



## Idaho State Board of Land Commissioners

Brad Little, Governor and President of the Board  
Lawrence E. Denney, Secretary of State  
Lawrence G. Wasden, Attorney General  
Brandon D Woolf, State Controller  
Sherri Ybarra, Superintendent of Public Instruction  
Dustin T. Miller, Secretary to the Board

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*Be it remembered, that the following proceedings were had and done by the State Board of Land Commissioners of the State of Idaho, created by Section Seven (7) of Article Nine (IX) of the Constitution.*

Final Minutes  
State Board of Land Commissioners Regular Meeting  
January 19, 2021

The regular meeting of the Idaho State Board of Land Commissioners was held on Tuesday, January 19, 2021 at the Idaho Department of Lands, Garnet Conference Rooms, Suite 103, Boise, Idaho, and via webinar. The meeting began at 9:00 a.m. The Honorable Governor Brad Little presided. The following members were in attendance:

Honorable Governor Brad Little  
Honorable Secretary of State Lawrence Denney  
Honorable Attorney General Lawrence Wasden  
Honorable State Controller Brandon Woolf  
Honorable Superintendent of Public Instruction Sherri Ybarra

For the record, due to the Governor's Stage 2 Stay Healthy Order, dated 12/30/2020, gatherings, including public meetings, were limited to 10 persons or less in physical attendance. Controller Woolf was present at the physical meeting location; all other Board members joined via Zoom webinar.

**1. Department Report** – *Presented by Dustin Miller, Director*

**Trust Land Revenue**

- A. Timber Sales – December 2020
- B. Leases and Permits – December 2020

**Status Updates**

- C. Land Bank Fund

**Discussion:** None.

**2. Endowment Fund Investment Board Report** – *Presented by Chris Anton, EFIB Manager of Investments*

- A. Manager's Report
- B. Investment Report

**Discussion:** Mr. Anton reported that the fund ended calendar year 2020 very strong, up 3.7% for the month of December and 16.3% for the calendar year. The fund was up 18.2% for the first six months of the fiscal year and through Friday [January 15] it was up 19.9%. Looking back at

calendar year 2020 the performance of the portfolio really stood in stark contrast to the impact experienced by people of the COVID-19 virus. In March, the financial markets declined sharply. The S&P was at 30% as communities were isolated and all were concerned about the spread of the virus. The Federal Reserve, however, jumped in very quickly; they enacted emergency programs in March and April to provide liquidity to the financial markets and breathe life into the employment market. Congress enacted the CARES Act – \$2.2 trillion in funding to individuals and small businesses most affected by the crisis – and near the end of 2020 another \$900 billion of stimulus was provided to the economy. This support, and extraordinary efforts around the world to develop vaccines, gave investors hope that over time the economy would heal, and everyone would return to a more normal way of living. This is really what drove the forward-looking performance in the market; hopefully by later this calendar year there will be health in the economy.

Large cap technology stocks rallied first off the bottom in March because they were best positioned to the nation's new way of living and working from home. This can be seen in the performance of the fund's large cap growth manager, Sands, which was up 72.8% for the year. Later in the calendar year as the vaccines were approved by the FDA and distribution started, there became more optimism that the recovery would broaden so smaller cap stocks began to outperform; they actually for the year beat large cap stocks, but their performance came in the last quarter of the calendar year.

As 2021 gets underway, there are challenges ahead. The nation is not through COVID-19 by any stretch of the imagination. There is optimism that vaccines will be deployed extensively and anticipation that by summer much of this will be past and there will be a broadening and strengthening in the economy.

Reserves are fully at target levels given the performance the fund had in the markets. In terms of upcoming events, EFIB has its budget presentation on February 5th and the next Investment Board meeting is scheduled for February 11th.

Controller Woolf asked if he had heard correctly that the fund went over the \$3 billion mark for a short time. Mr. Anton clarified it was \$3 billion for the entire portfolio, which includes the endowment fund plus some money for Parks and Recreation, Department of Environmental Equality, Fish and Game, and Department of Lands. It was close to \$2.9 billion for just the land grant portfolio [endowments]. Governor Little asked if that included the insurance fund that EFIB administers. Mr. Anton said no, that is a separate figure of about \$900 million; nearly \$4 billion for all financials combined.

Mr. Anton warmly recognized his dear friend and colleague, Dean Buffington, who passed away in December. Dean served on the Endowment Fund Investment Board for 19 years and as its chairman for 17 years. Dean enjoyed working closely with Governor Little, the Land Board, and staff at the Department of Lands. Mr. Anton offered kind praise for Dean, remarking that he was a really great guy and was responsible for much of the success of the Endowment Fund Investment Board during his time. Mr. Anton shared that he would miss Dean and wanted to acknowledge Dean and thank him for all he did for EFIB and for the state of Idaho.

For the record, a motion was made by Attorney General Wasden that the Land Board prepare a certificate or other commemoration of Dean Buffington's years of service to be sent to his family

giving thanks to Dean for his many years of service. There being no objection Governor Little so ordered. Governor Little mentioned that he was a Senate member of the Investment Board when Dean first became chairman and there are not very many people in Idaho that have as tirelessly and effectively led a board. Governor Little continued that there are a lot of boards around the state and one attribute that the five Land Board members could dependably rely on was Dean's steadfast commitment to the people of Idaho and the Land Board's trust obligation. Governor Little remarked that the Investment Board's performance over the time that Dean was there, and some of the crises that the market endured, Dean's steady hand and his leadership were in evidence; every beneficiary of the endowments should be thankful for Dean's service.

### **Consent—Action Item(s)**

#### **3. Approval of Draft Minutes – December 15, 2020 Regular Meeting (Boise)**

**Consent Agenda Board Action:** A motion was made by Attorney General Wasden that the Land Board adopt and approve the Consent Agenda. Controller Woolf seconded the motion. The motion carried on a vote of 5-0.

### **Regular—Action Item(s)**

#### **4. Due Diligence for Eastern Idaho Regional Solid Waste District Land Exchange – Presented by Josh Purkiss, Program Manager-Real Estate, and Cameron Arial, District Municipal Advisor, Eastern Idaho Regional Solid Waste District**

**Recommendation:** Direct the Department to proceed with due diligence for the Eastern Idaho Regional Solid Waste District land exchange proposal.

**Discussion:** Attorney General Wasden drew attention to Attachment 2, the red cross-hatched section in the upper right quadrant and acknowledged this is just proposed and the actual outcome is not yet known. Attorney General Wasden noted there are two L-shaped parcels that peaked his interest, one to the immediate south of the red hatched portion and one to the immediate east of the hatched portion, and wondered if those parcels would be isolated, either from access or from other state lands. Mr. Purkiss responded that the Department is trying to use Land Bank funds to acquire a parcel in the shape of a W just to the east of that bottom L-shaped parcel. The Department is concerned about the access. During the due diligence phase, staff will ensure that if there are any remnant parcels, they will have all lawful access and the final package will address that issue.

Governor Little said it would be good for the Department to reach out to all of the landowners adjacent of both the property slated for disposal and the property slated for acquisition. Governor Little asked why not just sell the property rather than exchange it, and also surmised the land is going to be reclassified from either agriculture or dry grazing into a municipal site which will happen simultaneous with the proposal. Mr. Purkiss addressed public outreach, saying the District has been talking to the surrounding neighbors and will have public meetings to receive feedback on the exchange, and that will be brought back to the Board at the final approval. Mr. Purkiss responded to the question about selling the property that the Department is prohibited from selling land over 320 acres which is why staff steered this towards an exchange. Mr. Purkiss affirmed that the land acquired will be reclassified to dry crop ag. Governor Little inquired if the Department is not planning to do any outreach and only the

advocates will do it? Mr. Purkiss clarified that both the Department and the District will be performing outreach; the District already began their effort, and the Department will provide additional information.

**Board Action:** A motion was made by Attorney General Wasden that the Land Board adopt the Department recommendation that is approve due diligence on this transaction. Controller Woolf seconded the motion. The motion carried on a vote of 5-0.

**5. Final Approval for Owyhee Land Exchange** – Presented by Ryan Montoya, Bureau Chief-Real Estate Services

**Recommendation:** The Idaho Department of Lands recommends that the Land Board approve the exchange and direct the Department to complete and close the Owyhee Land Exchange.

*[Editor's note: Due to duration, the Discussion and Public Comment portions of this item are written in first-person format. This is not a verbatim transcript.]*

**Discussion:**

**Ryan Montoya:** Thank you, Governor, members of the Land Board. My name is Ryan Montoya, Real Estate Services Bureau Chief for the Idaho Department of Lands. Also on the video conference are representatives from the BLM, should there be any questions that they need to address. This agenda item is to request direction from the Land Board to complete the Owyhee Land Exchange. Just for clarification, this item has gone through due diligence and is ready for closing. I would like to thank the many Department staff members who've worked on this project for over a decade, as well as the stakeholders who've been instrumental in getting this exchange to where it is at today. In 2008, the Land Board directed the Department to enter into a land exchange agreement with the BLM to exchange state lands scattered in sage grouse and wilderness habitat for federal lands that would block up and provide access to the endowments. Since 2008, the Department has worked with the BLM as well as performed substantial public outreach to state lessees, federal permittees, and many stakeholders. In addition, the State has worked with the BLM on extensive due diligence. With due diligence complete, and as shown in Attachment 1, the BLM is prepared to issue the Notice of Decision upon the Land Board's final approval to complete the exchange. Attachment 2 – the screen that I am sharing – is the map of the exchange. For a quick background, the Land Board has directed the Department to pursue land exchanges that block up land, gain access, and increase revenue to endowment beneficiaries which in this case is the Public School endowment. On the map you will notice that there are identifiers as B and S. The B properties are those that are currently owned by the BLM, which will be acquired by the State. You will notice the brown area is the areas designated as wilderness. There are substantial land holdings within the wilderness area. The objective was to exchange out of those areas that were immediately in or adjacent to the wilderness area into areas that are in larger blocks such as B12 and other areas that block up our existing ownership. Notice in the background that there are the blue and the pink parcels which are being blocked up within those state areas. I will present a summary of some of the due diligence in the following presentation that was prepared in cooperation with the BLM. *[Mr. Montoya went through the slides – Attachment 3.]*

In addition to the information in the presentation, there's an increase in endowment revenue through the additional AUMs. Based on the 2021 grazing rate, there will be an annual increase in revenue of \$2,976. As I previously mentioned, since 2008 there's been substantial outreach. Since 2016 some of the highlighted outreach has been:

- In February 2016, a presentation for approval from the Land Board on the Restated Agreement to Initiate which outlined the terms of the exchange agreement as well as the parcels in the exchange.
- In June 2019, the BLM issued the environmental assessment, received comments, and sent letters to the permittees as well as other stakeholders. There were over 145 letters sent out; only 2 permittees responded and that was the Miller Land Company and Simplot.
- In May 2019, there were presentations to the Owyhee County Commissioners as well as the Owyhee Initiative.
- In 2018 and 2019, the Department updated its website and fact sheets.
- In 2018, 2019, and 2020 the Department presented in front of the Idaho Joint Land Use Study to provide an update on the status of the exchange.
- In 2019 and 2020, presentations were made to the Idaho Cattlemen's Association.
- In July 2020, August 2020, and December 2020 letters were sent to the lessees regarding the exchange.
- January 12, 2021, there was a presentation to the Owyhee Cattlemen's Association.
- The Department met individually with stakeholders and those who had questions or voiced concerns regarding the exchange.

The next steps:

- Obtain Land Board approval.
- BLM will sign Environmental Assessment Record of Decision; publish the Notice of Decision and have the 45-day public comment period.
- BLM will work to resolve any protests and appeals.
- Agencies will work through the closing process.

We anticipate that the closing will be in May or June if there are no appeals or protests. In conclusion, the following benefits will be experienced by the Public School endowment if the land exchange is approved and closed:

- Efficient management of the asset
- Reduced management costs
- Acquisition of property with access
- Blocking up of state lands
- Disposition of state lands lacking access
- Increased returns

The Department recommends that the Land Board approve the exchange and direct the Department to complete and close the Owyhee Land Exchange.

**Public Comment:**

**John Robison:** Good morning, Governor, and members of the Land Board. My name is John Robison and I am the Public Lands Director for the Idaho Conservation League. Thank you for the opportunity to call in today to testify in support of the Owyhee Land Exchange. Over the last year the Idaho Conservation League has pointed out several areas for improvement regarding Department of Lands' proposals and processes. We believe that the process used in the case of the Owyhee Land Exchange could serve as a model for other proposals of high public interest. We think that the Department of Lands staff have done an exemplary job of working with stakeholders. They have been transparent, inclusive, patient, and adaptive in their approach. The public process was extensive and took the time it needed. The Department of Lands staff went out in the field, listened to stakeholders, and then worked with the BLM to tailor the land exchange to address these concerns. I witnessed the public outreach firsthand. The Department of Lands dropped several state sections from the exchange to address concerns from permittees and others. For the remaining parcels, the Department of Lands worked with the BLM and other stakeholders to develop provisions to minimize disruption and increase certainty. The high degree of coordination between the Department of Lands, the BLM, and the stakeholders paid off in the end. We believe the proposal before you is a win-win as it will benefit both state beneficiaries and the public and is a credit to the Department of Lands staff. Thank you again for the opportunity to testify and I'd be happy to stand for any questions.

**Craig Gehrke:** Good morning, Governor, and members of the Land Board. My name is Craig Gehrke; I am testifying today as the Vice Chairman of the Owyhee Initiative. My day job is the State Director for the Idaho office of The Wilderness Society. I appreciate this opportunity to testify for the Owyhee Initiative in support of the Owyhee Land Exchange. A little bit of background – the Owyhee Initiative this year is starting its 20th year of a collaborative effort to address certain natural resources out in Owyhee County. The Owyhee County area is very diverse, and it brings together a diverse constituency of people who care very deeply about it. I want to reiterate for the Land Board very quickly the members of the Owyhee Initiative who have worked together for 20 years in a collaboration. The members of the Initiative include the Owyhee County Farm Bureau, the Owyhee County Soil Conservation Districts, the Owyhee County Cattlemen's Association, the Owyhee Borderlands Trust, Backcountry Horsemen of Idaho, the Idaho Outfitters and Guides, the Idaho Wild Sheep Foundation, the Southwest Idaho Desert Racing Association, The Nature Conservancy, the Idaho Conservation League, Idaho Rivers United, the Sierra Club, and The Wilderness Society. The Owyhee Initiative worked for over a decade in the preparation and participation of the Owyhee Land Exchange. The Owyhee Initiative voted twice without dissent to support the Owyhee Land Exchange. I want to compliment both the Idaho Department of Lands staff and the BLM staff in their outreach efforts on this land exchange. They met with the Initiative out in Murphy numerous times to go through the proposal, prepared fact sheets, left behind the latest information to keep us all abreast of how the land exchange was proceeding. Again, I want to compliment the staff from both agencies for the outreach effort they put in now for 10 years to make this exchange a success. The Owyhee Initiative supports the land exchange; like I said, we voted twice without dissent to support this. We urge that the Land Board approve that this land exchange take place. Thank you and I will take any questions.

**Tim Lowry:** Governor Little and Land Board members, I am Tim Lowry and I am speaking on behalf of L U Ranching Company, a small family ranch. I want to thank the Board for postponing this decision whether to move forward to allow time to work on a solution with the issue regarding the exchange. Unfortunately, the issue I am here to talk about today remains. I want to make my position clear: I am not opposed to this, or any other exchange. I understand why it makes sense from a management perspective and creates a more desirable unit for competitive bidding for the State. However, the issue of recognizing, acknowledging, and protecting existing rights including stock water and grazing preference rights must be resolved. This issue has been raised many times over the years at meetings where the exchange has been discussed. It was raised in my 2015 letter to Director Schultz, it is addressed in Idaho Farm Bureau policy, Owyhee Cattlemen Association policy, and the Owyhee County land use and management plan for federal and state managed lands. It did not suddenly appear within the last six months. The lands that the State will receive are not a blank slate. These rights, which are appurtenances of the base property, exist on these lands; however, I don't think their existence should be a barrier to an exchange. 58-138 section 2 of Idaho Code gives the Board authority to receive less than fee simple title and allows impairment of title as may be in the State's best interest. I believe the State can acquire these lands and at the same time honor the existing rights. But I don't believe these rights can constitutionally, simply be extinguished in an exchange. I'd say only two formal meetings have been held since my letter of 2015 to address this issue. First on September 3, 2020 where I explained the issue and suggested there be future meetings to include the Idaho Farm Bureau, Owyhee Cattlemen and Owyhee County since they had explicit policy on these rights, and possibly some legislators since it seemed likely that legislative action may be required to settle the issue. Second meeting was on December 3, 2020 where a plan was presented to trade L U Ranching into the remaining BLM land and out of the exchange land. That plan is unacceptable for a couple of reasons and, had I been consulted in its development, I could have saved everyone some time. I still believe, and hope, that this issue can be resolved. It will take some work and a serious approach, but I am convinced a solution can be found to the present problem that will eliminate any problems in future exchanges. Thank you.

**Russ Hendricks:** Governor Little, Land Board members, good morning. I am Russ Hendricks representing the Idaho Farm Bureau. On October of 2014, the Department sent a letter to all BLM permittees involved in the proposed exchange stating that any exchange would be strictly voluntary for those permittees. Unfortunately, this has not happened in practice and that's what brings us here today. Our 80,000 plus member families recognize the Land Board's constitutional fiduciary duty to the endowment; however, that duty is not superior to and cannot override the constitutionally protected rights of Idaho citizens. These property rights are defined in Idaho law; Idaho Code 25-901 clearly and unambiguously declares that a federal grazing preference right is a property right. Fortunately we have the legislative record to bolster our position. Two brief examples are: Representative Frances Field, the sponsor of the preference language, stated according to committee minutes, "This proposed addition to Idaho law would verify the property right and interest of these historic grazing rights in the context of current federal statutes." Mr. Stan Boyd stated, "Ranchers want to be compensated for their legal rights." This law was passed in 1998 because of the changes to BLM grazing regulations in 1995 under Secretary Babbitt, as well as several lawsuits which were working their way through the federal court system at that time. The record shows the legislature fully intended to ensure federal grazing preference was a property right, compensable under Idaho law. The Attorney General analyses have done a masterful job of citing seemingly relevant federal regulations and federal court cases

attempting to demonstrate that the exchange as proposed is within the law. Unfortunately, these analyses sidestep the fact that this is a state action under state law; federal references are not relevant here. Neither analyses cite any state court cases or other evidence. It is simply their stated opinion that grazing preference is not a property right under Idaho law, denying the clear text of the statute. Similarly these analyses implicitly recognize a loss will occur if the current exchange is approved, but they go out of their way to establish that under federal regulations and federal court precedent they are non-compensable losses. Again, that may be true under federal law, but this is a state action under state laws. In conclusion, our members therefore respectfully ask the Board to postpone a decision and direct IDL to make a good faith effort to truly work with Mr. Lowry through meaningful collaboration to come to a mutually agreeable resolution under the law before a decision is finalized. Thank you and I would be happy to answer any questions.

**George Bennett:** Idaho Land Board members, our ranch is one of the places that was involved in the trade of the state land and the BLM. We are adjacent to the wilderness and have some BLM that is mixed out through our state leases. I might add that for the last 30 some years our grazing permit has been 90%-plus state land. We do have some BLM mixed around and it will make it easier for everybody if it gets exchanged. Down through the years the State has managed these lands for the BLM because it was remote and no access and hard to manage. We have been involved in Juniper eradication and have some great strides in this through water for our ranch increased along with the return of sage grouse. We have signed up for Juniper eradication at least twice and had to turn it down because of the delay in the Land Board and the BLM to make this exchange. We are willing to sign up one more time, but we'd like to ask that this goes on through and gets done in the next little while. We are definitely in favor of the state land and BLM land exchange. Thank you.

**Stephen Miller:** Good morning, Governor Little, and Land Board members. My name is Stephen Miller; I am the President of the Miller Land Company, Inc., an Idaho S-corporation that owns private rangeland in Owyhee County west of Triangle along Flint Road, from Spencer Reservoir past Boulder Creek. The company has two BLM allotments: West Antelope and the Miller FFR. The proposed land exchange includes the entire Miller FFR allotment and approximately one-third of our West Antelope allotment. We also have a state grazing lease for two parcels which join the West Antelope allotment. I want to comment on two issues. The first is the issue of the stock water rights owned by the Miller Land Company. There are three in the Miller FFR and one in the West Antelope allotment. I share some of the same concerns presented by Mr. Lowry concerning water rights. I am not sure how these will be treated in the long run. Once our state grazing lease expires, it could result in a loss of these rights if at auction another party secures the lease. I view these rights as property and a loss without due compensation could be a taking. I assume and hope that this concern will be addressed in a manner through a legal review that would be satisfactory to all parties. The second issue is just a clarification to the rules about the land exchange. The Miller Land Company, through ownership of private land, has the BLM grazing preference for both allotments mentioned. In other words, the BLM grazing decision for allotments has all AUMs associated with the allotments because they're derived from the base property owned by the company. The Miller Land Company has a lease agreement with the Kershner family which gives control of the base property but not ownership and thus allows the BLM grazing permit to be solely in the name of Kershner. Kershner is actually responsible to graze their cattle on the allotments in accordance with the BLM rules and permit. They also graze their



cattle on the state land that is leased by the Miller Land Company. The Miller Land Company pays the fees for both the BLM and the state grazing. The rules guiding the land exchange only references the BLM permit for determining the length of the new state grazing lease after the exchange is completed. It should be noted that the Miller Land Company will need to be the lessee of the state land for grazing just as it is currently today. The expiration date of the existing BLM permit will be used. The lease will continue to be subleased to Kershner as their lease agreement with the Miller Land Company. I thank you for the opportunity to discuss these matters with you.

**Chris Black:** Hello, Governor, and Land Board; I am here to speak on my personal experience with this land exchange. I have a big BLM allotment out there that includes state; I have two wilderness areas within that allotment. It's been my experience that all due diligence has been met with this. I'm in favor of the exchange. We've had an opportunity to opt out if we need to on any of these parcels being exchanged, and we have the opportunity to acquire the grazing on the exchange pieces that fall within our allotments. Those things being met, that has met all of the criteria that I needed for my ranch. With this huge process going on, and as long as it has gone on, I have faith in the Land Department of being able to work through any other problems or issues that come up with it. That's all I have to say is with my experience and with some of the boards that I have been associated with, the Owyhee Initiative Board, we had some votes on this and there wasn't any opposition to it. The State and BLM have reached out to us through mailings and through meetings. I feel that my input has been heard. Thank you very much.

**Additional Discussion:**

**Governor Little:** Unless there is somebody else signed up, I believe that is it. Ryan do you want to address part of the testimony, or does anyone else?

**Ryan Montoya:** Prior to the commencement of your decision, there was discussion on some of the legal aspects of this. We consulted with the Attorney General's Office and I believe that Mr. Strack, Deputy Attorney General, is prepared to provide some background and information to the Land Board in response to some of the comments that were made today, so with that I will turn it over to him.

**Steve Strack:** Thank you, Governor, members of the Board. My name is Steven Strack; I am a Deputy Attorney General in the Natural Resources Division. I have been there for 33 years and have dealt with these kinds of issues for much of that time. I think some background information might be useful for the Board. The lands that Mr. Lowry was speaking to are in the South Mountain grazing allotment. That's a mix of federal, state, and private lands but it is all grazed together; the state and the federal governments issue separate permits and leases but the cattle graze throughout the allotment. If this exchange goes through, the allotment would still be a mix of federal, state, and private lands but there would be a higher percentage of state land. Right now Mr. Lowry holds the right to graze 165 AUMs on the federal lands within the allotment. If the exchange goes through, he will still hold 62 of those AUMs and the other 103 would be under a state lease on the lands that the state would acquire. The exchange doesn't take away any rights to graze for Mr. Lowry. He will still have the right to graze on the state lands if he accepts the state's offer of the land use permit. He will still have access to the water sources on state lands because those state lands are not fenced off from the rest of the allotment. The primary difference that Mr. Lowry would hold before and after the exchange is that under federal

regulations Mr. Lowry holds what is called a grazing preference which basically gives him a priority right to any future federal permits for the number of AUMs that are associated with his base property which within the allotment was 165. The practical effect of the exchange on Mr. Lowry is that he is no longer in line for future leases on the state lands; he is still first in line for future leases on the federal lands. On the state lands, at the expiration of the 5-year permit which he would be offered as part of the exchange, he would be subject potentially to public auction due to a conflict application that's received. Is that a taking of property without compensation? I think Mr. Hendricks referenced that our analysis is primarily based on federal law but that's because the grazing preference is itself a creature of federal law. Mr. Hendricks noted the committee minutes from Idaho Code 25-901 which talks about grazing preferences as an appurtenance of base property. He mentioned that one of the committee members noted that the purpose of the legislation was to basically describe the property right in the context of federal statutes. Again, that's because the federal statutes are the basis for creating these rights and recognizing these rights. Mr. Lowry is correct, a grazing preference in itself can be very valuable; it adds a lot of value to the base property. But, not everything of value qualifies as property under the Fifth Amendment or Idaho Constitution. Article I Section 14, which is Idaho's takings clause, prohibits taking of private property for public use. The Taylor Grazing Act which is the basis for grazing permits and grazing preferences provides, and the U.S. Supreme Court has affirmed, that a grazing permit and a grazing preference does not create any property interest in federal land. A grazing preference exists only so long as the federal government recognizes it. In that sense, it is not so much a property right, but it is a form of government benefit. Like any government benefit, like a tax credit or whatever, it can add a tremendous value to your business and can add tremendous value to your private property, but if the government stops providing that benefit it is not a taking of property. It is simply a cessation of a benefit. The courts have held that a grazing preference is much like a benefit that is bestowed by the government on ranches that use public lands, those are called base properties; it's a preference to deal with a particular rancher if those federal lands are made available for grazing but if those lands are no longer available for grazing under a federal permit, and here they're not because they are being conveyed to the state, then there is no taking of property, there's no plan for compensation. I think Mr. Hendricks noted that this is a state action, but in fact, Mr. Lowry is losing his permit by means of the federal government disposing of these lands to the state through an exchange. It is the federal action that basically cancels out the grazing preference. The state, as a government, can't cancel anything. Only the federal government can dispose of those lands; only the federal government can cancel the grazing preference.

In terms of water rights, they do require a bit of a different analysis because they are created by state law, not federal law. Our Idaho Supreme Court has held that state-based stock watering rights on federal lands do not include the right to enter the federal land unless the federal government itself grants permission. In other words, a water right holder has to obtain grazing access rights from the federal government for those water sources that are on federal property; access is not part of the property right or the water right. Federal courts have held that cancellation of grazing privileges does not take state water rights because access is simply not part of the bundle that makes up that state water right. Our Idaho Supreme Court has basically affirmed that water rights do not include access rights. As a practical effect, if Mr. Lowry was to lose his federal grazing permits it may eventually prevent use of his state water rights, but it does not take away any part of the state water rights itself. And since this is a grazing allotment and Mr. Lowry would still hold permits to graze on the federal lands that are part of the allotment, he

would not be fenced off from using those state lands at this point in time. He would still have access to those water sources to water the cattle that he is permitted to continue grazing within the allotment. There is a potential at some future point, again it is only a potential, that once those state grazing leases are made available for public auction, someone could come in with a lease on the state property and fence it off. Again it is a possibility at some point that it could be fenced off; whether or not the Department would allow that is a decision that would have to be made in the context of a grazing management plan. The assertion that Mr. Lowry is going to lose his water rights at any point in the future is just speculation. Until those lands are fenced off, he continues to have access.

Finally, I think Mr. Lowry made a reference that he is losing some economic value because he is losing his grazing preference. That is certainly true. Grazing preference can add a lot of value to Mr. Lowry's base property, but again the federal courts have looked at that issue in the context of whether or not a taking of base property should include the value of grazing preferences. The federal courts have concluded that a grazing preference is a benefit that the federal government provides and certainly adds value to Mr. Lowry's property, or to the holder of the base property, but it's not property itself. The government is not liable for the reduction in value of the base property that is lost if a grazing preference is cancelled. Again, because a grazing preference is a creature of federal law, that is the appropriate source to look to in terms of whether or not a grazing preference is itself a compensable property right. Governor, that concludes my remarks and I will stand for any questions.

**Attorney General Wasden:** I have looked at Idaho Code section 25-901 and I want to read some language to you, Steve, and ask you about that. 25-901 says that livestock ranches are bought, sold, traded, and inherited with assurance that appurtenant grazing preference rights will be transferred to the new base property owner. Therefore, a grazing preference right shall be considered an appurtenance of the base property through which the grazing preference is maintained. That's the last two sentences of 25-901. But in the proposed exchange, the base property is not bought, sold, traded, or inherited as I read it and so it doesn't appear to me that 25-901 on its face applies because the base property is still in the hands of the same holder. So this language really doesn't apply in that context. I am just asking for your thoughts on that specific provision.

**Steve Strack:** Governor, Attorney General, that is entirely correct. The statute declares a grazing preference to be an appurtenance to base property, but that only becomes an issue if the base property itself is conveyed or transferred. It's much like a water right. A water right is appurtenant to state property and if you transfer the state property the water right can go with it, just like a grazing preference can go with the base property. Declaring it an appurtenance does not mean that it has any separate existence under state law; it is federal law that creates the grazing preference, so we look to federal law to determine whether or not this kind of disposal of federal property results in the taking. The federal courts have been very clear in concluding that it does not.

**Attorney General Wasden:** Follow up question. Changing the subject a little bit, Steve, and that's regarding water. I want to make sure that I understand. Currently some property holders have a stock watering right. It is a water right that is recognized in the SRBA [Snake River Basin Adjudication], it is recognized by the Idaho Supreme Court, it is recognized by the state, and it applies on grazing permits on federal land. The question here seems to be if it exchanges and

those properties are held by the state, somehow that will impact that water right because there may be some point in the future when the allottee doesn't hold that water right and that water right can be forfeited. But that risk actually exists today, recognizing there's a preference and that sort of thing, but if the current holder was to lose that grazing permit, they still would run the risk of forfeiture at some point if they failed to access that water at the appropriate point. What I am trying to say is the fact that it is held by the state or the federal government – the land itself – the risk of forfeiture still exists, maybe lesser so in the hands of the federal government, but it still exists. I wanted to see if what I am thinking is correct.

**Steve Strack:** Again, you're correct. Anytime you establish a water right on someone else's property whether it be state property, private property, or federal property you are doing so at the risk that at some future point you may lose the right to access that property. The Idaho Supreme Court has established this as a matter of water law that a water right does not create a right of access to property. It doesn't create a trespass. You can't trespass on someone else's property to exercise your water right; you always need the landowner's permission. When you do so on federal property you are doing so at the risk that at some point that permit could be cancelled. That raises another interesting point of federal grazing permits and grazing preferences is that they are not guarantees. Mr. Lowry has a grazing preference which puts him first in line if the federal government issues a permit to graze that property in the future. There's no guarantee that a permit will be issued. The federal government always has the discretion to not issue permits and to not graze certain properties. That basically establishes that what we're looking at is not a property right per se, and so no taking.

**Attorney General Wasden:** Follow up. Steve, would you agree with me that with regard to those water rights it's not the exchange that puts the water right at risk, it is the nature of the water right itself.

**Steve Strack:** Yes, it is the nature of the water right itself. Again, a water right does not include a right of access. Mr. Lowry would retain all of his water rights even if he was fenced off from that property at some point in the future, and that water right could be transferred to the new lessee, so it still has value.

**Board Action:** A motion was made by Attorney General Wasden that the Land Board fulfill the Department recommendation that is approve the exchange and direct the Department to complete and close the Owyhee Land Exchange. Controller Woolf seconded the motion. The motion carried on a vote of 5-0.

## **Information**

None

## **Executive Session**

None

There being no further business before the Land Board, at 10:27 a.m. a motion to adjourn was made by Attorney General Wasden. Controller Woolf seconded the motion. The motion carried on a vote of 5-0.

