

## Negotiated Rulemaking Summary

### IDAPA 20.03.05, Rules Governing Riverbed Mineral Leasing in Idaho

Docket No. 20-0305-2301

Following Executive Order 2020-01: Zero-Based Regulation, this rule chapter is scheduled to be repealed and replaced in 2023 for review during the 2024 legislative session.

The Idaho Department of Lands (IDL) administers these rules under the authority of Title 47, Chapter 7, Idaho Code. IDAPA 20.03.05 establishes a consistent process to authorize mineral exploration and extraction on state-owned navigable rivers and collect rents and royalties. By leasing exclusive rights to the waterways, customers may explore areas without competition. IDAPA 20.03.05 allows responsible resource extraction while protecting the lands, streams, and watercourses of the state.

Negotiated rulemaking for these rules was approved by the Land Board on November 15, 2022. The Notice of Intent to Promulgate Rules – Zero-Based Regulation Negotiated Rulemaking was published in the Idaho Administrative Bulletin on April 5, 2023.

#### Stakeholder Outreach

The IDL's outreach for negotiated rulemaking included the following:

- Published the Notice of Negotiated Rulemaking in the Idaho Administrative Bulletin
- Created a rulemaking webpage to post documents, scheduling information, and comments (<https://www.idl.idaho.gov/rulemaking/docket-20-0305-2301/>)
- Posted meeting information on social media
- Posted rulemaking notices to Townhall Idaho
- Emailed 43 customers and other interested parties
- Mailed postcards to 138 customers

#### Public Meeting Participation

Negotiated rulemaking meetings were held on April 19 and April 26, 2023 to discuss draft changes to the rules and receive comments from interested parties. A total of 12 non-IDL affiliated people attended these meetings.

IDL considered all comments received during the negotiated rulemaking process. Summarized comments and IDL's responses are in the attached Response to Comments on Negotiated Rule.

Much of the discussion during public meetings centered on public notice on the issuance of exploration location permits. Per Idaho Code 47-703(3), the Land Board is not given authority to deny exploration location permits, and the discoverer must post their exploration certificate on each ½ river mile. The discoverer then must file an exact copy with the IDL and pay the appropriate fee.

Some comments were made during meetings about which stretches of river are available for exploration. It was clarified during the meeting that IDL has authority under this rule on state-owned navigable waterways, and that some rivers have been withdrawn from mineral entry due to state statutes or Land Board actions.

Discussion was had at each meeting about IDL's regulatory overlap with the Idaho Department of Environmental Quality (IDEQ) and the Idaho Department of Water Resources (IDWR). Many activities conducted on exploration locations and riverbed mineral leases require Stream Channel Alteration permits from IDWR and may require an IPDES multi-sector general permit from IDEQ. Based on this discussion, the proposed rule now includes language referring to the permit requirements from IDEQ. The rule also reflects the same categorization of casual and motorized exploration in Idaho Code 47-7. These categories are also used by IDWR in their Stream Channel Alteration rules, although they use different terms for them.

### **Written Comments**

Four sets of written comments were received during the public comment period (April 5 to July 19, 2023).

Written comments discussed the responsibility of IDL to protect public trust values, and suggested adhering to standards set forth in the Kootenai Environmental Alliance vs. Panhandle Yacht Club case of 1983. While riverbed mineral leases do have a public comment period and provide for public hearings, the exploration locations do not. Idaho Code § 47-703 does not provide public participation for exploration locations, and do not provide a mechanism for IDL to deny them.

IDL's responses to these comments and more are in the attached Response to Comments on Negotiated Rule.

### **Concluding Negotiated Rulemaking**

The issue of IDL's ability to deny or allow public comment on exploration locations remains unresolved. IDL believes that Idaho Code 47-703 does not give the Department the authority to deny exploration location permits. IDL kept language in the rule that reflects these findings. IDL also continues to follow the guidance given for complying with Executive Order 2020-01.

IDL concluded the negotiated rulemaking process and submitted the rule changes for publication as a proposed rule in the September 6, 2023, edition of the Idaho Administrative Bulletin. Key documents from the rulemaking record are available at <https://www.idl.idaho.gov/rulemaking/docket-20-0305-2301/>, including written public comments, research materials, and the proposed rule text in legislative format to allow the reader to easily identify changes.

**Response to Comments on Negotiated Rule**  
 IDAPA 20.03.05, Rules Governing Riverbed Mineral Leasing in Idaho

Comment	Rule Section	Response	Commenter
<p>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 Public Trust Doctrine as articulated in <i>Kootenai</i>, even if they may not appear to violate statutory language, on its face.</p> <p>Both existing and proposed Administrative Rules may be inconsistent with the <i>Kootenai</i> requirements and the Land Board’s fiduciary obligation to its public beneficiaries.</p> <p>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.</p>	<p>General Comment</p>	<p>The requirements of Exploration Location Permits include a condition that all locators shall abide by the provisions of Title 42, Chapter 38, Idaho Code (Stream Channel Protection Act), where applicable and shall maintain stream water quality. This act declares that the public health, safety and welfare requires that the stream channels of the state and their environments be protected against alteration for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. If an exploration location certificate holder has a Stream Channel Alteration permit, they have met the public benefit requirements of this act.</p> <p>Riverbed mineral lease applications are subject to public comments and public hearings, which assures that IDL is fulfilling its role to the public trust resources.</p>	<p>Idaho Conservation League 6/16/2023</p>
<p>Pursuant to <i>Shokal v. Dunn</i>, 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</p>	<p>General Comment</p>	<p>The purpose of this rule is not regulatory in nature. This is a leasing rule. It grants exclusive control over the mineral rights in navigable waterways for a limited period of time and provides revenue to the state. It does not authorize specific mining activities.</p> <p>Under this rule, casual exploration does not require approval from IDL (20.03.05.015.03).</p>	<p>Idaho Conservation League 6/16/2023</p>

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<p>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.</p>		<p>Exploration Locations, and IDL’s ability to approve them, is discussed in the Section 016 General Comment in this table below. IDL does include a requirement in the Riverbed Mineral Leasing procedure that an Idaho Department of Water Resources Stream Channel Alteration Permit is required and must be received before a lease can be issued. The procedures will be updated to include a similar requirement for an IPDES General Permit as well.</p>	
<p>Why do you have the word recreational in your mission statement online, but you have proposed to scratch the word out completely everywhere in your new proposals?</p>	000.02	<p>The definition of and references to recreational mining have been removed due to the 2014 changes to definitions in statute (Idaho Code § 47-703A(6)). The statutory definition of casual exploration now covers what was defined as casual exploration and recreational mining in the rules. This also better aligns with the Idaho Department of Water Resources authority for small scale mining under the Stream Channel Protection Act.</p>	<p>Travis Hollon 4/24/2023</p>
<p>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.</p>	015.06	<p>Casual exploration is commonly conducted using suction dredges. IDL specified suction dredging in the rule in order to apply the requirements to the most common practice used in casual exploration.</p>	<p>Idaho Conservation League 6/16/2023</p>

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<p>Instead, ICL recommends that the language be amended to:  <i>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.</i></p>			
<p>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.</p>	015.06	<p>Under Executive Order 2020-01 and guidance from the Division of Financial Management, this rule is seeking to remove duplicative references. The permitting requirements from IDWR and IDEQ are currently stated in section 015 of this rule, and this section applies to both section 016 (Exploration Locations) and section 020 (Riverbed Mineral Leases). Restating these requirements would not meet the requirements from DFM. Requirements for these permits will be included in the Riverbed Mineral Leasing Procedures. Also, Idaho Code § 47-704(8) already requires coordination with IDWR before issuing a lease.</p>	<p>Idaho Conservation League            6/16/2023</p>

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<p>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.</p>	<p>016 General Comment</p>	<p>According to Idaho Code § 47-703(1)- All state lands or navigable waters are open to exploration locations unless they are: 1. Covered by a mineral lease or a pending lease application. 2. Under a valid Exploration Location. 3. Have been specifically withdrawn from mineral entry or exploration.</p> <p>The filing of an exploration location pursuant to Idaho Code § 47-703 is a “ministerial” task rather than a “discretionary” task. In other words, if an individual follows regulations set forth in Idaho Code § 47-703, they have met the conditions required for their exploration location, and no action is required on behalf of the Board of IDL. Idaho Code § 58-1203 authorizes the Land Board to reject activities involving the alienation or encumbrance of the beds of navigable rivers, but again, the Land Board exercises its discretion in its decision as to whether the lands are open for exploration or withdrawn, not in the ministerial processing of exploration location notices. Exploration locations are not a significant encumbrance to public trust resources due to their limited size (1/2 mile of riverbed) and duration (2 years).</p>	<p>Idaho Conservation League 6/16/2023</p>
<p>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 IDL 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.</p>	<p>016.01-.05</p>	<p>IDL rules conform to the requirements set by statute. Idaho Code § 47-703A(6)(a) defines casual exploration as “entry and/or exploration which does <u>not</u> appreciably disturb or damage the land or resources thereon.” IDL believes that casual exploration does not significantly impair trust resources. Motorized exploration may appreciably disturb or damage the land or resources, but 47-703A(1) requires that motorized exploration operators must submit an exploration and reclamation plan and a bond prior to any work being done. Operators must comply with the Dredge and Placer mining act requirements and Mined Land Reclamation Act requirements as well. These reclamation plans, bond, and acts provide oversight of and requirements to restrict impairment of trust resources. Casual exploration is also conducted with dredges 5” or less and operators who wish to use larger equipment must obtain a riverbed mineral lease, which is subject to public comments and hearings.</p>	<p>Idaho Conservation League 6/16/2023</p>

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<p>Section 030.02 of the proposed rule refers to a royalty schedule. Is the current royalty schedule being modified in any way and if so what changes are being proposed? Should the schedule be modified in the future, will doing so require IDL to conduct further rulemaking?</p>	030.02	<p>The current royalty schedule is not being modified as a result of this rulemaking. The royalty schedule is determined by the Land Board.</p>	<p>Idaho Association of General Contractors 4/18/2023</p>
<p>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. ICL requests a minimum bond amount be retained and updated to reflect the most up to date cost estimates for motorized exploration.</p>	040.02	<p>This change reflects changes made to Idaho Code § 47-703A, “The bond shall be in an amount determined by the board to be the estimated reasonable costs to perform the reclamation activities described in the exploration and reclamation plan in the event of the failure of the operator to complete those activities, plus ten percent (10%) of such costs, and conditioned on the payment of all damages to the land and resources thereon caused by the motorized exploration.”</p> <p>Bonding should reflect the actual reclamation costs similar to what the Mined Land Reclamation statute and rules currently have. This is typically the cost of reclamation relative to the local wage and equipment rates.</p>	<p>Idaho Conservation League 6/16/2023</p>
<p>Section 040.03 of the proposed rule (pages 5&amp;6) replaces the \$750 minimum bond with an amount equal to an “estimated reasonable cost of reclamation.” We understand that this change reflects changes made to 47-703A, Idaho Code. However, we would like IDL to clearly state how the term “reasonable” is to be defined and the process it will use to establish an “estimated reasonable” fee.</p>	040.02	<p>Bonding should reflect the actual reclamation costs similar to what the Mined Land Reclamation statute and rules currently have. The term reasonable applies to the cost of reclamation relative to the local wage and equipment rates.</p>	<p>Idaho Association of General Contractors 4/18/2023</p>