Idaho Department of Lands
Agency Guidance Document
Public Trust Program
Boise Staff Office
(208) 334-0200
comments@idl.idaho.gov

Disclaimer of Interest Procedures

In accordance with Executive Order 2020-02, Transparency in Agency Guidance Documents, guidance documents promulgated by the department are not new laws. They represent an interpretation of existing law, except as authorized by Idaho Code or incorporated into a contract.

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Section 5 – Legal Authorities

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I. Authorities and Statutes

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II. Case Law

Pollard v. Hagen, 44 U.S. 212, (1844) (All new states enter the union under equal footing. Therefore, all of the states own the lands beneath the navigable rivers and lakes.)

Shively v. Bowlby, 152 U.S. 1, (1894) (State obtained title to lands below ordinary high water mark of navigable bodies of water at statehood.)

Illinois Central Railway Co. v. Illinois, 146 U.S. 387 (1892) (State as administrator of trust of beds of navigable bodies of water does not have power to abdicate its role as trustee in favor of private parties.)

Scott v. Lattig, 227 U.S. 229, 33 S.Ct. 242 (1913) (Snake River is navigable and state owns the bed. This case reaffirmed the equal footing doctrine in Idaho.)

Callahan v. Price, 26 Idaho 745, 146 P.2d 732 (1915) (Salmon River is navigable, and establishes the idea of the public trust doctrine in Idaho.)

Northern Pacific RR Co. v. Hirzel, 29 Idaho 438, 161 P.2d 854 (1916) (Snake and Clearwater Rivers are navigable for title purposes, and "public lands" in article 9, section 8 of the Idaho Constitution does not include the beds of navigable waterways.)

Burrus v. Rutledge, 34 Idaho 606, 202 P.2d 1067 (1921) (Public has rights on water despite ownership of lands beneath the water.)

Smith v. Long, 76 Idaho 265, 281 P.2d 483 (1955) (The meander line is not intended as either a boundary line or a determination of the ordinary high water mark.)

Hayden Lake Protective Association, Inc. v. Dalton Gardens Irrigation District et al, Kootenai County, Judge Spear (1962) (Ordinary high water mark of Hayden Lake is 2239 feet above sea level.)

Rutledge v. State, 94 Idaho 121,482 P.2d 515 (1971) (Formerly submerged lands of the State may be acquired by adverse possession.)

West v. Smith, 95 Idaho 550, 511 P.2d 1326 (1973) (Riparian landowners have unobstructed access to the navigable waters along all points of riparian land.)

Southern Idaho Fish and Game v. Picabo Livestock, 96 Idaho 360, 528 P.2d 1295 (1974) (Test for navigability for public right of way; Court decision essentially codified in § 36-1601.)

Ritter v. Standal, 98 Idaho 446, 566 P.2d 769 (1977) (Authority of State Board of Land Commissioners over navigable waters is affirmed.)

Heckman Ranches, Inc. v. State, 99 Idaho 793, 589 P.2d 540 (1979) (Determining ordinary high water mark, agricultural purposes does not mean grazing.)

Kootenai Environmental Alliance, Inc., Appellant v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085 (1983) (Public Trust Doctrine is affirmed and further defined in Idaho.)

Idaho Forest Industries, Inc. v. State, 112 Idaho 512, 733 P.2d 733 (1987) (Public trust arises only in land below natural high water mark of navigable waters.)

Erickson v. State, 132 Idaho 208, 970 P.2d 1 (1998) (State is the presumed owner of property below the ordinary high water mark, so burden of proof for an adverse claim of ownership is upon the adjacent upland owner.)

Idaho v. United States, 533 U.S. 262, 121 S.Ct. 2135 U.S. (2001) (Coeur d'Alene tribe owns the lower one-third of Lake Coeur d'Alene and the St. Joe River inside the reservation boundaries.)

City of Coeur d'Alene v. Lake Coeur d'Alene Property Owners Association et al, 143 Idaho 443, 147 P.3d 75 (2006) (Elevation of Lake Coeur d'Alene is no higher than 2128 at all points on the lake, and public may use the lakebed below this elevation.)

III. Land Board Directives

September 11, 1984 Department shall issue disclaimers of interest instead of a quit claim deed for formerly submerged lands that are now above the ordinary high water mark (Attachment 1).

October 21, 1997 The fee for a disclaimer of interest is the greater of $600 or the actual cost of processing the application. (Attachment 2).

June 12, 2007 Department shall reserve a 25-foot wide public use right-of-way along navigable rivers when issuing Disclaimers of Interest, while allowing the Department to propose alternatives to the Land Board due to unusual circumstances. Alternatives to the 25-foot wide public use right- of-way will be presented to the Land Board for approval (Attachment 3).

IV. Attorney General Opinions

Attorney General Opinion 07-1, Clarifies state's role in managing public trust lands, the legal basis for that role, and how it applies to the 25-foot public use easement reserved in disclaimers of interest (Attachment 4).

V. Interagency Agreements

Memorandum of Understanding, Idaho Department of Water Resources and Idaho Department of Lands (Attachment 5).

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Section 10 – Navigable Waters Ownership

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I. Ownership and Title

A. Navigability for Title

The State of Idaho owns the beds and banks of all navigable waters below the Ordinary High Water Mark (OHWM), assuming the waterways were navigable at the time of statehood (Attachment 6). These sovereign lands were acquired by virtue of the Equal Footing Doctrine established by the Pollard v. Hagen case and included in the Idaho Admissions Act. Navigable waters are administered by the Idaho Department of Lands (IDL) for the benefit of the public in accordance with the Public Trust Doctrine. The Shively v.Bowlby case established that states obtain title to navigable waters at statehood. The Scott v. Lattig and Callahan v. Price cases established the Equal Footing Doctrine and the Public Trust Doctrine in Idaho. The Public Trust Doctrine was further defined in Kootenai Environmental Alliance , Inc. v. Panhandle Yacht Club, Inc. (KEA), and is now in statute as Idaho Code § 58-12. The courts, however, are the final arbiters of the Public Trust Doctrine (KEA). All lakes and streams that are navigable for title purposes are also navigable as a right-of-way. While IDL has a list of waterways considered navigable, the list is not set in stone. The criteria for navigable waters includes its use for commerce or navigation at or prior to statehood. Only the Land Board, the courts, or a combination of the two, have the authority to change the list of navigable waterways.

The concept of public trust lands derives from a law instituted by the Roman Emperor Justinian in 530 A.D. The law stated that running water, the sea, and consequently the shores of the sea were common to all mankind. This concept was carried forward into English Law and then to the original 13 states, or colonies at the time. Idaho Code § 73-116 incorporates

the Common Law of England into Idaho Code. The KEA case used common law principles in discussing the Public Trust Doctrine.

B. Meander Lines

Meander lines are shown on the land records system as a heavy, dashed, blue line. They are from the original surveys of navigable waters. These surveys were conducted from about 1867 to the early 1900's. Many surveys were done by the United States General Land Office (GLO).

These survey lines are general representations of the meandering nature of the shorelines, thus the term meander lines. They are also called GLO lines. The meander lines also allowed upland lot sizes to be determined for the public land surveys needed prior to orderly settlement. The Government Lots were thus established along navigable waters. Meander lines are not ownership lines, as established in the Smith v.Long case. The Bureau of Land Management (BLM) has copies of the original surveys and survey notes that are often helpful for studying the GLO lines. The state only owns those lands below the current ordinary high water mark of navigable streams. Generally speaking, the ownership moves with the rivers, and the actual ordinary high water mark is the ownership boundary.

C. Navigability for Right-of-Way

Some streams were declared navigable as a right-of-way after statehood. The State of Idaho does not claim ownership of the beds and banks of these navigable waters, but they may be navigated by the public without interference from the underlying and adjacent landowners. This is affirmed by the Burrus v. Rutledge case. Eagle Creek (Shoshone County), Pritchard Creek (Shoshone County), and Silver Creek (Blaine County) are the only three streams with this designation (Attachment 6), and all three are a result of legal actions. Southern Idaho Fish and Game v. Picabo Livestock is the landmark case for navigability as a right of way, and it was later placed in statute as Idaho Code § 36-1601. Further designations may only be done by order of the State Board of Land Commissioners or by court order.

II. Movements of Navigable Waters

Navigable waters, especially rivers, have changed locations since statehood and since the original meander lines were surveyed. Navigable waters move either through accretion or avulsion. The law presumes accretion unless substantive evidence of avulsion can be provided. Different types of rivers and different geological settings influence how and when rivers move around, so the breaking point between accretion and avulsion cannot be defined with precision.

A. Accretion

Accretion is a natural movement that generally occurs as material is deposited on the inside of a river bed and material is eroded on the outside of a river bend. The ownership of the river and adjacent uplands moves with the river through accretion.

B. Avulsion

Avulsion is a sudden change of course in a river, often from a catastrophic flood. The old channel is abandoned, and a new channel is cut through former upland areas. A remnant of upland should exist between the old and new channels. The ownership lines do not change if

avulsion occurs, so the state does not have clear title to the new segment of river channel. Claims of avulsion have to be dealt with on a case by case basis.

III. Clearing Title on, or Adjacent to, Navigable Waters

Two methods exist for a land owner to clear title to property when the location of the meander lines and the actual OHWM of a navigable lake or stream are different:

1. Quiet Title action through the courts; and
2. Disclaimer of Interest from the Idaho Department of Lands (Attachment 7). See Section 15.

The reason for the difference in location may be movement of the river or inaccuracies in the establishment of the meander lines. Either reason should be handled the same. IDL prefers to clear up title issues through disclaimers of interest when possible. This preference, however, should not result in IDL approving a Disclaimer of Interest that is not sufficiently protective of the public trust. The Illinois Central Railway Co. v. Illinois established that the state cannot abdicate its role as public trustee in favor of private parties.

IV. Islands

Islands create some of the more interesting situations that can arise concerning ownership of navigable rivers. An island in this discussion is limited to an area that is above the OHWM but is surrounded by riverbed. Gravel or sand bars that are present during low flow, but are covered during ordinary high water, are not islands because they are completely below the OHWM. Islands are classified as two different types, and how they are treated during the disclaimer process will vary accordingly.

A. Islands Present Before Statehood

If an island was present before statehood then it usually belongs to the federal government. These islands should be meandered or described in the original GLO surveys. The Bureau of Land Management is often the land management agency in charge of such islands. Some islands in the Snake, Boise, and Payette Rivers are still owned by the BLM. If the island was large enough to be settled, like Eagle Island on the Boise River, then the island has become private land through various federal homestead or settlement acts.

B. Islands Formed After Statehood

If an island formed after statehood, then it belongs to the state unless one of two things has occurred. One exception is when the river moves through avulsion and creates an island. As described earlier, ownership lines do not change if avulsion occurs. A newly created island would continue to be owned by the prior upland land owner. The river may simply extend a new arm out and around a parcel of former upland. The other exception is if a landowner has been paying taxes on an island and either occupying it or farming it for a number of years. This latter exception should be carefully applied. Paying taxes alone does not guarantee private ownership. Using an island for a private hunting preserve does not constitute occupancy.

Growing crops for many years indicates that private ownership is a possibility. Generally speaking, this situation may come up when the river actually did move through avulsion. Since the state's interest is mainly the area below the OHWM, gaining clear title and pedestrian easements may be worth ceding ownership of the island and avoiding a legal fight. Consultation with the Program Manager is advised.

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Section 15 – Processing Disclaimers of Interest

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I. Why Disclaimers of Interest Are Used

A. Through the disclaimer process, IDL has an opportunity to determine where the state ownership of navigable waters is located. As established in the Rutledge v. State case, former public trust lands are subject to adverse possession by adjacent upland landowners if the public trust lands have lost their public trust values. Essentially, if the public trust lands are no longer within or below the ordinary high water mark (OHWM), then they may not be public trust lands anymore. The title to these lands is clouded, and the current location of the public trust lands must be identified in order to clear the title to the adjacent uplands and the river.

B. Disclaimers do not have the expense and uncertainty of adverse possession or quiet title actions, which is why IDL prefers to use disclaimers. Deeds and quit claim deeds were issued in the past and can be found on the land records system. Since IDL does not necessarily own the lands, however, that is no longer considered an appropriate method for clearing the titles. It also brings into question the Land Board's requirement to auction land instead of just disposing of it. The doctrine of accretion, reliction, and avulsion governs ownership along rivers and only adjacent landowners generally have a legal claim to uplands that have been formed through accretion. The Land Board directed IDL to use disclaimers on September 11, 1984 (Attachment 1).

II. Tools Used for Disclaimers

A. Disclaimer of Uplands to Adjacent Upland Land Owners

Uplands that lie within the original surveyed meander lines, but above the current OHWM, may be disclaimed from IDL to the legal owner of the adjacent upland property. If two or more upland owners claim the same accretion land, they must sort out their differences before IDL will process a disclaimer. A written letter, quit claim deed, or other documentation is needed to ensure that the parties involved have reached agreement on the new boundaries. Generally, the ¼-¼ lot lines are extended across the accretion land to divide it between adjacent landowners. In some situations, a boundary line perpendicular to the river is a more equitable solution. When an entire former river channel is surrounded by two different landowners, splitting the accretion land down the middle may be the best solution. While department personnel can offer their opinion on the most logical division of accretion land, the department must not take sides in any dispute between upland owners. The department should only get involved if a landowner attempts to claim ownership of land below the OHWM.

B. Acquired Disclaimer of Interest

Portions of the current river below the current OHWM that lie outside the original meander line will be disclaimed from the adjacent upland landowner to the state. This is done in conjunction with the other type of disclaimer described above.

C. 25-foot Public Easements

Since statehood, alterations of navigable waters have resulted from artificial means such as dikes, fill, irrigation diversions, and dams. These actions have diminished the public trust lands, and the identification of the OHWM is not a straightforward task. The IDL will, however, often use the existing OHWM providing the requesting party will grant a 25- foot public use right of way along and adjacent to the existing ordinary high water mark along rivers (Attachment 2). The reservation of this easement is also allowed by Idaho Code § 58-119A. This easement is generally not reserved along navigable lakes. It is also generally not reserved along rivers with an artificial high water mark due to a downstream dam. IDL must be the recipient of the easement, pursuant to Attorney General Opinion No. 07-1.

The easement may differ in dimension or location, or it may not be reserved at all in certain circumstances. These exceptions must be carefully weighed against the needs of the public trust, and should be in the minority of situations. Moving greenbelts away from the river for the convenience of a developer is not sufficient reason for diminishing the public trust. Any deviation from the 25-foot easement must be thoroughly documented by the Area Office and this information must be included in the Land Board Memo.

Although landowners often argue that public trails past their houses will increase crime and devalue their properties, numerous studies cited by the National Park Service, other states and municipalities, and other governmental and private entities have shown that the opposite is true. Well designed and maintained trail systems increase nearby property values and have lower crime rates than the adjacent urban areas.

D. Conservation Easements

These easements can sometimes be used to settle disagreements over where the OHWM is located, or other issues associated with a disclaimer. For example, the easement could cover an area next to the river that exhibits public trust characteristics, such as a cottonwood grove, pond, slough, or wetland, and evidence regarding the location of the OHWM is unclear. Under a conservation easement, the land remains privately owned, but the easement requires that the land remain in a natural condition. Public access is often allowed, albeit from the 25-foot easement and not across the landowners undisputed uplands. IDL must be the recipient of the easement, pursuant to Attorney General Opinion No. 07-1. These easements are not very common, and consultation with the Program Manager is suggested.

III. Disclaimer Requests

A. Identify Supervisory Area

Requesting parties should be directed to contact the appropriate IDL Supervisory Area Office to determine if the subject property qualifies for a disclaimer. Disclaimers are initiated by landowners and are voluntary. If the property had a disclaimer in the past, in most cases a new disclaimer is not necessary. The wording of the prior disclaimer should specifically state that the ownership lines will move with the river in the future.

B. Application

If Area personnel determine a subject land parcel qualifies for a disclaimer of interest, and the requesting party is interested in pursuing the disclaimer, the Area will supply them with an Application For Disclaimer of Interest. No other work should be done on the disclaimer until a completed application and the nonrefundable application fee of $300 is received by the Area. In most cases, a site visit is not needed prior to receiving a completed application and the application fee. The name on the application must be the owner of record for the upland property.

C. Time Recording

After the completed form and $300 application fee are received, the Area will place copies of the form and deposit slip in the LMR Document Exchange and request a disclaimer number and a project number. All time spent on the disclaimer will then be coded on employee time sheets to the project number under the Public Trust PCA. The project

number will be used through the end of the disclaimer process. The total time spent will be used to help determine any processing costs due by the requestor in excess of the base $600 fee ($300 application fee and minimum $300 final processing fee).

D. Preliminary Office Review

Area personnel will examine the IDL land records and other available resources such as aerial photos, prior recorded surveys, and adjacent disclaimers. An office meeting with the applicant should be held to review the data and make a preliminary determination. This determination should include uplands that IDL would disclaim to the applicant, riverbed that the applicant would disclaim to IDL, the 25-foot public use right-of-way the applicant would grant to IDL, and the fees must also be discussed during this meeting. All of the requesting party's contiguous land adjacent to the river should be included in the disclaimer process.

The requesting party must be informed that the subject property will require a survey by a licensed surveyor, and an IDL representative must determine the location of the OHWM mark.

E. Field Survey of the OHWM

An IDL representative will visit the site with the surveyor to establish the OHWM. The angle points where the OHWM survey begins and ends and where the OHWM changes bearing are the only points that need to be surveyed. The requesting party may accompany the surveyor, but they are not required to be present. The OHWM can be marked with stakes or flagging during this site visit, and the surveyor can follow up independently with the actual survey and placement of monuments or pins. See Section 30 of these Procedures for more details concerning the identification of the OHWM.

F. Survey Requirements

The surveyor will need to prepare a record of survey, and a metes and bounds description, which show:

1. The present OHWM and the original meander line as surveyed by the GLO and tied to the nearest section or quarter corner.
2. Upland areas within the original meander lines to be disclaimed from the state to the property owner. The size of the area in acres must be determined;
3. Current riverbed outside the original meander lines to be disclaimed from the property owner to the state. If possible, the acres to be acquired by the state should be determined;
4. 25-foot wide public use right-of-way dedicated to IDL;
5. Conservation easements dedicated to IDL;

IV. Final Application Package

In addition to the application form and initial $300 fee, a complete final application package for a disclaimer of interest will be reviewed by Area staff and must contain the following:

A. Letter of Request

A letter of request for the Disclaimer of Interest including the acreage of accretion land requested and the exact name and address requested to appear on the disclaimer. This must be the owner of record for the adjacent uplands;

B. Survey and Legal Description

A full size copy of the record of survey and a copy of the legal descriptions as identified in Subsection III.F, Survey Requirements. A digital copy of the legal descriptions (MS Word) and survey (PDF) will be required;

C. Tax Payment History

Tax payment history for the last five years, if available;

D. Proof of Ownership

Proof of ownership of the upland property adjacent to the area to be disclaimed. A copy of the last deed of record is preferable.

V. Approval/Denial Process

A. Area Approval or Rejection

Area personnel should carefully review the survey for discrepancies between what was determined on the ground and what the survey indicates. Area personnel will then submit legal descriptions to Land Records staff for accuracy validation. Survey errors or inaccuracies must be corrected by the applicant prior to the application moving forward. Area personnel will send a letter to the applicant requesting corrections or additional information required.

Once the Area has determined that an application package is complete and contains all the information in Subsection IV, they will prepare a draft Land Board Memo with attachments and draft the disclaimer and/or easement documents. The application package, draft documents, and proof of the $300 application fee will then be forwarded to the Program Manager.

B. Approval/Review by Program Manager

The Program Manager will review the disclaimer application package and draft documents for consistency with the Land Board policy and these procedures. The project number will also be used by the Program Manager for time reporting. The Program Manager will then

schedule the disclaimer for the next available Land Board meeting. The Program Manager will request from Fiscal a total of the time and cost spent on the project number to help determine what the final processing fee should be. Four hours of the Technical Records Specialist's time should be added for final document preparation, mailing, signatures, and recordation. The final amount shall be inserted into the Board Memo. The total minimum cost of a disclaimer is $600. Since a $300 application fee has already been paid, the final processing fee will be a minimum of $300.

If the disclaimer application package is complete, the Program Manager will forward it to the Director's staff for inclusion on the Land Board agenda.

C. Bureau Action

Following approval by the Land Board, the Program Manager will request that the Area obtain a recorded Record of Survey to include as an attachment to the disclaimer(s) and/or easement. The Program Manager will then submit the application package to the Technical Records Specialist for final execution. The Technical Records Specialist will use the project code for time sheet entry. The Technical Records Specialist will then include the disclaimer in the action log and send two original acquired easements, two originals of land being disclaimed to IDL if applicable, and a draft of the disclaimer from IDL to the applicant. All original documents must be signed and notarized by the applicant and returned to IDL along with the final processing fee as per the approved Board Memo,

After the signed documents and processing fee are received by IDL the two original documents will be sent to the approving authorities for signature.

The fully signed documents will then be recorded by The Technical Records Specialist in the county where the disclaimer property is located. If more than one document has been signed, all the documents must be recorded simultaneously. Following recordation, support staff will scan for land records updating. One original will be returned to the applicant, and the other will be retained by the Bureau. A copy of the final documents will be forwarded to the Area office.

The Technical Records Specialist will close out the project number and give a final summary to the Program Manager electronically. The Program Manager will use the compiled information on Disclaimers to adjust these procedures or provide training as needed.

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Section 30 – Identifying the Ordinary High-Water Mark

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I. Definitions

Many terms are used to describe the boundaries of state ownership on navigable waters, but "ordinary high water mark" (OHWM) is the term that must be consistently used when discussing disclaimers. This is not the water level in summer. It is not the "average" high water mark. It is not generally considered a flood level unless development has encroached on the river. It can only be firmly established by examining evidence in the field. The Idaho Supreme Court in Heckman Ranches, Inc. v. State defined the OHWM as "**the line which the water impresses upon the soil for sufficient period of time to deprive the soil of its vegetation and destroy its value for agricultural purposes".** The Heckman Ranches case defined agricultural purposes used in this context as raising agricultural crops and not just grazing livestock. This definition of OHWM is also incorporated into similar definitions in Idaho Code and the administrative rules:

> "The high water elevation in a lake over a period of years, uninfluenced by man-made dams or works, at which elevation the water impresses a line on the soil by covering it for sufficient periods to deprive the soil of its vegetation and destroy its value for agricultural purposes." (Idaho Code § 58-1302(c), and IDAPA 20.03.04.010.23)

> "… the line that water impresses on the soil by covering it for sufficient periods to deprive the soil of its vegetation and destroy its value for agricultural purposes. When the soil, configuration of the surface, or vegetation has been altered by man's activity, the natural or ordinary high water mark shall be located where it would have been if no alteration had occurred." (Idaho Code § 58-1202(2))

The term "natural or ordinary high water mark" as herein used shall be defined to be the line which the water impresses on the soil by covering it for sufficient periods to deprive the soil of its vegetation and destroy its value for agricultural purposes. (Idaho Code § 58-104(9))

II. Identifying the Ordinary High Water Mark

An important concept to remember is that the OHWM is not strictly determined by any one thing. It is determined by a preponderance of evidence, which can be quite varied on rivers. This evidence includes:

1. Agricultural use, as in growing crops, often indicates land is above the OHWM.

2. Sandy or gravelly areas without well developed A and B soil horizons can suggest the area is below the OHWM. Steep rivers in a canyon will often have a scour line on the banks that has stripped the soils and exposed mostly rock. The OHWM is often the highest scour line, as per the definitions in statute and rule.

3. Small, or large, steps in the riverbank may mark the OHWM.

4. Vegetation, especially naturally occurring perennial vegetation, may or may not be useful. Grasses and small willows will often grow all the way down to the low water line, and thus may not be very useful. Plants associated with upland environments may be helpful, but ponderosa pines have been observed happily growing below the ordinary high water mark of large rivers. The river may not stay at the high stage long enough to drown the trees. A large number and variety of upland plants, however, may indicate the area is above the OHWM. Annuals are generally not very indicative.

   In a straight, fast stretch of river, the OHWM may often be located near the base of mature cottonwoods, willow trees, or other large deciduous trees. In backwater areas or wide, slow stretches, many large trees may be located below the OHWM. A large number of small cottonwood seedlings or saplings may indicate an area is below the OHWM. Research into cottonwood regeneration indicates that these trees most often reproduce in sandy areas exposed by running water.

5. Lichen lines on the trunks of larger trees, when present, may indicate water levels that are sustained during high water. If high water persists long enough, it will kill off the submerged lichen on the trunk. After the water recedes, a discernable horizontal line may be left on the tree trunk. These lines can also sometimes be seen on fence posts or other objects with lichen. The lines are especially helpful during the summer following an ordinary high water flow.

6. Moss on rocks or riprap along a shoreline may also have a discernable line created by consistent levels of high water. Bridge piers or abutments can also be used. The moss will grow where the rock or concrete has been submerged long enough for the moss to grow. The moss may dry out between inundations, but it is just dormant. The moss often stops growing at a depth where the scouring action is too great for it to stay put, or where the water depths are too great for it to grow. More than one moss line may be present. The

OHWM may be one of the higher moss lines, and not one of the lower moss lines.

7. Flood debris is an important line of evidence. Grass, driftwood, sticks, garbage, and other flotsam often accumulate at the OHWM. Extreme flood events may, however, carry debris higher than the OHWM.

8. Fences may also be considered evidence of the OHWM, especially old fence lines. Fences are often put up to define ownership boundaries, and they are often located at the edge of arable fields near the river.

9. If an easement will be part of the disclaimer package, then the location of the OHWM may be influenced by where a path could reasonably be constructed. The Public Trust Doctrine partly governs the decisions regarding the OHWM.

10. The top of an old dike could be a good place to locate the OHWM, and then the dike can be used for a greenbelt or pedestrian access. Newly constructed dikes could be ignored, as per Idaho Code § 58-1202(2).

11. Anecdotal evidence can sometimes be helpful. Local residents may have a good idea of how high the river usually gets.

12. Flow gauge records can be used, but correlation between the OHWM at a disclaimer location and a specific, preferably nearby, gauging station would be needed. The gauge should be close to the area of interest so the two locations will be more likely to experience the same high water timing and conditions. If major tributaries are between the disclaimer location and the gauge, then the two locations could have different high flow timing or conditions. The best data is available at http://waterdata.usgs.gov/id/nwis/current?type=flow. Data tables can be downloaded into excel and analyzed to determine what appears to be an ordinary high flow. The highest daily peak flow (peak streamflow) in a given year is the best data to use. If direct observations of rivers can be made at a specific location and at the suspected ordinary high flows, then the flow recorded from that gauge and the OHWM at that location can be correlated. The flows that correlate to an OHWM on Idaho rivers often have a recurrence interval of four (4) to seven (7) years.

13. Some dam controlled rivers, such as the Lower Boise, do have a designated discharge for ordinary high water. It is 6,500 cubic feet per second (cfs) as measured at the Glenwood Bridge. This flow was determined by the U.S. Army Corps of Engineers as the level required to maintain a free flowing channel in the Lower Boise River. It is also the level used by the Idaho Department of Water Resources for determining where Stream Channel Alteration Permits may be needed. For reference, flood stage on the Lower Boise is 7,000 cfs. The 10-year flood event is 7,200 cfs, the 50-year flood event is 11,000 cfs, and the 100-year flood event is 16,600 cfs.

14. Air photos may be used to help determine the current location of the OHWM, and the evolution of the OHWM through time. The Boise River has the best catalogue of photos. It was flown in 1996 when the river ran at the designated ordinary high water of 6,500 cfs. If flowing water covers ground in those photos, then it should probably be below the OHWM.

Standing water in fields or riparian areas, however, may or may not be below the OHWM. Most river air photos are not flown during high water, but they can still be used to identify where scouring flows appeared to exist during high water. The entire state was photographed recently with high resolution color orthophotography. These can be compared with past air photos to determine how the river is moving over time, or what encroachments may be helping the river to move. The photos can also be used to help determine if past river movements were through avulsion or accretion. If you anticipate a substantial number of disclaimer requests in the future, then you may want to consider contacting other agencies and having some photos taken at an approximation of ordinary high water. The USGS Earth Explorer website has a huge volume of aerial imagery: https://earthexplorer.usgs.gov/

15. IDL's land records system with the orthophoto overlay is an important tool for determining how the current location of the river compares with the original surveys. They also indicate what areas have already been addressed by disclaimers or quit claim deeds. These previous disclaimers could be used as starting points if they are adjacent to the parcel of interest, and if the previously marked OHWM has not moved since that disclaimer was completed. The datasheets must also be examined to determine if ownership has been handled through deeds in the past. Not all of these appear on the map view.

16. Arcview maps with GCDBs and state land records on top of recent color orthophotos are good maps to use in the field. GPS locations of angle points can later be overlaid on the same map.

17. 7.5 minute topographic maps and other maps can be useful to see topographic contours and how rivers have changed over time. They are also used for the location map in the Land Board package.

18. Previous surveys from the county recorder's office.

19. County assessor maps can also be used to gather information. These records are most helpful when determining who is eligible to acquire accretion land. County parcel boundaries and the fact that someone has paid taxes on current riverbed are not the strongest pieces of information for determining the location of the OHWM. Navigable waters are generally not subject to adverse possession, and counties will let a landowner pay taxes on anything they wish. Unless a landowner tells the county otherwise, they could pay dozens of years of taxes on land that they do not own. It does not prove ownership, and the counties do not give refunds after such mistakes are identified.

20. Public use of the area should be documented. This has been used in past court cases to justify public easements.

III. Inspection Report

An inspection report is required for inspections identifying the ordinary high water mark . This report may be needed to defend the disclaimer. Also, if the landowner chooses to not go forward

with a disclaimer, the notes can be saved for later use. It is common for these properties to change hands, and new owners often come in with a new request. Having the prior documentation on hand will save a lot of time and effort in processing the new disclaimer request. If a few years elapse between a survey of the OHWM and the submittal of a complete disclaimer package, the survey pins should be relocated in the field to make sure nothing substantive has changed. Movements of 20 feet or more within a few years in not unusual.

A. Ordinary High Water Mark

Two things should be documented:

1. The approximate location of the OHWM on an air photo or map. GPS points can be taken and then imported later onto on orthophoto base. This can then be compared with the survey when it is received. This will allow IDL to check if the location of the OHWM was changed after being flagged with the surveyor.

2. The evidence used to establish the OHWM along the property. If the landowner does not believe the OHWM was properly established, this information can be used to explain why the OHWM was established. The information can also be used, if needed, to defend IDL's decisions in a quiet title action.

B. Land Uses

Land uses of the former and current riverbed should also be documented. Improvements, pastures, croplands, irrigation influences, wetlands, and other features can help determine what should be considered upland or riverbed. Land uses can also influence what the state or the landowner wants to claim ownership of.

STATE BOARD OF LAND COMMISSIONERS

September 11, 1984

SUBJECT

Issuance of a disclaimer for non-state lands lying between meander line survey ~~or~~ and ordinary high water mark.

AUTHORITY

Idaho Code Section 6-402

DISCUSSION

The state lacks a substantive claim to title of lands lying above the ordinary high water mark and below the meander line as surveyed in the GLO surveys. The issuance of Quit Claim Deeds to these lands may indicate on the surface that the State has an interest which is being disposed of contrary to laws covering disposal of state lands. When these deeds are platted on official plats indication is also made that state interests may have been disposed of improperly.

RECOMMENDATION

The department recommends that when Quit Claim Deeds are requested for lands to which the state has no claim of title, the state issue a disclaimer instead of a Quit Claim Deed specific to those lands above the ordinary high water mark.

BOARD ACTION Approved. SEP 11 1984

STATE BOARD OF LAND COMMISSIONERS
October 21, 1997

SUBJECT

This is a request to increase the administrative fees charged for processing disclaimer of interest requests for accretion land along navigable rivers and lakes.

RECOMMENDATION

The department recommends that the minimum fees for disclaimers of interest be raised from $200.00 to $600.00 effective November 1, 1997; however, the fee could be greater if the department incurs costs in excess of $600.00. This is for non endowment land that lies between the ordinary high water mark and the meander lines established by the original surveys by the General Land Office, the predecessor to the Bureau of Land Management.

OVERVIEW

The department began issuing quitclaim deeds for accretion lands to adjacent landowners in 1975 for $10.00 which was the deed fee in use at that time. This process continued until 1984 when the department presented to the Land Board a proposal to issue disclaimers of interest rather than quitclaim deeds. This was done to clarify that the department was not conveying a property interest and, in doing so, bypassing the laws pertaining to disposal of state lands as outlined in Idaho Code, Title 58-313. This proposal was approved on September 11, 1984. The department established a policy at that time to charge a $200.00 fee or the cost of the inspection, whichever is greater. In the intervening 13 years, the largest amount an applicant paid for a disclaimer of interest was $400.00.

The department is currently developing a policy (Operations Memorandum) for processing disclaimers of interest. In doing so, it is necessary to review the existing fee structure which has been in operation for 13 years. In 1984, the only document that the department prepared was the disclaimer of interest which was issued to the applicant. Now, there is also one and, sometimes two acquired easements for unimproved pedestrian access or an improved greenbelt easement to be prepared by the department. Most of the time there is also a disclaimer of interest for a portion of the current river bed to be disclaimed to the state from the applicant which is usually prepared by department personnel. In addition, in some cases a conservation easement is also prepared in cooperation with the Idaho Fish and Game Department. That adds up to a lot more department personnel time involved in inspecting the properties and preparing the necessary documents.

The work that goes into preparing and completing a disclaimer of interest request can be fairly simple to complex depending on 1.) the number of documents to be prepared; 2.) the completeness and accuracy of the survey provided by the applicant and the surveyor; 3.) the number of individuals that have to be contacted during the preparation of the documents, i.e., the applicant, the surveyor, an attorney , a title company representative, etc. After doing some research and questioning of the usual people ordinarily involved in processing a disclaimer of interest application, it appears that the administrative costs accumulated in the processing of an average request ranges between $500.00 and $700.00.

The action the department takes in issuing these disclaimers of interest are extremely helpful to the adjacent landowner in clearing title to their property as title companies require some sort of documentation that they (the landowner) have clear title to their property before they can build on it or sell it. If the landowner had to go through a quiet title process through the court system, it would be considerably more expensive. Department staff believe the fees should be related to the costs we have in preparing the disclaimer request versus producing revenue since the properties are not endowment land. The disclaimer of interest is a much better process than a quiet title suit in the courts for clearing title to properties which the state has no property rights.

BOARD ACTION **APPROVED OCT 21 1997**

ATTACHMENTS

1. Copy of Land Board Minutes dated September 11, 1984

DFM
DFM:mh
September 30, 1997

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STATE BOARD OF LAND COMMISSIONERS
June 12, 2007
Regular Agenda

SUBJECT

Adoption of a formal policy regarding the reservation of a 25-foot wide public use right-of-way in exchange for disclaimers of interest along navigable rivers.

BACKGROUND

The State owns the beds and banks of navigable rivers below the ordinary high water mark (OHWM). The OHWM, however, is not a permanently fixed location. Many of the navigable rivers have changed course since the original meander surveys in the 19th and 20th centuries. Where the course of the river has changed and the former riverbed is now dry uplands, the land no longer retains public trust values and the State no longer has an interest in retaining title to these lands. The State should, however, protect the public trust by maintaining public access along the existing bed of the river.

Prior to September 11, 1984 the Department issued quit claim deeds for former riverbeds. On the above date the State Board of Land Commissioners (Land Board) directed the Department to issue disclaimers of interest instead of quit claim deeds when clearing title to former riverbeds. In 1986 the Department began reserving 25-foot wide public access easements along the upland side of the newly surveyed ordinary high water marks. This practice has continued on most disclaimers issued statewide. (Refer to Attachment 6, Issuance History for River Disclaimers.) Disclaimers are initiated by landowners and are voluntary. Both parties must agree on the terms of the disclaimer.

The easement reservation began along the Boise River. The popularity of the greenbelt system, and rapid growth in the 1980's, dictated that the Department attempt to protect the public trust values of the river, while simultaneously helping to clear ownership and make way for riverside development. The law governing riparian and littoral rights indicates that rivers or lakes cannot be diked, diverted, or filled in, and then claimed by an adjacent owner as private uplands. These activities have historically taken place along the Boise River and have clouded the exact location of the OHWM. In addition, dam construction upstream has altered the historic flow patterns, further complicating the establishment of the correct OHWM. Most other rivers in the State have these same issues of bank alteration and changed high water marks. These uncertainties underscore the give and take of the disclaimer process.

DISCUSSION

The Department's current practice in resolving ownership issues is to generally accept the current location of the river, as defined by the OHWM identified by Department personnel. In exchange for accepting the current location of the river, a 25-foot wide public use right-of-way isreserved to the State or a local municipality on the upland adjacent to the OHWM. This serves to protect the public trust values associated with rivers, by providing river access to the public. In some instances the easement differs in dimension or location based on site specific facts. In a few extraordinary circumstances, the easement is not reserved at all. These rare exceptions are carefully weighed by the Department against the needs of the public trust.

Land Board records reveal no indication of a specific adopted policy related to the reservation of public easements, in conjunction with disclaimers of interest, along navigable rivers. What is apparent, however, is that Land Board members from the 1980's up through the present have vigorously supported the easement reservation associated with disclaimers. Land Board members routinely ask if the easement reservation is part of the disclaimer package.

Perhaps the greatest benefit of the easement reservation process has been the establishment of a greenbelt from Lucky Peak Dam to the City of Eagle; the envy of many other western states. As title to other lands adjacent to navigable rivers are cleared up throughout Idaho, other residents can enjoy the same benefits. After 20 years of successful implementation of this practice, the Department requests that the Land Board adopt a formal policy that directs the Department to reserve a 25-foot wide public use right-of-way when issuing disclaimers of interest.

This item was last before the Land Board at the March 13, 2007 meeting (Attachment 1). The Land Board directed the Department to seek an Attorney General's opinion regarding the policy of asking for a 25-foot wide public use right-of-way from the riparian landowner, who seeks a Disclaimer of Interest on the former public trust property as a condition of the State of Idaho granting the disclaimer.

RECOMMENDATION

Consistent with the recommendation as presented at the March 13, 2007 Board meeting, direct the Department to reserve a 25-foot wide public use right-of-way along navigable rivers when issuing Disclaimers of Interest, while allowing the Department to propose alternatives to the Land Board due to unusual circumstances. Alternatives to the 25-foot wide public use right-of-way will be presented to the Land Board for approval.

BOARD ACTION

A motion was made by Attorney General Wasden to move the adoption of the suggested formal policy regarding reservation of a 25-foot wide public use right-of-way along navigable rivers. Secretary of State Ysursa seconded the motion. The motion carried on a vote of 3-2, with Governor Otter and Superintendent Luna voting nay.

ATTACHMENTS

1. March 13, 2007 Land Board Memorandum
2. March 23, 2007 Letter from Judy Peavey Derr, President, Foundation for Ada/Canyon Trail Systems
3. April 17, 2007 Letter from Tom Dale, Chair, Community Planning Association
4. May 25, 2007 Email from Brian Hoff
5. June 3, 2007 Letter from Stephanie Burgess, Meridian
6. Issuance History for River Disclaimers
7. Attorney General Opinion No. 07-1, May 7, 2007

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

ATTORNEY GENERAL OPINION NO. 07-1

To: George Bacon, Director
Idaho Department of Lands
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

INTRODUCTION

At the March 13, 2007, meeting of the State Board of Land Commissioners ("Board"), a formal Attorney General's opinion was requested regarding the legal basis for the Board's practice of requiring a 25-foot public easement in exchange for a disclaimer of the State's ownership of formerly submerged lands.

QUESTIONS PRESENTED

You ask the following questions:

1. What is the Board's role with respect to management of submerged lands?

2. What are the legal principles that establish the State's interest to lands adjacent to navigable streams?

3. What is the legal basis for the Board's long-standing practice of requiring the exchange of a 25-foot public use easement for the grant of a disclaimer of the State's interest to formerly submerged lands?

4. Does the exchange of a 25-foot public use easement for the grant of a disclaimer of the State's interest to formerly submerged lands constitute a taking of private property for a public purpose?

P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400, FAX: (208) 334-2530
Located at 700 W. Jefferson Street, Suite 210

CONCLUSIONS

1. The State of Idaho received title to the submerged lands underlying navigable water bodies below the ordinary high water mark ("OHWM") under the Equal Footing Doctrine upon statehood. Submerged lands are held in trust by the State for the benefit of the public. The Board was statutorily designated as the trustee of submerged lands within Idaho.

2. The legal principles of accretion, reliction and avulsion govern the ownership of submerged and formerly submerged lands below and adjacent to navigable waterways.

3. The legal basis for the Board's long-standing practice of requiring the exchange of a 25-foot public use easement for the grant of a disclaimer of the State's interest in formerly submerged lands is in the nature of the settlement of a private boundary dispute based upon competing proprietary claims.

4. The exchange of a 25-foot public use easement for the grant of a disclaimer of the State's interest in formerly submerged lands does not constitute a taking of private property for a public purpose without just compensation because the easement represents valuable consideration for the State's relinquishment of its claim to ownership of the parcel of land in dispute.

ANALYSIS

A. Under the Public Trust Doctrine, the Board Serves as a Trustee With a Fiduciary Responsibility to Assure Public Access to the Beds and Banks of Navigable Waterways

Under the Equal Footing Doctrine,[1] the State obtained title to the beds and banks of navigable water bodies upon its admission into the Union in 1890. The power to direct, control and dispose of submerged lands is vested in the Board pursuant to Idaho Code § 58-104(9). The State's ownership and the Board's management responsibilities are not without limitation. In Kootenai Environmental Alliance v. Panhandle Yacht Club, 105 Idaho 622, 671 P.2d 1085 (1983) ("KEA"), the Idaho Supreme Court ruled that Idaho's submerged lands are subject to the common law Public Trust Doctrine. In KEA,

[1] The Idaho Admission Act provides that Idaho was "admitted into the Union on an equal footing with the original states in all respects whatever." Idaho Admission Act, ch. 656, § 1, 26 Stat. 215 (1890). The United States Supreme Court in Shively v. Bowlby, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894), determined that one aspect of admission of a state on equal footing with the original states was the title to the beds of navigable waters below the OHWM.

the Idaho Supreme Court reviewed the common law history of the Public Trust Doctrine and its application in various other jurisdictions to synthesize the parameters of the Public Trust Doctrine to be applied in Idaho.

The Public Trust Doctrine requires that the State, through the Board, hold title to the beds and banks of navigable water bodies below the OHWM for the use and benefit of the public. 105 Idaho at 625, 671 P.2d at 1088. The beneficial uses reserved to the public historically included navigation, commerce and fishing. *Id.* More recently, courts have recognized a broader range of public uses including public recreational activities such as fishing, hunting and swimming. *Id.*[2] Courts have recognized that the public trust is dynamic and can expand with the development and recognition of new public uses. *Id.*

The core element of the State's public trust responsibility is that, as trustee on behalf of the public, the State may not abdicate its responsibility for submerged lands in favor of private parties. *Id.* Nor can the Board dispose of public trust lands unless explicitly authorized by the legislature. Under the Lake Protection Act, title 58, chapter 13, Idaho Code, the Board is limited to approving encroachments or issuing leases on the submerged lands of navigable lakes consistent with the Public Trust Doctrine. However, such encroachments must be in aid of commerce, navigation and recreation and must not substantially impair the public interest in the remaining submerged lands and waters. 105 Idaho at 626, 671 P.2d at 1089.

From Massachusetts, Wisconsin and California, the Idaho Supreme Court fashioned the remaining factors for determining whether the alienation of state-owned submerged lands violates the Public Trust Doctrine. From Massachusetts jurisprudence, the Idaho Supreme Court chose the following requirement:

> [P]ublic 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.

105 Idaho at 628, 671 P.2d at 1091.

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[2] Idaho's legislature recognized this broad scope of interests to be protected in the enactment of the Lake Protection Act, title 58, chapter 13, Idaho Code. Idaho Code § 58-1301 states in pertinent part that: "The legislature of the state of Idaho hereby declares that the public health, interest, safety and welfare requires that all encroachments upon, in or above the beds or waters of navigable lakes of the state be regulated in order that the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment."

From Wisconsin jurisprudence, the Idaho Supreme Court established that the final determination whether an alienation or impairment of state-owned submerged lands violates the Public Trust Doctrine will be made by the judiciary. 105 Idaho at 629, 671 P.2d at 1092. In so doing, the court will not supplant its judgment for that of the State, but will take a "close look" at the State's action. *Id.* In determining whether the State's action violates the public trust, the court will weigh the effect of the proposed project on the public trust resources impacted such as navigation, fishing, recreation or commerce. *Id.* The court will also look at the impact of the proposed project along with the cumulative impact of the existing impediments to full use of the public trust resource on the specific public trust resources impacted by the alienation or impairment. 105 Idaho at 629-30, 671 P.2d at 1092-93.

Examining California law, the Idaho Supreme Court determined that the allocation of public trust resources could be subject to future modification based on changed circumstances. The court determined that even where the State has appropriately allocated a public trust resource to a private use, a change in circumstances could change the validity of the allocation of that public trust resource. 105 Idaho at 631, 671 P.2d at 1094. Therefore, the grant of a private use to the State's submerged lands remains subject to the Public Trust Doctrine. *Id.* The State's alienation or impairment of the formerly submerged beds and banks must take into account the highly dynamic nature of the boundary lines along navigable rivers and the difficulty of drawing a firm boundary line. The following analysis sets forth the legal and factual complexities inherent in evaluating State ownership of the beds and banks of navigable waterways below the OHWM. These complexities add uncertainty to the Board's exercise of its fiduciary responsibility as trustee of the public trust.

B. The Ownership of the State's Public Trust Resources Cannot Easily Be Factually or Legally Ascertained

As previously noted, the State owns the beds and banks of presently or formerly submerged lands that were part of navigable waterways below the OHWM at the time the State was admitted into the Union. Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement District, 112 Idaho 512, 733 P.2d 733 (1987) ("IFI"). The location of the OHWM was established by Idaho common law in Raide v. Dollar, 34 Idaho 682, 203 P. 469 (1921). In Dollar, the court determined that:

> The high water mark of the river, not subject to tide, is the line which the river impresses on the soil by covering it for sufficient periods to deprive it of vegetation and to destroy its value for agriculture.

34 Idaho at 689, 203 P. at 471. This standard was subsequently codified at Idaho Code § 58-104(9) which provides in pertinent part:

> The term "natural or ordinary high water mark" as herein used shall be defined to be the line which the water impresses on the soil by covering it for sufficient periods to deprive the soil of its vegetation and destroy its value for agricultural purposes.

Thus, determining the State's ownership is predicated upon the physical location of the line that water impresses on the soil by covering it for sufficient periods to deprive it of vegetation at the time of statehood. Because of man's modification of river flows and intervening hydrologic events, establishment of the OHWM is highly complex and difficult.

Original government land surveys used meander lines as a surveying technique to determine the approximate acreage of upland lots abutting navigable rivers and lakes. The meander line in a government survey was used because it was virtually impossible to survey the actual OHWM along a river. Meander lines are an approximation of the OHWM along a navigable river. However, the meander line is not intended as either a boundary line or a determination of the OHWM. Smith v. Long, 76 Idaho 265, 281 P.2d 483 (1955).

An owner of riparian property may attempt to prove that the State does not own title to property because it is above the OHWM. In addition, a riparian owner may also attempt to prove that they have acquired ownership of formerly submerged lands under the theory of accretion. Accretion has been defined as the addition of riparian property by the gradual deposit, by water, of solid material causing to become dry land what was previously covered by water. Aldape v. Akins, 105 Idaho 254, 668 P.2d 130 (1983). The adjoining riparian owner acquires title to alluvial deposits between the water and the land bordering thereon. Nesbitt v. Wolfkiel, 100 Idaho 396, 398, 598 P.2d 1046, 1048 (1979). The law presumes a change in the submerged lands occurred as a result of accretion, but the presumption may be rebutted by evidence that the change that occurred was avulsive.[3] *Id.*

Formerly submerged lands of the State may also be acquired by adverse possession. Rutledge v. State, 94 Idaho 121, 482 P.2d 515 (1971). However, in order for formerly submerged lands to be adversely possessed, the lands must have lost their value

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[3] Avulsion is the sudden and perceptible loss to land by the action of water or a sudden change in the bed or the course of a stream. Joplin v. Kitchens, 87 Idaho 530, 394 P.2d 313 (1964). If avulsion is the cause of the shift in the river's bed, title remains as before the change of course. *Id.*

as a public trust resource. 94 Idaho at 123, 482 P.2d at 517. This can occur where the formerly submerged lands have dried up and been put to a public use over a long period of time. *Id.* In Rutledge, for example, the former bed of the river had been developed as a motel property. 94 Idaho at 121, 482 P.2d at 515.

There is a defense, however, to a claim of title to the formerly submerged lands under a claim of adverse possession. In IFI, Justice Huntley's concurrence[4] cited with approval the principle that man-made alterations below the OHWM will not result in the loss of public trust resources. Justice Huntley noted that the Rutledge case only addressed adverse possession resulting from natural forces without the contribution of man-made alterations to the natural river system. 112 Idaho at 521, 733 P.2d at 742. In establishing the rationale for this precedent, Justice Huntley stated that if artificial modification of river systems could result in adverse possession: "the state would be left vulnerable to surreptitious drain and fill operations which would destroy important wetlands and rob Idahoans of the associated resources and values." *Id.* Relating this precedent to the public trust obligation, Justice Huntley noted that:

> If we held otherwise, adverse claimants could accomplish by wrongful, unilateral action what the state itself could not accomplish by voluntary conveyance, namely the alienation of public trust land for purely private purposes.

Id.

C. The Board's Long-Standing Practice of Requiring the Exchange of a 25-Foot Public Use Right-of-Way for the Grant of a Disclaimer of the State's Interest to Formerly Submerged Lands is a Programmatic Means of Resolving Boundary Disputes Consistent With the Board's Fiduciary Duty to Protect Public Trust Lands

Given the complexity and expense of resolving disputes between the State and riparian owners, the Board often chooses to compromise disputes relative to the State ownership of submerged land.[5] The State's disclaimer process provides a legally

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[4] Justice Huntley's concurring opinion was joined in by Justices Donaldson and Bistline. Therefore, the concurring opinion is binding precedent.

[5] The Board does not always choose to compromise disputes regarding the ownership of claimed submerged lands. In those cases, the Board does not enter into the disclaimer process. Examples where the State has litigated its ownership of submerged lands include: Erickson v. State, 132 Idaho 208, 970 P.2d 1 (1998) (the State contested an allegation of the OHWM of Lake Coeur d'Alene below 2128'); Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement District, 112 Idaho 512, 733 P.2d 733 (1987) (the State challenged the ownership of portions of Hayden Lake); State of Idaho v. U.S.

defensible means of resolving disputed claims between the riparian owner and the Board. Claims to the State's formerly submerged lands constitute an expansion of the adjoining riparian owner's property, not a contraction of the riparian owner's claim to title. The State in its role as the trustee exercising its fiduciary responsibility to the citizens of the State of Idaho must ensure that the public trust asset is not compromised. Thus, the Board adopted the policy of requiring a 25-foot public right-of-way when disclaiming title to formerly submerged lands. The right-of-way preserves the public trust value while providing clear title to the adjoining landowner.

The Department's disclaimer policy is analogous to the resolution of a private boundary dispute by two contiguous real property owners. The Idaho Supreme Court has consistently recognized the validity of agreements between adjoining property owners to establish a disputed property line by agreement. In Downing v. Boehringer, 82 Idaho 52, 349 P.2d 306 (1960), the Idaho Supreme Court explained the doctrine of boundary agreement as follows:

> [W]here the location of a true boundary line on the ground is unknown to either of the parties, and is uncertain or in dispute, [the] coterminous owners [of the parcels involved] may orally agree upon a boundary line. When such an agreement is executed and actual possession is taken under it, the parties and those claiming under them are bound thereby.

82 Idaho at 56, 349 P.2d at 308.

In boundary by agreement, the parties forego litigation in the form of a quiet title action or adverse possession action and compromise on the appropriate boundary. The compromise may involve the payment of compensation or a compromise dividing the disputed property line along an agreed allocated basis.

The same may be said of the Department's disclaimer process. A dispute exists as to the exact location of coterminous properties, with the riparian owner holding title to the landward parcel and the State holding title to the waterward parcel. The owner of the riparian parcel seeks for various reasons to establish title to formerly submerged State

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Department of the Interior, No. 97-0426-BLW (D. Idaho 2002) (Deer Flat Refuge) (the State challenged the federal government's ownership of federal reserve water rights); Heckman Ranches, Inc. v. State, 99 Idaho 793, 589 P.2d 540 (1979) (State challenged contention of the OHWM of the Salmon River). These cases constitute a significant commitment of State resources both in terms of cost and time. These cases also include only those which have been subject to substantial litigation. The Department administratively denies ownership of State-owned submerged lands which are not challenged through the courts.

lands.[6] If the Department determines that the disclaimer sought is not of a significant importance, the disclaimer process goes forward. As compensation for the uncertainty in locating the precise demarcation between State-owned submerged lands and contiguous riparian land, the State receives compensation in the form of a 25-foot public use easement. If the riparian owner does not agree that the compensation sought by the Department is fair, the riparian owner is under no obligation to complete the disclaimer process.

The Board's long-standing practice of requiring the exchange of a 25-foot public use right-of-way for the grant of a disclaimer of the State's interest to formerly submerged lands is a legitimate compromise in settlement of a disputed property line between adjacent property owners. It is a voluntary agreement entered into between willing parties to resolve a disputed boundary line. It does not constitute a claim by the State against the riparian owner, nor does it represent the Department or the Board acting in its regulatory capacity. Rather, it represents the Board exercising its proprietary interest to State submerged lands.

D. The Exchange of a 25-Foot Public Use Right-of-Way for the Grant of a Disclaimer of the State's Interest to Formerly Submerged Lands Does not Constitute a Taking of Private Property for a Public Purpose

The Takings Clause of the Fifth Amendment provides: "Nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The aim of the clause is to prevent the government "from forcing some people alone to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49, 80 S. Ct. 1563, 1569, 4 L. Ed. 2d 1554 (1960).

A taking can occur directly through the exercise of the governmental power of eminent domain. *See, e.g.,* United States v. 564.54 Acres of Land, 441 U.S. 506, 99 S. Ct. 1854, 60 L. Ed. 2d 435 (1979). A taking can also occur indirectly when the government acts in a manner which causes an inverse condemnation. First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987). Inverse condemnation can occur in two manners. Inverse condemnation can occur through a direct physical invasion of a party's property known as a physical taking. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). In addition, inverse condemnation can occur by virtue of the government's restriction on land use through its regulatory

[6] Historically, parties seeking disclaimers have done so to clear title to facilitate lending or sale or to establish an ownership interest for purposes of subdivision.

authority. Penn Central Transportation Company v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

As previously noted, the Board's long-standing practice of requiring an exchange of a 25-foot public use easement for the granting of a disclaimer of the State's interest to formerly submerged lands is an exercise of the State's proprietary role as the owner of the State's public trust resource.[7] Therefore, cases relating to takings based upon the State's regulatory authority are inapplicable.

Since these lands were formerly submerged lands, they remain impressed with the public trust. Actions to protect the public trust are not the imposition of state regulation over private parties. The State is giving up its interest to formerly submerged lands over which it could exert a claim. In doing so, the State retains the right of public access over a small portion of those formerly submerged lands thereby satisfying its fiduciary role to the public. The Board's policy requiring the exchange of a 25-foot public use easement in exchange for a disclaimer constitutes the settlement of the State's claim to title to formerly submerged lands. The riparian owner gains unencumbered title to the State's formerly submerged lands. The State satisfies its fiduciary responsibility under the public trust by providing public access but surrenders its legally cognizable defenses to the riparian owner's claim to title. A riparian owner that enters into a disclaimer agreement with the State has entered into a legally binding contractual agreement regarding the coterminous boundary of the riparian land and public trust land. This agreement is not a regulatory function and therefore cannot constitute a taking of private property for a public purpose.

CONCLUSION

The Board has a fiduciary responsibility under the Public Trust Doctrine to maintain public access to the submerged lands underlying navigable waterways. Private interests may attempt to claim formerly submerged lands. However, due to the complexity of the legal and factual prerequisites to a claim of title, the Board is justified in requiring compensation in the form of a 25-foot public use right-of-way from the party claiming title. This compensation is a settlement of a disputed boundary and does not constitute the taking of private property for a public purpose. The Board is acting in a proprietary capacity in compromising a disputed claim to public trust resources.

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[7] Courts have recognized that takings cannot occur by the State's exercise of its proprietary powers founded on the Public Trust Doctrine. *See* Marine One, Inc. v. Manatee County, 898 F.2d 1490 (11th Cir. 1990) (rescission of marine construction permits was exercise of the state's proprietary interest in submerged lands and therefore not a taking of private property).

AUTHORITIES CONSIDERED

1. United States Constitution:

Fifth Amendment.

2. United States Statute:

Idaho Admission Act, ch. 656, § 1, 26 Stat. 215 (1890).

3. Idaho Code:

§ 58-104(9).
§ 58-1301.
Title 58, chapter 13.

4. U.S. Supreme Court Cases:

Armstrong v. United States, 364 U.S. 40, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960).

First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).

Penn Central Transportation Company v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

Shively v. Bowlby, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894).

United States v. 564.54 Acres of Land, 441 U.S. 506, 99 S. Ct. 1854, 60 L. Ed. 2d 435 (1979).

5. Idaho Cases:

Aldape v. Akins, 105 Idaho 254, 668 P.2d 130 (1983).

Downing v. Boehringer, 82 Idaho 52, 349 P.2d 306 (1960).

Erickson v. State, 132 Idaho 208, 970 P.2d 1 (1998).

Heckman Ranches, Inc. v. State, 99 Idaho 793, 589 P.2d 540 (1979).

Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement District, 112 Idaho 512, 733 P.2d 733 (1987).

Joplin v. Kitchens, 87 Idaho 530, 394 P.2d 313 (1964).

Kootenai Environmental Alliance v. Panhandle Yacht Club, 105 Idaho 622, 671 P.2d 1085 (1983).

Nesbitt v. Wolfkiel, 100 Idaho 396, 598 P.2d 1046 (1979).

Raide v. Dollar, 34 Idaho 682, 203 P. 469 (1921).

Rutledge v. State, 94 Idaho 121, 482 P.2d 515 (1971).

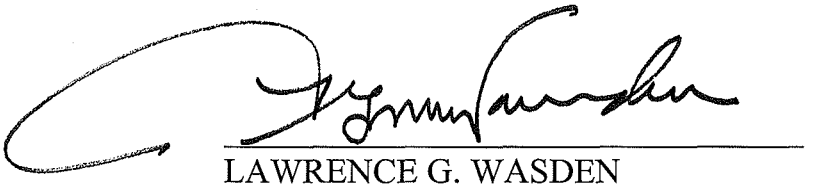
Smith v. Long, 76 Idaho 265, 281 P.2d 483 (1955).

State of Idaho v. U.S. Department of the Interior, No. 97-0426-BLW (D. Idaho 2002).

6. Other Cases:

Marine One, Inc. v. Manatee County, 898 F.2d 1490 (11th Cir. 1990).

DATED this 7th day of May, 2007.



LAWRENCE G. WASDEN
Attorney General

Analysis by:

C. NICHOLAS KREMA
Deputy Attorney General
Department of Lands

MEMORANDUM OF UNDERSTANDING
BETWEEN THE IDAHO DEPARTMENT OF WATER RESOURCES
AND THE IDAHO DEPARTMENT OF LANDS

RELATIVE TO FOREST PRACTICES,
NAVIGABLE WATERS, THE IDAHO DREDGE AND PLACER MINING ACT
AND
THE STREAM CHANNEL PROTECTION ACT

This Memorandum of Understanding (MOU) is entered into by the Idaho Department of Lands (IDL) and the Idaho Department of Water Resources (IDWR). The provisions contained in this MOU pertain to stream channel alterations, in conjunction with forest practices and dredge and placer mining, which impact navigable waters, endowment lands and/or non-federal forestlands. This MOU supercedes the amended Memorandum of Understanding dated July 9, 2002.

I. PURPOSE:

It is the policy of the State of Idaho to protect the lands, lakes, streams, and rivers within the State of Idaho, and the State of Idaho acquired title upon statehood to the bed of all navigable waters, and endowment lands.

II. STATEMENT OF MUTUAL BENEFIT AND INTERESTS:

The State Board of Land Commissioners, through IDL, has authority under the Idaho Forest Practices Act, Title 38, Chapter 13, Idaho Code, to regulate forest practices; and has authority under the Idaho Dredge and Placer Mining Act, Title 47, Chapter 13, Idaho Code, to protect lands, lakes and streams from damage resulting from dredge and placer mining.

IDWR has authority under Title 42, Chapter 38, Idaho Code, to regulate the alteration of stream channels for the health, safety and welfare of the public and to protect stream channels from alteration for protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality; and has authority under Title 58, Chapter 4, Idaho Code, to interpose any objections to timber sales on state land because of any interference with the conservation of the irrigation water of any watershed.

Silviculture activities including discharges of dredge and fill material for construction and maintenance of forest roads are not prohibited by or subject to regulation under Section 404 of the Clean Water Act and its implementing regulations. *See* 33 U.S.C. § 1344; 33 C.F.R. Part 323. This exemption does not relieve IDL from obtaining other approvals required under the Clean Water Act regulations.

The responsibilities of IDWR and IDL must be coordinated to provide service to the citizens of Idaho, to administer the policies of the State and to avoid waste and duplication of effort.

III. INTER-AGENCY PROCEDURES:

IDWR and IDL shall, annually, hold IDWR Regional – IDL Area level meetings in the spring at the respective IDL Supervisory Area Offices. The Idaho Department of Environmental Quality, Idaho Department of Fish and Game (Regional Fishery Biologist), and the US Army Corps of Engineers will be invited to attend these spring meetings. Combination of these Area meetings for efficiency reasons is encouraged when endorsed by both IDL and IDWR.

The purpose of the annual meetings is to exchange information on programs, inform each other of pending activities as provided for in sections of this agreement and to discuss matters pertaining to the accomplishment of mutual objectives of stream channel protection.

IDWR and IDL staff shall meet and develop an Administrative Procedures and Guidance Document relative to the Forest Practices Act and the Stream Channel Protection Act to be used as a guide to field staff and to provide a list of principal contacts. Each Department and their respective staff will handle their own activities and utilize their own resources, including the expenditure of their own funds, in pursuing these objectives. Each Department will carry out its separate activities in a coordinated and mutually beneficial manner.

IV. OPERATIONS ON ENDOWMENT OR PUBLIC TRUST LANDS:

IDAHO DEPARTMENT OF WATER RESOURCES SHALL:

a. Consider IDL activities that are reviewed at the annual spring meetings or follow-up notification, that meet the requirements of the Forest Practices Act, the Stream Channel Protection Act, and IDAPA 37.03.07, as complying with IDWR procedural requirement for such activities. Any IDL activities (including but not limited to Section V.a. of this MOU) presented at the meeting will not require submission of a Stream Channel Alteration Permit application. IDWR reserves the right to comment on the timing and methods used to complete these projects, to ensure channel stability, for the protection of fish and wildlife habitat, water quality, aquatic life, recreation, and aesthetic beauty.

b. Provide to IDL a copy of all joint applications for permits to alter a stream channel within 20-work days from receipt, in PDF electronic format, which would alter streams on or adjacent to endowment lands, on or adjacent to lands administered by IDL or occupying the beds of navigable streams or beds of lakes and non-federal reservoirs. Notify IDL of activities on non-state lands, which develop subsequent to the annual

spring meetings that may affect IDL lands, streams or programs. IDL shall consider this notification as meeting the intent of Sections 42-3803 and 42-3804, Idaho Code.

c. Upon request, furnish to IDL copies of all drawing, maps, and specifications relating to applications submitted to IDWR.

d. Include special terms and conditions in permits, which will affect endowment lands or state owned beds of navigable streams as requested by IDL.

e. Provide assistance in identifying the ordinary high water mark on navigable rivers for establishment of jurisdiction purposes for the Stream Channel Protection Act and for title purposes. IDWR and IDL recognize that rivers are dynamic and established land surveys do not always reflect the mean or ordinary high water mark under the Stream Channel Protection Act.

f. Comment to IDL regarding approval under the Stream Channel Protection Act after receiving comments solicited from other agencies in connection with proposals to alter or occupy beds of navigable rivers or as part of dredge and placer mining activities and refer applications or applicants desiring a permit to alter or occupy beds or waters of navigable lakes, non-federal reservoirs, located on navigable rivers to IDL.

g. Upon request by IDL, deny a permit which IDL determines will adversely affect endowment lands.

h. Inform IDL of law, rule and policy changes relating to the Stream Channel Protection Act and provide training to IDL employees concerning Stream Channel Alteration requirements as necessary.

IDAHO DEPARTMENT OF LANDS SHALL:

a. Meet or exceed the procedural requirement of IDWR Stream Channel Alteration Rules and Regulations and Minimum Standards (Rules), adopted by the Idaho Water Resource Board (IWRB), to protect stream channels on State of Idaho Lands and on other lands administered by IDL.

b. Provide maps to IDWR Regional Stream Channel Coordinator at the annual meetings. These maps will identify predetermined areas, including stream name and legal description, where IDL activities may have an effect on stream channels. Such activities may include, but are not limited to, proposed timber sales, mining operations, roads, culverts, bridge construction, maintenance projects, stream channel restoration projects and fishery habitat improvement projects.

c. Provide a Joint Application for Permit (IDWR form No. 3804B) to IDWR for activities not covered under either the IDAPA 37.03.07.055 or .064 proposed to be

carried out in protected reaches of streams designated in an IWRB adopted comprehensive river plan. For example, stream channel relocation and reconstruction activities require filing a Joint Application for Permit.

d. Notify, in writing, IDWR Regional Stream Channel Specialist or Regional Manager of activities that develop subsequent to the annual meeting that are located in or will likely affect a perennial stream channel, including applications for lease or easements in navigable waters or endowment lands.

e. Review and comment on IDWR annual Recreational Suction Dredging Permit and Attachments and consider it as an activity jointly authorized, review and comment on other Joint Applications submitted and accept an application to IDWR to alter a stream channel as an application to IDL to occupy or alter the bed of a navigable stream or river, including approval as joint review for projects not requiring IDL lease agreements or easements. Indicate whether or not permits from IDL are required, or whether IDL approvals are to be part of IDWR approval.

f. Furnish to IDWR and other interested parties where applicable copies of all applications for dredge and placer mining permits, surface mine reclamation plans, riverbed mineral leases, easements, logging operations or any proposal to alter or occupy the bed of any stream or river.

g. Prepare permits, lease easements as required by Land Board policy, include on each permit issued a statement indicating that a permit from IDWR may be required and provide copies to IDWR when stream channel alterations are proposed.

h. Deny permits, leases or easements upon request of IDWR if IDWR determines that the project would damage a stream channel.

V. OPERATIONS ON PRIVATE LANDS:

IDAHO DEPARTMENT OF WATER RESOURCES SHALL:

a. Consider a completed Notification of Forest Practices and completed Supplemental Notification Form for private timber harvest activities as a stream channel alteration permit, provided all activities meet the requirements of the Forest Practices Act and the Stream Channel Protection Act and IDAPA 37.03.07. Projects not installed or maintained to meet these criteria must be removed.

Projects qualifying for approval under the Notification of Forest Practices and completed Supplemental Notification Form are:

- Installation of round, squash culverts, open arch or open box culverts, forty (40) square feet open end area or less.
- Installation of culverts, less than sixty (60) feet in length, constructed in non-fish-bearing, perennial streams.

- Construction of bridges on nonpublic roads, seventy-five (75) feet or less in length, that do not require placement of piers within the mean high water marks; cause an encroachment of the stream channel with fill material, or cause wetlands to be filled.
- Construction or reconstruction of fords less than seventy-five (75) feet in overall length and twenty-five (25) feet in width.
- Removal of perennial stream crossing culverts (40 square feet open ended area or less). Removal of culverts must be done during low flows and if practical, during dry stream conditions created by temporary diversion or dewatering. All fill over the culvert, perched material, and fill encroaching on the channel must be removed using machinery equipped with a bucket and placed in stable locations, above the high water mark, seeded and mulched. Once the culvert is removed, the banks need to be sloped back to a stable configuration, seeded and mulched.

Applicants must provide a description of the project, the location by stream name, quarter/quarter, section, township and range. Applicants must also verify that the project is exclusively for forest practices activities and will be installed and maintained in accordance with applicable regulations of the Stream Channel Protection Act and Forest Practices Act.

All new or reconstructed stream crossing structures in any stream supporting a fishery must provide for fish passage.

b. Process Stream Channel Alteration Permits for projects involving Forest Practices and other projects that do not meet the criteria under item V.a. above. When the banks must be armored, when in-channel structures are required to ensure stream stability in conjunction with installation or removal of stream crossings, when using machinery equipped with a blade or operating machinery within the stream channel for stabilization, improved fish passage or placement of woody debris for fish habitat and anytime state water quality standards cannot be met, a Stream Channel Alteration Permit and a Section 404 permit is required.

c. Investigate and enforce any violation of the Stream Channel Protection Act that cannot be resolved under the Forest Practices Act or as requested by IDL. IDWR reserves the right to undertake a separate enforcement action any time it is determined necessary for protection of fish and wildlife habitat and water quality as required by law.

d. Inform IDL of law, rule and policy changes relating to the Stream Channel Protection Act and provide training to IDL employees concerning Stream Channel Alteration requirements as necessary.

e. Include a statement on permits indicating whether the permit also constitutes approval from IDL, that an additional authorization is necessary from IDL, or that a permit is not required, as requested by IDL.

THE IDAHO DEPARTMENT OF LANDS SHALL:

a. Meet or exceed the procedural requirement of IDWR Stream Channel Alteration Rules and Regulations and Minimum Standards (Rules), adopted by the Idaho Water Resource Board (IWRB), to protect stream channels on State of Idaho Lands and on other lands administered by IDL.

b. Review and comment on IDWR annual Recreational Suction Dredging Permit and Attachments and consider it as an activity jointly authorized, review and comment on other Joint Applications submitted and accept an application to IDWR to alter a stream channel as an application to IDL to occupy or alter the bed of a navigable stream or river, including approval as joint review for projects not requiring IDL lease agreements or easements. Indicate whether or not permits from IDL are required, or whether IDL approvals are to be part of IDWR approval.

c. Ensure that the completed Notification of Forest Practices and Supplemental Notification Form meet stream channel alteration permit criteria for forest practices and stream channel crossing projects. IDL will furnish IDWR's Stream Channel Specialist and other interested parties a copy of all completed Supplemental Notifications.

d. Consider failure to follow requirements of the Forest Practices Act a violation of permit conditions and report to IDWR related NOVs pertaining to stream crossings and stream channel alterations. Work not in compliance with the Notice of Forest Practices and Supplemental Notification Form will be considered a violation of the Stream Channel Protection Act.

e. Coordinate oversight and enforcement with IDWR when violations do not fall under the Forest Practices Act. Violations of the Forest Practices Rules require corrective action and potential mitigation. Normally accepted restoration and mitigation practices for violations of the Forest Practices Act pertaining to stream crossings and stream channel alterations are:

- The removal of materials placed within a stream channel as a result of a silviculture violation.
- Stabilization and re-vegetation of all areas disturbed as a result of a silviculture violation.
- IDL or Idaho Department of Fish and Game fishery enhancement projects permitted by IDWR for the installation or removal of large woody debris from impacted stream channels. Placement of material in a stream channel for activities other than culverts and bridges, and not directed under a Notice of Violation issued by IDWR or IDL, may require filing of an application under Section 42-3803, Idaho Code.

f. Refer applicants not covered by a Forest Practices Notification, and desiring to alter a stream channel to IDWR.

g. Furnish to IDWR and other interested parties where applicable copies of all applications for dredge and placer mining permits, surface mine reclamation plans, riverbed mineral leases, easements, logging operations or any proposal to alter or occupy the bed of any stream or river.

h. Consider an approved Stream Channel Alteration Permit for the removal of gravel bar or bed material from non-navigable rivers by a flood control district for flood control purposes as final state approval for this activity. IDL has determined that the requirements of the Dredge and Placer Mining Act, Title 47, Chapter 13, or the Surface Mining Act, Title 47, Chapter 15, do not apply, regardless of the disposition or sale of the material removed for this purpose. The operator is not mining materials from a placer deposit and the activity is not a surface mining operation.

i. Inform IDWR of law, rule and policy changes established by the Board of Land Commissioners relating to navigable streams, to dredge and surface mining and the Forest Practices Act. IDL will provide training for IDWR staff as necessary.

j. Deny permits, leases or easements upon request of IDWR if IDWR determines that the project would damage a stream channel.

VI. MAINTENANCE AND REVISION PROCEDURES:

The Idaho Department of Lands and Idaho Department of Water Resources will hold a state level meeting in Boise, whenever mutually agreed to be necessary, to discuss a broad policy, standards and procedures of mutual interest and to consider the adequacy of the terms of this memorandum. This Memorandum of Understanding may be amended by mutual consent of the parties hereto as often as necessary to maintain the stated objectives and may be terminated by either party by providing written notice thirty (30) days prior to the termination date.

DIRECTOR
Idaho Department of Lands

11-7-07
Date

DIRECTOR
Idaho Department of Water Resources

Oct 25, 2007
Date

LAKES CONSIDERED NAVIGABLE FOR STATE TITLE PURPOSES

NO.	NAME	COUNTY	AUTHORITY FOR DESIGNATION
1.	Alturas Lake	Blaine	State
2.	Anderson Lake	Kootenai	State
3.	Bear Lake	Bear Lake	State, Coast Guard
4.	Beaver Lake	Bonner	State
5.	Bell's Lake	Benewah	State
6.	Benewah Lake	Benewah	State
7.	Black Lake	Kootenai	State
8.	Blue Lake	Bonner	State
9.	Blue Lake	Kootenai	State
10.	Bonner Lake	Boundary	State
11.	Boulder Lake	Valley	State
12.	Box Lake	Valley	State
13.	Brush Lake	Boundary	State
14.	Cave Lake	Kootenai	State
15.	Chase Lake	Bonner	State
16.	Chatcolet Lake	Benewah	State, Coast Guard
17.	Cocolalla Lake	Bonner	State
18.	Coeur d'Alene Lake	Kootenai	State, Coast Guard
19.	Fernan Lake	Kootenai	State, Coast Guard
20.	Fish Lake	Clearwater	State
21.	Glidden Lake	Shoshone	State
22.	Granite Lake	Bonner	State
23.	Granite Lake	Valley	State
24.	Hauser Lake	Kootenai	State
25.	Hayden Lake	Kootenai	State
26.	Henry's Lake	Fremont	State
27.	Herman Lake	Boundary	State
28.	Hidden Lake	Kootenai	State, Coast Guard
29.	Kelso Lake	Bonner	State
30.	Killarney Lake	Kootenai	State
31.	Louie Lake	Valley	State
32.	Medicine Lake	Kootenai	State
33.	Mirror Lake	Bonner	State
34.	Mud Lake	Jefferson	State
35.	Payette Lake	Valley	State
36.	Payette Lake, Little	Valley	State
37.	Payette Lake, Upper	Valley	State
38.	Pend Oreille Lake	Bonner	State, Coast Guard, Federal Court (194 Fed. Rep. 643, 600 F. Supp. 802), State Court (54 Idaho 700)

NO.	NAME	COUNTY	AUTHORITY FOR DESIGNATION
39.	Perkins Lake	Blaine	State
40.	Perkins Lake	Boundary	State
41.	Priest Lake	Bonner	State
42.	Priest Lake, Upper	Bonner	State
43.	Redfish Lake	Custer	State
44.	Redfish Lake, Little	Custer	State
45.	Riordan Lake	Valley	State
46.	Robinson Lake	Boundary	State
47.	Rose Lake	Kootenai	State
48.	Round Lake	Benewah	State
49.	Round Lake	Bonner	State
50.	Samuels Lake	Bonner	State
51.	Sheppard Lake	Bonner	State
52.	Spirit Lake	Kootenai	State
53.	Stanley Lake	Custer	State
54.	Stevens Lake, Upper	Shoshone	State
55.	Stevens Lake, Lower	Shoshone	State
56.	Swan Lake	Kootenai	State
57.	Thompson Lake	Kootenai	State
58.	Turtle Lake	Benewah	State
59.	Twin Lake, Lower	Kootenai	State
60.	Twin Lake, Upper	Kootenai	State
61.	Warm Lake	Valley	State
62.	Williams Lake	Lemhi	State

RIVERS CONSIDERED NAVIGABLE

NO.	NAME	TYPE OF NAVIGABILITY	SECTION (B.M.)	AUTHORITY
1.	Blackfoot	Title	E boundary T3S, R38E	State
2.	Boise	Title	All	State, State Court (94 Idaho 121)
3.	Boise, Middle Fork	Title	Through T5N, R8E	State
4.	Boise, North Fork	Title	Through T5N, R7E	State
5.	Boise, South Fork	Title	Through T3N, R11E	State
6.	Buffalo	Title	Through S21, T13N, R44E	State
7.	Clark Fork	Title	All	State, Coast Guard (to a entrance into point 4 miles above Pend Oreille Lake)
8.	Clearwater	Title	All	State, Coast Guard, State Court (29 Idaho 401, 438)
9.	Clearwater, Middle Fork	Title	All	State
10.	Clearwater, North Fork	Title	Through T40N, R7E	State, Coast Guard (upstream to Beaver Creek)
11.	Coeur d'Alene	Title, R/W	Through T51N, R3E	State, State Court (12 Idaho 723)
12.	Eagle Creek	Right-of-Way		State Court (20 Idaho 695)
13.	Kootenai	Title	All	State, Coast Guard (from Canadian border to Bonners Ferry)
14.	Lochsa	Title	Through T33N, R7E	State
15.	Moyie	Title	All	State, Federal Court (157 Supp. 931)
16.	Pack	Title	Downstream from NPRR bridge to its mouth	Coast Guard
17.	Payette	Title	All	State
18.	Payette, N Fork	Title	To Payette Lake	State
19.	Payette, S Fork	Title	Through T9N, R9E	State
20.	Pend Oreille	Title	All	State, Coast Guard
21.	Priest	Title	All	State
22.	Pritchard Creek	Right-of-Way		State Court (20 Idaho 695)
23.	St. Joe	Title	Through T45N, R7E (mouth to hwy. bridge 3/4 mile east of St. Joe City)	State, Coast Guard
24.	St. Maries	Title	Through S9, T45N, R2W	State
25.	Salmon	Title	Through T10N, R13E	State, State Court (26 Idaho 745, 99 Idaho 793)
26.	Salmon, Middle Fork	Title	Through S12, T14N, R9E	State
27.	Salmon, South Fork	Title	Through T20N, R6E	State
28.	Selway	Title	Through T32N, R7E	State
29.	Silver Creek	Right-of-Way		State Court (96 Idaho 360)
30.	Snake	Title, R/W	All	State, Coast Guard (Idaho-Washington border to Guffy Dam Site), Federal Court (227 US 229), State Court (29 Idaho 438)

NO.	NAME	TYPE OF NAVIGABILITY	SECTION (B.M.)	AUTHORITY
31.	Snake, Henry's Fork	Title	All	State
32.	Spokane	Title	Cd'A Lake to Post Falls Dam	State, Federal Court (775 F.2d 305)

DISCLAIMER PROCEDURE

The State of Idaho owns the beds and banks of all navigable waters below the ordinary high water mark, assuming the waterways were navigable at the time of statehood. These sovereign lands were acquired by virtue of the Equal Footing Doctrine and are administered by the Idaho Department of Lands (IDL) for the benefit of the public in accordance with the Public Trust Doctrine.

Two methods exist to clear title to property in areas where the navigable waterways have changed:

1) Quiet Title action through the courts
2) Disclaimer of Interest from the Department of Lands

The procedure for acquiring a disclaimer of interest is as follows:

1. Contact the appropriate IDL Supervisory Area Office to determine if the subject property qualifies for issuance of a disclaimer.

2. If the property qualifies, the subject property will require a legal survey. An IDL representative will visit the site with the surveyor to establish the Ordinary High Water Mark (OHWM). The applicant may also be present.

3. In cases where the present river has moved onto lands outside the GLO meander line survey, the IDL will require the requesting party to disclaim to the State, that portion of the present riverbed lying outside the GLO meander line survey. The plat and legal description must show the location and acres of the riverbed parcel to be disclaimed to the state.

4. Since statehood, accretions have resulted from artificial means such as diking, filling, irrigation diversions, dam construction, etc. Due to the uncertainties associated with identifying an OHWM and to avoid extensive research and potential litigation, the IDL will generally use the existing OHWM providing the requesting party will grant a 25-foot public use right of way along and adjacent to the existing ordinary high water line. This serves to protect the public trust values associated with rivers and the disclaimed lands by providing public access.

5. The surveyor will need to prepare a record of survey, and a metes and bounds description, which shows: 1) the areas to be disclaimed from the state to the property owner; 2) the areas to be disclaimed from the property owner to the state; and 3) the 25-foot public use right of way. These documents must show the present OHWM in relation to the original meander line as surveyed by the federal government land office (GLO) and be tied to the nearest section or quarter corner.

6. When the survey has been completed, submit the following documents to the Department of Lands office:

   (a) A letter of request for the Disclaimer of Interest. Include the acreage of accretion land requested and the exact name and address you wish to appear on the disclaimer.

(b) A full size copy of the record of survey and a copy of the legal descriptions. A digital copy of the record of survey (PDF format) and legal descriptions (MS Word format) will also need to be provided for document preparation.

(c) Tax payment history.

(d) Proof of ownership of the upland property adjacent to the area to be disclaimed; a copy of the property deed is preferable. The applicant must be the legal owner.

(e) $300 application fee, which is a portion of the minimum $600 processing fee.

7. After approval by the State Board of Land Commissioners the applicant will be billed the remainder of the processing fee. This fee is the actual cost of the field inspection and preparation of the required documents, minus the application fee, but not less than $300. The final documents for signature will also be sent to the applicant. After all signatures are obtained, IDL will record all the related instruments.

IDAHO STATE DEPARTMENT OF LANDS

DIRECTOR'S OFFICE
P.O. Box 83720
954 W. Jefferson St.
Boise ID 83720-0050
Tel No: 334-0200
FAX No: 334-2339 or 3698
George B. Bacon, Director

PRIEST LAKE AREA OFFICE
4053 Cavanaugh Bay Rd.
Coolin ID 83821
Tel No: 443-2516
FAX No: 443-2162
Mick Schanilec, Area Supervisor

PEND OREILLE LAKE AREA OFFICE
2550 Hwy. 2 West
Sandpoint ID 83864
Tel No: 263-5104
FAX No: 263-0724
Ed Robinson, Area Supervisor

KOOTENAI VALLEY AREA OFFICE
Route 4, P.O. Box 4810
(South Highway 95)
Bonners Ferry ID 83805
Tel No: 267-5577
FAX No: 267-8301
Scott Bacon, Area Supervisor

MICA AREA OFFICE
3706 Industrial Ave. South
Coeur d'Alene ID 83815
Tel No: 769-1577
FAX No: 769-1597
Michael Denney, Area Supervisor

ST. JOE AREA OFFICE
1806 Main Ave.
St. Maries ID 83861
Tel No: 254-4551
FAX No: 475-4867
Ken Ockfen, Area Supervisor

CATALDO AREA OFFICE
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Kingston ID 83839
Tel No: 682-4611
FAX No: 682-2991
Bob Burke, Area Supervisor

CLEARWATER AREA OFFICE
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Orofino ID 83544
Tel No: 476-4587
FAX No: 476-7175
Bob McKnight, Area Supervisor

PONDEROSA AREA OFFICE
3130 Highway 3
Deary ID 83823
Tel No: 877-1121
FAX No: 877-1122
Sam Charles, Area Supervisor

MAGGIE CREEK AREA OFFICE
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913 Third St.
Kamiah ID 83536
Tel No: 935-2141
FAX No: 935-0905
James Clapperton, Area Supervisor

CRAIG MT. AREA OFFICE
P.O. Box 68
Craigmont ID 83523
Tel No: 924-5571
FAX No: 924-5572
Jay Sila, Area Supervisor

PAYETTE LAKES AREA OFFICE
555 Deinhard Lane
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Tel No: 634-7125
FAX No: 634-5117
Sheldon Keafer, Area Supervisor

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Boise ID 83703
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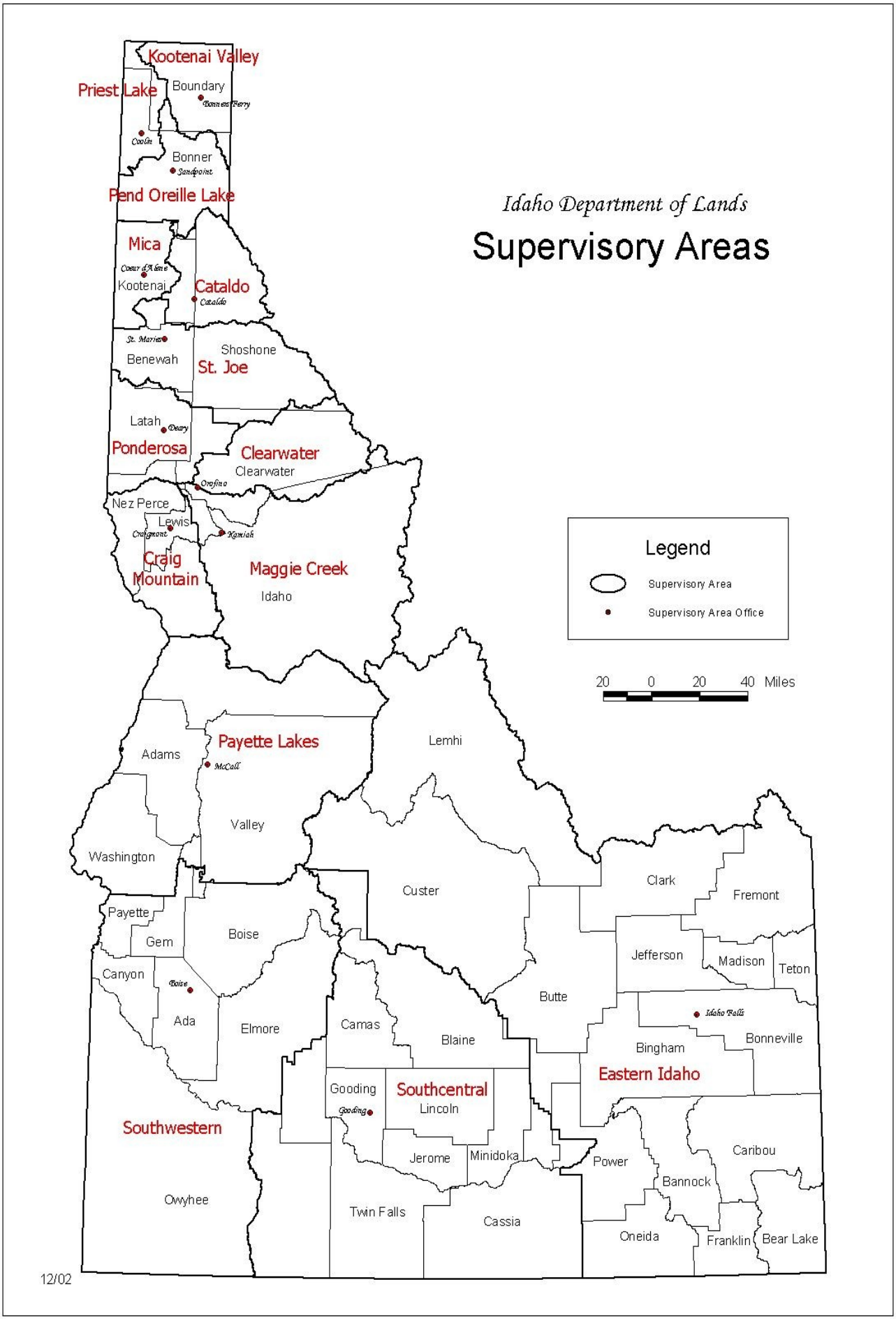
FAX No: 853-6372
Steve Douglas, Area Supervisor

SOUTHCENTRAL AREA OFFICE
324 South 417 East, Ste. 2
U.S. Hwy. 93 Business Park
Jerome ID 83338
Tel No: 324-2561
FAX No: 324-2917
Tim Duffner, Area Supervisor

EASTERN IDAHO AREA OFFICE
3563 Ririe Highway
Idaho Falls ID 83401
Tel No: 525-7167
FAX No: 525-7178
Pat Brown, Area Supervisor


Idaho Department of Lands
Supervisory Areas
Kootenai Valley
Priest Lake
Boundary
Bonner's Ferry
Coolin
Bonner
Sandpoint
Pend Oreille Lake
Mica
Coeur d'Alene
Kootenai
Cataldo
Cataldo
St. Maries
Benewah
Shoshone
St. Joe
Latah
Deary
Ponderosa
Clearwater
Clearwater
Orofino
Nez Perce
Lewis
Craigmont
Kamiah
Craig Mountain
Maggie Creek
Idaho
Legend
Supervisory Area
Supervisory Area Office
20 0 20 40 Miles
Payette Lakes
McCall
Adams
Lemhi
Valley
Washington
Custer
Clark
Fremont
Payette
Gem
Boise
Jefferson
Madison
Teton
Canyon
Boise
Ada
Elmore
Camas
Blaine
Butte
Idaho Falls
Bingham
Bonneville
Eastern Idaho
Gooding
Gooding
Southcentral
Lincoln
Southwestern
Jerome
Minidoka
Power
Caribou
Bannock
Owyhee
Twin Falls
Cassia
Oneida
Franklin
Bear Lake
12/02