

MINUTES  
**SENATE RESOURCES & ENVIRONMENT COMMITTEE**

**DATE:** Wednesday, February 24, 2021

**TIME:** 1:30 P.M.

**PLACE:** Room WW55

**MEMBERS PRESENT:** Chairman Vick (Vick), Vice Chairman Johnson, Senators Van Orden (Bair), Heider, Patrick, Siddoway (Burtenshaw), Stennett, and Rabe

**ABSENT/ EXCUSED:** Chairman Vick and Senator Guthrie

**NOTE:** The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

**CONVENED:** **Vice Chairman Johnson** called the meeting of the Senate Resources and Environment Committee (Committee) to order at 1:30 p.m.

**Vice Chairman Johnson** said the first order of business was the Gubernatorial Appointment hearing for James Yost. However, he was not present, so the Committee moved on to bills. **Vice Chairman Johnson** said he anticipated that **S 1090** would take a little more time, so he called on Gary Spackman to present **H 43** while awaiting Mr. Yost's arrival.

**H 43** **Relating to Water; Eliminates Inactive Provisions of Law and Outdated and Obsolete Sections of Idaho Code.** **Gary Spackman**, Director, Idaho Department of Water Resources (IDWR), presented **H 43**. He said the Governor's Office directed each agency to submit legislative proposals to seek to eliminate outdated or unnecessary provisions in the Idaho Code. **H 43** is one of those legislative proposals.

Section 42-237b through 42-237g authorized the creation of a local groundwater board to resolve complaints from those holding rights to surface water and groundwater against groundwater users' holding water rights. **Mr. Spackman** said IDWR is unaware of the local groundwater board to ever hold a hearing or make a decision, so the proposal would repeal its formation and operations.

**MOTION:** **Senator Siddoway** moved to send **H 43** to the floor with a **do pass** recommendation. **Senator Heider** seconded the motion. The motion carried by **voice vote**. Vice Chairman Johnson will be the floor sponsor.

**GUBERNATORIAL APPOINTMENT:** **James Yost** said he was reappointed to the Northwest Power and Conservation Council (Council) for a three-year term and noted his 12-year tenure on the Council. **Mr. Yost** said the Council is developing a five-year power action plan for the Northwest to be completed by late summer. The plan includes Washington, Oregon, Montana, and Idaho on how to direct activities of the Bonneville Power Administration. The Council completed the Fish and Wildlife program, which will be incorporated into the power plan as required by the Northwest Power Act of 1980.

**DISCUSSION:** **Senator Stennett** said she wanted to know more about the power action plan. **Mr. Yost** said the circumstances the Council members find themselves in is unique this year. With trying to retire coal and with very little favor for natural gas, the region has moved extensively toward renewable energy sources like solar and wind. **Mr. Yost** stated for reliability, renewables have to be overbuilt and that puts energy efficiency at a higher cost than the renewables. The problem the Council is facing is capacity and reliability.

**Senator Stennett** asked about capacity and the ability for storage. **Mr. Yost** replied that it will be either pumped storage, which is limited, or batteries. **Senator Stennett** asked Mr. Yost what he would prefer to see in the power plan. **Mr. Yost** said he is supportive of renewables, but if the Northwest has to build six to eight times the amount of renewables required for reliability, it would become very expensive. The people who have invested in those renewables will be curtailed during the day and then it is not economical for them. He also has some concerns about the financing. **Mr. Yost** said his position has been that a balanced system is needed where there is reliability and then use renewables when they are available.

**Senator Stennett** inquired about the Columbia River Treaty, for which Mr. Yost is advocating for Idaho. **Mr. Yost** said there had not been any recent meetings between the United States and Canada, but some sub groups have had discussions.

**Senator Siddoway** asked if the Council would have a role in the studies if anything comes of Representative Simpson's proposal to remove the dams. **Mr. Yost** replied that two years ago, the Council was asked about power replacement options if there was not hydro power generated at the four lower Snake River dams. The Council indicated they needed to finish the power plant, then could shift funding and staff to do the modeling and studies required to figure out what replacement costs would be. **Senator Siddoway** inquired about what necessary infrastructure would be needed if the dams were removed. **Mr. Yost** said the Council only deals with power and there are a lot of other issues that would have to be reviewed. The three main ones are power and energy replacement, transportation, and irrigation.

**Vice Chairman Johnson** thanked Mr. Yost for his comments to the Committee and for his service to Idaho. He said voting will be held next Monday.

#### **S 1090**

**An Act to Remove the Responsibility of the Attorney General From the Department of Lands.** **Senator Harris** presented **S 1090** and said this legislation removes the Attorney General's responsibility of providing legal representation to the Idaho Department of Lands (IDL). **Senator Harris** said the Attorney General is one of five constitutional officers who sit on the Land Board that is charged with managing more than 2.5 million acres of State endowment trust lands in Idaho. In addition to being a member of the Land Board, the Attorney General provides legal counsel to IDL. **Senator Harris** said this is viewed as a conflict of interest and consequently, there is some distrust among the public.

**Senator Harris** discussed the fiscal note. IDL has a budget for legal counsel set at \$400,000. The Attorney General's office receives \$382,311 annually, of that amount, to offset the cost of providing legal counsel to IDL. **S 1090** would allow IDL to secure their own attorneys when the need arises at a cost of \$250 per hour.

#### **DISCUSSION:**

**Senator Stennett** wanted to know the source and need for this bill. **Senator Harris** replied it was his bill. He perceives it as a conflict of interest. **Senator Heider** questioned the cost and wondered if it was worth the change.

#### **TESTIMONY:**

**Vice Chairman Johnson** said he had received written testimony from Mr. Bruce Smith, a retired natural resource attorney for 30 years, requesting that his testimony be read into the record (Attachment 1) and the Vice Chairman obliged. Mr. Smith, opposed **S 1090**. He stated the bill is likely unconstitutional and is based mostly on speculation, conjecture, and misunderstanding of how the Land Board and IDL operates.

**Darrell Early**, Natural Resources Division Chief, Office of the Attorney General, said the Attorney General does not normally comment on legislation that is pending before the Senate or the House. This proposed legislation has direct impacts upon the office of the Attorney General and upon the State Board of Land Commissioners (Land Board), of which the Attorney General is a member. For that reason, the Attorney General asked him to be here today to express on his behalf his opposition to this proposed legislation. **Mr. Early** said it was his hope that his comments will clarify there is no conflict of interest between the Attorney General's role on the Land Board and the supervision of the attorneys that represent IDL.

**Mr. Early** stated the Attorney General's Office has 121 attorneys, with three that are permanently assigned and retained by IDL. All have specialized experience in any number of areas and all those services are available to IDL. **Mr. Early** explained the roles of the assigned attorneys. One is a specialist in real estate land transactions, another handles litigation for fire cost recovery, and another provides administrative law support on issues like encroachment permits on navigable lakes, fire protection, and related services.

**Mr. Early** said they provide legal advice on all matters related to the agency's actions. IDL manages 2.5 million acres of land surface and 3.4 million acres of mineral reserves within the State of Idaho. It has 303 full-time employees and 223 temporary or seasonal employees. IDL is a business and it is charged by the Constitution with making money for the endowments and that involves any number of business transactions on a daily basis throughout the year. IDL is also a regulatory agency with significant regulatory responsibilities for navigational encroachments, mine reclamation, forest protection, fire protection, and associated land management activities. As a government agency, IDL has to comply with statutes, constitutional mandates, and the Administrative Procedures Act.

**Mr. Early** said the scope of the work done by the Attorney General's Office is broad and specialized, and cannot be obtained on the market readily, and the experience they bring to this department is invaluable. **Mr. Early** indicated when deputies in the Attorney General's Office are hired, they are given one direction from the Attorney General: to provide objective, fair, timely, and accurate legal advice to their clients. In closing, **Mr. Early** said their job is to make sure the Director of IDL and the Land Board stay within the law.

**Jonathan Oppenheimer**, External Relations Director, Idaho Conservation League (ICL), testified in opposition to **S 1090** via Zoom. He said ICL is concerned that this legislation may interfere with the activities of IDL. **Mr. Oppenheimer** also said he does not see a conflict of interest associated with the representation of services that the Attorney General's Office provides to IDL. Another issue that Mr. Oppenheimer noted is the fiscal note, which significantly underestimates the cost to provide legal counsel.

**Mr. Oppenheimer** provided by email an Attorney General's opinion relating to H 118, S 1090, and H 101 which said all three bills raise serious constitutional concerns because they interfere with the Attorney General's core function of protecting the State's legal interests. **Mr. Oppenheimer** noted that in 2015, the Office of Performance Evaluations generally affirmed that the services that were provided by the Attorney General were a good deal for the Idaho taxpayers. He suggested that if there are concerns, the Legislature's Office of Performance Evaluations determine whether a more efficient system could be pursued.

**Mark Radford**, Idaho Falls, Idaho, business owner and cattle rancher, testified in opposition to **S 1090**. He said the fiscal note that Senator Harris presented is inaccurate, as the \$250 per hour charge is not even close to the actual charge. **Mr. Radford** also expressed concern over the hiring of independent lawyers who could charge any amount. He also said the bill did not include a budget.

**Senator Stennett** asked Dustin Miller, Director, IDL, if he had any discussion with the sponsor of the bill. **Mr. Miller** replied that he had not had any discussion with Senator Harris. **Senator Stennett** then inquired if IDL was having any difficulty with the way the Attorney General was representing IDL's interests. **Mr. Miller** said no, they were not. **Senator Stennett** then said it was her understanding that IDL has a degree of autonomy by the Constitution in order to do what their fiduciary or endowment responsibilities are. Aside from the Land Board, is that correct? **Mr. Miller** replied it was correct. He said the Land Board sets the policy for the department and it is his job as the director to focus on implementation of those directives.

**Senator Stennett's** last question was inquiring if Mr. Miller, as the director of IDL, could ever find the equivalent expertise, the diversity, that was mentioned by Mr. Early from outside counsel. **Mr. Miller** stated it would be very difficult to find that level of expertise.

**Vice Chairman Johnson** asked Mr. Early if there is in current statute an exemption that an agency may apply for so that they don't have to use the Attorney General's staff. **Mr. Early** responded by saying the major departments of the state government receive their legal services from the office of the Attorney General. There are a small number of very limited exceptions where they are allowed to retain or seek their own counsel.

**Senator Harris** closed the discussion by asking why a board of directors would have an attorney who also represents the company. He said that creates a conflict and asked that the bill be sent to the floor with a **do pass** recommendation.

**MOTION:**

**Senator Patrick** moved that **S 1090** be sent to the floor with a **do pass** recommendation. **Senator Siddoway** seconded the motion.

**DISCUSSION:**

**Senator Heider** quoted an old saying: "If it ain't broke, don't fix it." He said in this particular situation, the system is not broken, and he will be voting no. **Senator Siddoway** said the bill states that the Attorney General shall not represent or provide legal service to IDL. For that reason, he supports the bill. **Vice Chairman Johnson** indicated he would be more comfortable supporting the bill if the Office of Performance Evaluation studied what appears to be a conflict of interest and also, Committee members expressed some very valid concerns. **Senator Rabe** said she did not see clarity in the language and also has some concerns about its legality. That could cause additional litigation and expenses.

**ROLL CALL  
VOTE:**

**Vice Chairman Johnson** called for a roll call vote on the motion. **Senators Van Orden, Patrick, and Siddoway** voted aye. **Senators Rabe, Stennett, Heider, and Vice Chairman Johnson** voted nay. Chairman Vick and Senator Guthrie were absent. The motion failed.

**ADJOURNED:**

There being no further business at this time, **Vice Chairman Johnson** adjourned the meeting at 3:00 p.m.

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Senator Johnson  
Vice Chair

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Juanita Budell  
Secretary