

From: [Will Tiedemann](#)
To: [Rulemaking](#)
Cc: [Josh Johnson](#); [Jonathan Oppenheimer](#)
Subject: Public Comments RE IDAPA 20.03.05 Riverbed Mineral Leasing in Idaho
Date: Wednesday, September 27, 2023 2:10:26 PM
Attachments: [ICL Comments RE IDAPA-20.03.05 ZBR Rulemaking \(Admin Bulletin\).pdf](#)

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Hello,

Please see attached ICL comments regarding IDAPA 20.03.05 Riverbed Mineral Leasing in Idaho

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September 27, 2023

Idaho Department of Lands
Attn: Marde Mensinger – Rulemaking
P.O. Box 83720
Boise, Idaho 83720-0050
rulemaking@idl.idaho.gov

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 proposed IDAPA 20.03.05 Riverbed Mineral Leasing in Idaho (the Rules) published in the September Idaho Administrative Bulletin. 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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Background

On June 16, 2023, ICL submitted public comments on a draft version of the Rules proposed during the negotiated rulemaking process. On August 8, 2023, IDL published an updated Negotiated Rulemaking Summary that included responses to public comments (including ICLs). The comments below are in response to IDL's response to comments.

Land Board Discretion and Responsibility

Summarizing IDL's response to comments, IDL asserts that the Land Board is not required to evaluate individual riverbed mineral exploration locations (exploration locations) against Public Trust Doctrine since the processing of such requests is a "ministerial" task vs a "discretionary" task. IDL's asserts further that the Land Board is not required to evaluate exploration locations since they do so via the withdrawal of riverbeds from exploration.

However, IDL's response fails to adequately define "ministerial tasks" or to establish why "ministerial" tasks are unfit or unable to be reviewed by the Land Board, consistent with public trust requirements. As our previous comments have mentioned, Idaho Code 58-1203 states, "The public trust doctrine as it is applied in the state of Idaho is solely a limitation on the power of the state to alienate or encumber the title to the beds of navigable waters as defined in this chapter. **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 (emphasis added)." Furthermore, if the Land Board decided that their ability to withdraw riverbeds from exploration does satisfy Public Trust Doctrine in regards to individual exploration location, IDL's response to comments offer no information to support this determination, and appears arbitrary.

It is possible that at some point in the past the Land Board made a broad and discretionary decision that the nature of exploration locations do not impact public trust values, but IDL's response to comments fail to provide any rationale to support this. IDL's response to comments also states that 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). Yet again, IDL fails to establish a connection or demonstrate that the Land Board made this determination during any evaluation of the Public Trust Doctrine and its relation to exploration locations or during consideration of any Riverbed Mineral Withdrawals.

Finally, in *KEA v. Panhandle Yacht Club* (671 P.2d 1085, 105 Idaho 622), the court noted that "The trust is a dynamic, rather than static, concept and seems destined to expand with the development and recognition of new public uses." Given the dynamic and evolving nature of public trust resources and responsibilities, and the requirement that "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" (italics in original), it is confusing how the public could be so informed decades prior to any proposal.

IDL should re-evaluate existing permits and revise the 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.