislature passed a statute renouncing PTD's application to water rights and state public land decision making. However, the *Kootenai* test remains relevant where the public trust doctrine applies. As the Idaho Supreme Court stated in 2020:

This Court addressed the scope of the PTD in Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622 (1983). While Panhandle Yacht Club is still good law, the Idaho Legislature has since acted on the PTD. See I.C. § 58-1201(6). In 1996, the legislature enacted the Public Trust Doctrine Act (PTD Act) to "clarify the application of the [PTD] in the state of Idaho and to expressly declare the limits of this common law doctrine in accordance with the authority recognized in each state to define the extent of the common law." Id. The PTD Act limits the ability of the PTD to be used to enforce private property rights⁶.

Because these rules establish protocols for the occupancy of navigable waters (through "Casual Exploration," "Exploration Locations," or "Riverbed Mineral Leases") where the PTD's application is still in full force and untouched by 1996 statute, alienations or encumbrances of the bed of such waters must satisfy the *Kootenai* test.

Alienation and Encumbrance

Because riverbed mining occurs on the beds of navigable waters—lands explicitly covered by the PTD—any conveyance of these lands must withstand the PTD analysis. And the state's approval of a casual exploration, Exploration Location, or Riverbed Mineral Lease is the conveyances of a public trust land, triggering the PTD analysis. In previous cases, permits to use the surface or beds of navigable waters prompted Idaho courts to require a PTD analysis⁷.

Moreover, approval of casual exploration, Exploration Locations and/or Riverbed Mineral Leases must trigger a PTD analysis despite the statutory language that states "[n]othing in this chapter shall be construed as a limitation on the power of the state to authorize public or private use, encumbrance or alienation of the title to the beds of navigable waters held in public trust pursuant to this chapter for such purposes as navigation, commerce, recreation, agriculture,

⁴ *Id.* at 629-30.

⁵ IDAHO CODE ANN. § 58-1203 (2016).

⁶ *Newton v. MJK/BJK, LLC*, 167 Idaho 236, 469 P.3d 23, 29 (2020)

⁷ *See, e.g., Kootenai*, 105 Idaho 622 (1983) (dock permit); *Newton*, 167 Idaho 236 (2020) (boat garage permit); *Dupont v. Idaho State Bd. of Land Comm'rs*, 134 Idaho 618 (2000) (dock permit).

mining, forestry, or other uses...”⁸ Although the statute seems to preserve the state’s right to “alienate or encumber,” that language does not eliminate the requirement that the state undertake a PTD analysis prior to alienation or encumbrance. The statute and the trust can be read consistently, the latter ensuring that the former does not authorize mining that substantially impairs trust resources or is issued without a cumulative effects analysis.

Public Trust Doctrine Analysis

The current statutory and regulatory requirements for approving casual exploration, Exploration Locations, and Riverbed Mineral Leases are not sufficient under the PTD test announced in *Kootenai*. The Idaho Stream Channel Protection Act, Idaho Code § 42-3801 *et seq.* requires the Director of Water Resources to “determine the likely effect of the proposed stream channel alteration upon the fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality values of the stream”⁹ and to forward a copy of any application to the IDL to consider potential “unreasonably detrimental effects.” The Idaho Department of Water Resources’ (IDWR) regulations establish minimum standards and specify procedures for processing and considering applications for stream channel alterations. Under the regulations, IDWR considers the following prior to issuing a permit¹⁰:

- A. What is the purpose of doing the work?
- B. What is the necessity and justification for the proposed alteration?
- C. Is the proposal a reasonable means of accomplishing the purpose?
- D. Will the alteration be a permanent solution?
- E. Will the alteration pass anticipated water flows without creating harmful flooding or erosion problems upstream or downstream?
- F. What effect will the alteration have on fish habitat?
- G. Will the materials used or the removal of ground cover create turbidity or other water quality problems?
- H. Will the alteration interfere with recreational use of the stream?
- I. Will the alteration detract from the aesthetic beauty of the area?
- J. What modification or alternative solutions are reasonably possible which would reduce the disturbance to the stream channel and its environment and/or better accomplish the desired goal of the proposed alteration?
- K. Is the alteration to be accomplished in accordance with the adopted minimum standards?
- L. Are there public safety factors to consider?

The first element of the *Kootenai* test is whether the grant would serve trust purposes like navigation and commerce¹¹. This inquiry is likely reflected in the regulations by subsection (a): What is the purpose of doing the work? Without a commerce or navigation-specific inquiry, the state may fail to fulfill its trust obligations under the *Kootenai* test.

⁸ IDAHO CODE ANN. § 58-1203(3) (2016).

⁹ *Id.* at § 42-3804.

¹⁰ IDAHO ADMIN. CODE I. 37.03.07.035.

¹¹ *Kootenai*, 105 Idaho at 629.

The second element of the *Kootenai* test asks whether the conveyance would substantially impair the public's rights in the lands¹². In making this determination, the court noted relevant factors, including: 1) the effect of the proposal on traditional trust purposes, 2) the extent to which an individual project affects the resource both on its own and in conjunction with any existing effects, and 3) the degree to which private interests are favored over public interests. These *Kootenai*-test inquiries appear to be accounted for by IDWR in the statute and regulations governing channel alteration to the extent that it requires the director to consider "trust purposes," however, it is unclear whether and how the Idaho Board of Land Commissioners validate or consider this information in their role as the *proverbial keepers* of the Public Trust Doctrine, pursuant to Idaho Code 58-104.

In *Kootenai*, the court announced that "[t]rust interests include property values, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality."¹³ The statute instructs the Director of IDWR to "determine the likely effect of the proposed stream channel alteration upon the fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality values of the stream."¹⁴ The applicable regulations require more detailed examination of these trust purposes¹⁵. The *Kootenai* test directs decision makers to consider impairment to the public's rights in the lands, and this must be applied in the context of casual exploration, Exploration Locations, and Riverbed Mineral Leases.

In addition to considering the direct effects associated with the approval of casual exploration, Exploration Locations, and/or Riverbed Mineral Leases under the *Kootenai* test, IDL and the Land Board must also consider both the cumulative impacts of these activities, along with the degree to which private interests are favored over public interests. The *Kootenai* court announced that "a state, as administrator of the trust in navigable waters on behalf of the public, does not have the power to abdicate its role as trustee in favor of private parties."¹⁶ Considering the negative environmental consequences of riverbed exploration and mining, such a permit foreseeably favors private interests over the public. Yet, nowhere in the proposed regulations is the Land Board or IDL instructed to weigh the public versus private benefits of any prospective permits or authorizations. Approval of casual exploration, Exploration Locations and/or Riverbed Mineral Leases issued without administrative assurance that the activity does not favor the interests of a private party at the expense of the public appear to violate the PTD as articulated in *Kootenai*, even if they may not appear to violate statutory language, on its face. Therefore, ICL is concerned that both existing and proposed Administrative Rules may be inconsistent with the *Kootenai* requirements and the Land Board's fiduciary obligation to its public beneficiaries.

Finally, the *Kootenai* court also instructed state agencies that, when conducting a PTD analysis, to consider the "extent to which an individual project affects the resource both on its own and in conjunction with any existing effects."¹⁷ The current and proposed regulations are insufficient

¹² *Id.* at 629-30.

¹³ 105 Idaho at 632.

¹⁴ IDAHO CODE ANN. § 42-3804 (2016).

¹⁵ See list of consideration factors, *supra*. IDAHO ADMIN. CODE r. 37.03.07.035.

¹⁶ *Id.* at 625.

¹⁷ *Id.* at 629 (emphasis added).

to satisfy this test because they require no express consideration of the cumulative or long-term effects of the permitted activities, except arguably with regards to the IDWR's consideration of an action's effect on flooding or erosion¹⁸. Consequently, the regulations seem to allow an agency to issue a permit based on present conditions alone. The PTD analysis required by Kootenai requires more: an express requirement that a cumulative impact assessment precede any lawful permit.

Land Board Discretion and Responsibility

ICL disagrees that the Land Board does not retain discretion relative to both casual exploration and Exploration Locations. Idaho Code 58-1203 is clear "The state board of land commissioners may approve, modify or reject all activities involving the alienation or encumbrance of the beds of navigable waters in accordance with the public trust doctrine."

ICL remains concerned that the state has effectively transferred their trustee Public Trust protection duties to the IDWR, without first contemplating or disclosing the effects to public trust values. In the [Meeting Summary for the April 19, 2023 negotiated rulemaking](#) meeting, it states, "IDL defers to regulation per IDWR Stream Channel Alteration Permits for casual exploration." ICL remains unaware of any public trust or other effects analysis that ensures that the Land Board is upholding their affirmative duty to protect these public trust values.

Further, during the April 19, 2023 negotiated rulemaking meeting, IDL staff stated that neither the Land Board nor IDL "have the ability to deny Exploration Locations," that they are "approved automatically," and that these approvals are "ministerial tasks." Further, a letter from IDL Director Tom Schultz to ICL (November 15, 2012) stated that "the Land Board controls and manages exploration on State lands through withdrawal of tracts from mineral entry" relying in part on an informal Attorney General opinion from 1932.

ICL is concerned that the Riverbed Mineral Leasing Rules are not consistent with the *Kootenai* test requiring consideration prior to alienation or encumbrance of trust resources. As articulated by the Idaho Supreme Court, IDL and the Land Board must verify that all such permits satisfy a public versus private benefit analysis, in order to ensure that the state is not abdicating its role as trustee in favor of private parties. That analysis aims to ensure against the state's authorization of substantial impairment of trust resources. Further, all such permits must be accompanied by a cumulative effects analysis that takes into account other past, present, and reasonably foreseeable future actions, so that the public can be assured that there is no significant impairment of trust resources. Until the department adopts regulations consistent with these requirements, it should re-evaluate existing permits and revise proposed rules to ensure that Public Trust values and considerations be closely evaluated prior to the alienation or encumbrance of the beds or banks of navigable waters.

Requirements for Clean Water Act Permitting

While ICL appreciates the reference to other required state permits, from IDWR and the Idaho

¹⁸ IDAHO ADMIN. CODE R. 37.03.07.035.01(e) ("Will the alteration pass anticipated water flows without creating harmful flooding or erosion problems upstream or downstream?").

Department of Environmental Quality (DEQ), ICL recommends several amendments to clarify the scope of the requisite permits.

Rule Draft #2 includes a change in IDAPA 20.03.05.015.06. Casual Exploration. “Department of Environmental Quality permits. Suction dredging requires a valid general or individual permit issued under the Idaho Pollutant Discharge Elimination System.”

While it is accurate that “suction dredging” does constitute a “point source” under the definitions of the Clean Water Act and requires an IPDES permit, other forms of casual exploration or riverbed mining may also require a permit from DEQ. After all, suction dredge mining is just one of the methods that may be utilized to retrieve minerals via casual exploration, Exploration Location, or a Riverbed Mineral Lease, and other methods of mining or exploration may similarly result in a discharge requiring authorization pursuant to DEQ rules.

Instead, ICL recommends that the language be amended to:

Any activities that may result in a discharge to waters of the United States, including but not limited to suction dredging, require a valid general or individual permit issued under the Idaho Pollutant Discharge Elimination System.

In addition, the permitting requirements of other state agencies are only referenced in the aforementioned section related to Casual Exploration (IDAPA 20.03.05 Section 015.06.) Instead, ICL recommends that similar language be added to IDAPA 20.03.05.016 (Exploration Locations) and IDAPA 20.03.05.020 (Riverbed Mineral Lease) sections as well.

Pursuant to *Shokal v. Dunn*, 109 Idaho 330, 337-39 (1985), while IDL, IDWR and DEQ have distinct responsibilities as it relates to the protection of public trust resources, stream channels alteration, and water quality, it is essential that each of these various permit approvals be properly conditioned upon each other. That is, approval of casual exploration, Exploration Locations, or Riverbed Mineral Leases must be conditioned on the approval and receipt of a permit from other applicable state agencies.

“Water Resources must oversee the water resources of the state, ensuring that those who have permits and licenses to appropriate water use the water in accordance with the conditions of the permits and licenses and the limits of the law. It is not the primary job of Water Resources to protect the health and welfare of Idaho's citizens and visitors — that role is vested in the Department of Health and Welfare, including compliance with the water quality regulations and monitoring effluent discharge in our state's waterways. Nevertheless, although these agencies may have separate functions, Water Resources is precluded from issuing a permit for a water appropriation project which, when completed, would violate the water quality standards of the Department of Health and Welfare. **It makes no sense whatsoever for Water Resources to blindly grant permit requests without regard to water quality regulations. Hence, Water Resources should condition the issuance of a permit on a showing by the applicant that a proposed facility will meet the mandatory water quality standards.** Under this rule, Water Resources has the authority to withhold a permit application until it receives a proposed design which appears to be in compliance with the water quality standards. Once the conditional permit is granted, Water Resources has continuing jurisdiction over compliance with the conditions of the permit, including

suspension or revocation of the permit for proven violations of the permit's conditions regarding water quality.

The Department of Health and Welfare continues to have the primary responsibility for policing water quality control in this state, and can exercise in personam jurisdiction over those who violate the state's water pollution laws. While it often may be both more feasible and more reasonable for Health and Welfare to take remedial steps against one violating the pollution laws, either by forcing compliance or shutting down a facility, than to resist an application for a permit in the first instance, Health and Welfare certainly has the right to be heard in proceedings before Water Resources. And, as appointed guardian of the quality of Idaho water, its views are entitled to consideration.

In sum, we agree with the district court, Judge Smith, that Water Resources cannot issue a permit which would allow construction of a project violative of the laws regulating water quality. However, later compliance with those laws after construction of a facility generally will be a proper concern of the Department of Health and Welfare (**emphasis added**).¹⁹

Requirements for Bonding

Under the Draft Rule #2, Subsection 40.02, previously existing language requiring a minimum \$750 dollar bonding is proposed to be removed. ICL is concerned that no justification for removal of a minimum bond has been given. Presumably, this language was previously deliberately included and establishing a minimum bond amount was deemed necessary for motorized exploration. The proposed language leaves the door open for bonding below \$750. Furthermore, given the nature of inflation and cost escalation, \$750 may no longer even be an appropriate minimum bond.

Without reason showing otherwise, ICL requests a minimum bond amount be retained and updated to reflect the most up to date cost estimates for motorized exploration.

¹⁹ *Shokal*, 109 Idaho at 337-39