

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

In the Matter of:	)	Case No. PH-2018-PUB-20-001
	)	
Encroachment Permit Application	)	<b>FINAL ORDER</b>
No. L-96-S-0096E.	)	
	)	
BNSF Railway Co.,	)	
Applicant.	)	
_____	)	

**I. NATURE OF PROCEEDINGS/ISSUES**

Encroachments, including bridges and fills, placed in, on or above the beds of navigable lake require a permit issued by the Idaho Department of Lands (“IDL”) pursuant to the requirements of the Lake Protection Act, Title 58, Chapter 13, Idaho Code, and the corresponding administrative rules promulgated by the State Board of Land Commissioners, IDAPA 20.03.04.000 *et seq.*, Rules for the Regulation of Beds, Waters and Airspace over Navigable Lakes in the State of Idaho.

BNSF Railway Co. (“Applicant”), applied for Encroachment Permit No. L-96-S-0096E on February 22, 2018 (“Application”). Applicant seeks an encroachment permit for bridges across Lake Pend Oreille and Sand Creek, with certain associated fill. On March 14, 2018, I issued a Notice of Appointment of Hearing Coordinator and Hearing, in which I appointed Chris Bromley as Hearing Coordinator. The document also provided notice of two public hearings to be held on May 23, 2018: One at 8 a.m. Pacific Time in Ponderay, Idaho, and one at 6 p.m. Pacific Time in Sandpoint, Idaho. In addition, IDL extended the public comment beyond the thirty days required by Idaho Code § 58-1306, and held the record open for written comment until the conclusion of the evening hearing held on May 23, 2018.

The Hearing Coordinator issued his Preliminary Order on June 14, 2018. My responsibility is to render a decision pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.030.07 on the behalf of the State Board of Land Commissioners based on the record and applicable law. In making this determination I have relied on the entire record for this matter. Specifically,

- I have read the transcript of the public hearings conducted in Ponderay and Sandpoint, Idaho, on May 23, 2018.
- I have reviewed the record, including the Application and all documents and exhibits thereto; all written comments received prior to the close of the May 23, 2018 evening hearing; and all documents and exhibits.
- I have examined the Hearing Coordinator's Preliminary Order in light of the entire record and the applicable law.

## **II. FINDINGS OF FACT**

A. I adopt Paragraphs 1 – 31 of the Factual and Procedural Background of the Preliminary Order as my Findings of Fact. Certain pertinent additional facts are set forth in the Conclusions of Law, below.

## **III. CONCLUSIONS OF LAW**

B. I adopt Paragraphs 1-8 of the Conclusions of Law of the Preliminary Order (“Conclusions of Law”).

C. I have chosen not to adopt Paragraphs 9 - 18 of the Conclusions of Law as written, and those paragraphs are stricken. I instead conclude as follows:

1. The record in this matter includes a copy of “[a]n Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget’s

Sounds, on the Pacific Coast, by the Northern Route,” which was enacted by Congress on July 2, 1864. 13 U.S. Statutes at Large, p. 365. Section 2 of the Act, provides, in pertinent part:

And be it further enacted, That the right of way through the public lands be, and the same is hereby, granted to said “Northern Pacific Railroad Company,” its successors and assigns, for the construction of a railroad and telegraph as proposed; . . . Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, . . .

2. The Act “gave Northern Pacific title in the form of a ‘limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted.’” *Avista Corp., Inc. v. Wolfe*, 549 F.3d 1239, 1242-43 (9<sup>th</sup> Cir. 2008) (citing *Northern Pac. R.R. Co. v. Townsend*, 190 U.S. 267, 271, 23 S.Ct. 671 (1903)).

3. In addition:

A grant of land to a railroad for right of way purposes is substantially different from any like grant for other purposes. The character of the contemplated use makes it different. It is intended that the use by a railroad company will be perpetual and continuous. A railroad company performs a public service and is burdened with a public duty. In the performance of that duty it is held to the exercise of the highest degree of care, and the complete, convenient, and safe use of its right of way requires that its possession be exclusive—a possession not shared with another; that it have complete dominion over its right of way and that it enjoy all those rights which usually attend the fee.

*Lake CDA Investments, LLC v. Idaho Dep’t. of Lands*, 149 Idaho 274, 282, 233 P.3d 721, 279 (2010) (quoting *Coulsen v. Aberdeen-Springfield Canal Co.*, 47 Idaho 619, 626-27, 277 P. 542, 544-45 (1929)).

4. Whether a general grant of land such as that found in the 1864 Act is sufficient to convey ownership of submerged lands is uncertain, as recognized by the United States Supreme Court:

“[A]s was pointed out in *Shively v. Bowlby*, at pages 49, 57, 58 (14 S. Ct. 548), the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.

*United States v. Holt State Bank*, 270 U.S. 49, 55 (1926).

5. The record includes a “Rand McNally & Co.” map, circa 1890, which shows the route of “the Northern Pacific Railroad Company Land Grant” in and around “Sand Point.” The map shows the route as being adjacent to and crossing Lake Pend Oreille. Current aerial images that were included with the Application and are therefore part of the record show that BNSF is utilizing the route, including areas directly adjacent to the Lake at points on its northern and southern shores.

6. The right of way granted by Congress in 1864 extends across Lake Pend Oreille.

7. Idaho became a state in 1890, and “was admitted to the Union . . . on equal footing with its sister states in every respect. Idaho Admission Bill § 1 (1890). The state obtained title to all land below the high water mark of navigable waters within the state at the time of its admission based on this equal footing doctrine.” *Idaho Forest Indus., Inc. v. Hayden Lake Watershed Imp. Dist.*, 112 Idaho 512, 516, 733 P.2d 733, 737 (1987).

8. In light of those principles, the grant of right-of-way did not necessarily alienate the submerged lands to BNSF.

9. For purposes of this Final Order, it is not necessary to decide whether BNSF or the State of Idaho owns the bed and banks of Lake Pend Oreille. All that is necessary is to recognize BNSF's right to utilize the right-of-way for construction of a railroad bridge and associated fill.

D. I hereby adopt Paragraphs 19 - 22 (including the footnote therein) of the Conclusions of Law, and conclude that the Application was timely published, comments were taken, and hearings were held.

E. I hereby adopt Paragraphs 23 – 25 of the Conclusions of Law, and conclude that the Idaho Department of Lands (“IDL”) has jurisdiction over Lake Pend Oreille and Sand Creek.

F. I hereby adopt Paragraphs 26 – 29 of the Conclusions of Law.

G. I decline to adopt Paragraph 30 – 32 of the Conclusions of Law, and instead conclude as follows:

The Application may only be approved if it can 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.” I.C. § 58-1301. As will be explained below, weighing those “lake values” against the benefit of the project, the preponderance of the evidence leads in favor of approving the Application.

H. I hereby adopt Paragraphs 33 – 45 of the Conclusions of Law, with the exception that the word “trans” in Paragraph 38, p. 27, line 11 is corrected to “trains.”


#### IV. FINAL ORDER

Based upon the entire record; the Lake Protection Act (Title 58, Chapter 13, Idaho Code); and the Rules for the Regulation of Beds, Waters and Airspace over Navigable Lakes in the State of Idaho, IDAPA 20.03.04.000 *et seq.*, and as reflected in the Findings of Fact and Conclusions of Law set forth above,

**It is hereby ORDERED that the Application for Encroachment Permit No. L-96-S-0096E is APPROVED with a five year sunset period for construction.**

This is a final order of the agency. Pursuant to Idaho Code § 58-1306(c) and IDAPA 20.30.04.030.09, the Applicant or any aggrieved party who appeared at the hearing shall have the right to have the proceedings and Final Order reviewed by the district court in the county in which the encroachment is proposed by filing a notice of appeal within thirty (30) days from the date of this Final Order. Because this Order is for approval of a permit, any party appealing this Final Order must file a bond with the district court in accordance with Idaho Code § 58-1306(c). The amount of the bond will be set by the district court, in an amount not less than \$500.

DATED this 21<sup>st</sup> day of June, 2018.

  
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DAVID GROESCHL  
Director, Department of Lands

## CERTIFICATE OF MAILING

I hereby certify that on this 22nd day of June, 2018. I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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 Renée Miller, Management Assistant

**BEFORE THE DEPARTMENT OF LANDS**  
**OF THE STATE OF IDAHO**

In the Matter of:

Encroachment Permit Application  
No. L-96-S-0096E

BNSF Railway Co.,  
Applicant.

Case No. PH-2018-PUB-20-001

**PRELIMINARY ORDER**

**FACTUAL AND PROCEDURAL BACKGROUND**

1. On February 22, 2018, the BNSF Railway Company (“BNSF”) filed a *Joint Application for Permits* (“Application” or “App.”) with the Idaho Department of Lands (“Department” or “IDL”), the Idaho Department of Water Resources, and the U.S. Army Corps of Engineers (“USACE”) for bridges across Bridge Street, Lake Pend Oreille (“Lake”), and Sand Creek. *App.* at 1. “The project purpose is to provide improvements for freight and passenger rail traffic to meet existing and ongoing capacity needs. Rail traffic volumes have significantly increased for the past 30-years to the point that section of the BNSF rail system has become a constraint for interstate commerce.” *App.* at 5. The “preferred” alternative is construction of “New Track and Bridges over Sand Creek and Lake Pend Oreille west of the existing track/bridges . . . .” *Id.* “The existing single mainline and portions of the over-water rail bridges date from the early 1900s. . . . . The proposed project will relieve system congestion, back-up of rail traffic, and reduce hold times on sidings and wait times at grade crossings both locally and regionally.” *Attachment to App., Alternative Analyses: Sandpoint Junction Connector Project* at 4.

**A. The Bridges**

2. The bridge over Sand Creek is referred to by BNSF as “Bridge 3.1.” *App.* at 2. The bridge over Lake Pend Oreille is referred to by BNSF as “Bridge 3.9.” *Id.* “The new bridges will be constructed from the temporary construction bridges.” *Id.* at 4. “Temporary, timber deck work bridges will be constructed immediately adjacent to (west side) of the proposed new bridges to support large cranes . . . .” *Id.* at 4. “All bridge pile driving, both temporary and permanent, will be initially vibratory, and then impact driven. The temporary construction bridges (24-inch-diameter steel piles) will be primarily vibrated, with typically one pile per bent impact proofed, to provide appropriate support for equipment. The permanent bridges will be mostly vibrated to resistance, and then impact driven to meet railroad loading requirements.” *Id.*

3. “Prior to construction, a navigational plan for both the Br. 3.1 and Br. 3.9 temporary and new bridges will be developed and approved by IDL in accordance with Rule 015.13.g of IDAPA 20.03.04 . . . . This plan will address bridge(s) lighting and other navigational markings or aids for the project.” *Id.* at 5. An *Addendum – I* (“Addendum”) dated January 31, 2018, but updated on February 14, 2018, was submitted by BNSF to IDL regarding compliance with IDAPA 20.03.04.015.13.g. The Addendum addresses markings and lighting on the temporary and permanent bridge piers.

4. “The project design and proposal will not result in permanent changes to the hydrology of either Lake Pend Oreille or Sand Creek.” *App.* at 5.

**i. Bridge 3.9 over Lake Pend Oreille**

5. Regarding Bridge 3.9, “There is an existing interstate, mainline railroad bridge at the project site. The existing fixed bridge has both open-deck and ballast-deck spans, and is 4,769 feet long with 88 piers. Thirty-two of the original 100+ year-old single column concrete piers on wood pilings (16 on the north end and 16 on the south end of the bridge) were replaced in 2006-2009 with steel bents, each comprised of six closed-end steel pipe piles. The existing bridge also has a non-operable swing span over the two existing, published 76.6 foot-wide navigational channels.” *Attachment to App., Coast Guard Bridge Permit Application, Proposed BNSF Railway Company Lake Pend Oreille Bridge 3.9 at 2* (December 21, 2017) (“USCG 3.9 App.”).

6. The new, permanent bridge across the Lake “will be approximately 50 feet to the west of the existing bridge” consisting of “49 total spans,” “48 in-water pier bents (piers), each consisting of six, open-ended 36-inch diameter steel pipe pilings, for a total of 288 pilings below the jurisdictional OHWM (2062.5’) elevation of the lake. The new bridge piers will match the approximate alignment of every other pier for the majority of the existing Bridge 3.9.” *App. at 2*. There will be “10 spans at, and adjacent to the designated navigational spans on the existing bridge [which] will closely match those longer span horizontal clearances. The maximum vertical clearance (low chord) of the new bridge will be 15 feet above the regulated summer pool elevation of 2062.5 feet. These 15-foot clearances will consist of six 75’ 11” spans, four of which will align with the existing rail bridge’s 77-foot spans that are equal to or greater than 15-foot vertical clearance.” *Id.* The new bridge will be 4,874 feet long, “made of precast, pre-stressed concrete I-girders, a cast-in-place concrete deck, and pre-cast concrete caps . . . .” *USCG 3.9 App. at 2*.

7. The temporary, construction bridge across the Lake “will be constructed west of the new bridge location consisting of approximately 100, 48-foot long spans and one 24-foot long span at the north end. The construction bridge will have a total of 137 piers consisting of: 76 piers will four, 24-inch-diameter steel piles; 25 piers with eight, 24-inch-diameter steel piles; 32 piers with four, 24-inch-diameter steel piles to construct eight bridge staging setouts at approximately 500-foot intervals along the construction bridge.” *Id.* “In total there may be up to 700, 24-inch steel piles to accommodate minor adjustments in span support needs and site conditions. The construction bridge low chord elevation will gradually rise from the abutments at each end to a four-span section, corresponding to two spans on the existing bridge (Spans 64 and 65) with 15 feet of vertical clearance above the regulated summer pool elevation of 2062.5 feet. The construction bridge will grade at a 0.5% or less slope from the abutments to these 15-foot elevations. This will result in Spans 1 through 16 at the north end of the bridge having less than 10 feet of vertical clearance and the remaining 72 spans having 10 feet or greater vertical clearance.” *Id.* at 3.

8. “For Br. 3.9, some of the permanent bridge work will begin as the work bridge is under construction.” *Id.* at 4.

9. “Br. 3.9 will have 36-inch diameter steel pipes requiring an average of 1600 strikes each. The pilings driven for Br. 3.9 will have a bubble curtain from the pile driving for those locations that are at least 8-feet deep at the time of the pile driving. If less than 8-feet deep, just turbidity curtains will be used.” *Id.* at 4.

10. “The proposed project will take approximately 3-3.5 years (2018-2021). Proposed work is year-round.” *Id.* at 3.

11. The estimated cost of Bridge 3.9 is over \$100 million, and will be privately funded. *Id.*

**ii. Bridge 3.1 over Sand Creek**

12. Regarding Bridge 3.1, “There is an existing interstate, mainline railroad bridge at the project site. The existing fixed bridge is 155 feet long and 14 feet wide with four concrete piers, two of which are abutments. It was originally constructed in 1902, but was modified in 1990 with replacement of the superstructure, concrete pier caps, deck and walk. The existing bridge will remain unchanged.” *Attachment to App., Coast Guard Bridge Permit Application, Proposed BNSF Railway Company Sand Creek Bridge 3.1* at 2 (December 21, 2017) (“USCG 3.1 App.”).

13. The new, permanent bridge across Sand Creek “will be approximately 35 feet to the west of the existing Bridge 3.1 and consist of 12 total spans [consisting of] [o]ne approximate 80-foot span over the creek channel; [s]even approximate 45-foot spans, one of which will be over a portion of the creek during high water and the rest being fully upland of the OHWM (2062.5’); [t]hree approximate 25-foot spans, one of which will be over a portion of the creek during high water and the other two being fully upland of the OHWM (2062.5’); [a]nd one approximate 31-foot transition span, which will not be over water.” *App.* at 3. “There will be a total of 11 piers associated with the new bridge: [t]wo piers consisting of eight 24-inch diameter steel pilings, all of which will be within the navigational channel. Seven piers consisting of six 24-inch-diameter steel pilings, both which will be upland of the regulated OHWM (2062.5’). Two piers consisting of three 24-inch-diameter steel pilings, both of which will be upland of the regulated OHWM (2062.5’). The total number of pilings is projected to be 64, 22 of which will be below the regulated OHWM (2062.5’).” *Id.* “Only two of the piers will be fully within the



creek's navigational channel. The new bridge navigational horizontal clearance is 74 feet; the existing bridge has an approximate 45-foot horizontal clearance. Vertical clearance of the new bridge will match the vertical clearance of the existing bridge, which is 17 feet above the 2062.5-foot OHWM." *Id.*

14. The temporary, construction bridge over Sand Creek will "consist[] of 11 spans. There will be 10 piers fully or partially within the jurisdictional area below the OHWM (2062.5'). These will consist of: [t]wo piers with eight 24-inch-diameter steel pilings[;] [e]ight piers with four 24-inch-diameter steel pilings[.]" *Id.* "The total number of pilings below the OHWM (2062.5') may be up to 40 to accommodate minor adjustments in variable span support needs and site conditions. The temporary construction bridge span over Sand Creek marked and lighted navigational channel will be limited to the period when no navigational access up Sand Creek is available, from approximately October 15 to April 15, depending on Albeni Falls Dam fall drawdown and spring fill." *Id.*

15. "Br. 3.1 will have 24-inch diameter steel pipe piles requiring an average of 1200 strikes each." *Id.* at 4. "The pilings driven for Br. 3.1 will not be either bubble curtains or turbidity curtains due to the shallow nature of Sand Creek, and the current flow of the creek renders them both ineffective. The primary use of the turbidity curtain is to contain and settle the sediments that typically result from the use of bubble curtains. They also provide a small amount of sound attenuation during the pile driving activity." *Id.*

16. "The Bridge 3.1 project will take approximately one year and will occur during the 2018-2021 construction timeframe for the entire BNSF Sandpoint Junction Connector project. However, construction of the spans within the navigational area of Sand Creek will be limited to the period when navigational access is highly restricted upstream on Sand Creek, from

approximately mid-October to mid-April during the regulated low water or winter pool period.”  
*USCG 3.1 App.* at 4.

17. The estimated cost of Bridge 3.1 is over \$8 million, and will be privately funded.  
*Id.* at 3.

### **B. Nearshore Edge Fill Below The Ordinary High Water Mark**

18. There will be a “[t]otal of 0.88-acre of permanent fill and 0.38 acres of temporary fill: 0.29-acre permanent fill along the lakeshore edge at the south end of the project where the new track will connect to the existing BNSF Algoma Siding north switch[;] 0.01-acre permanent fill and 0.03-acre temporary fill at the south end of Bridge 3.9 to accommodate the transition from the bridges to the existing upland grade[;] 0.57-acre of permanent fill and 0.3-acre temporary fill at the north end of the Bridge 3.9 to accommodate the transition from bridges to the existing upland grade . . . [;] 0.01-acre at the south end of Bridge 3.1 to accommodate the transition from bridge to new rail grade[;] 0.05-acre temporary/incidental fill assumed from construction activities to install Bridge 3.1 upland pilings along the water line north of the navigational channel.” *App.* at 3.

19. “Fills in nearshore locations and wetlands will occur at the earliest stages of the project to take advantage of performing that work while lake levels are lower and wetland areas are relatively dry.” *Id.* at 4.

### **C. Notice Of The Application And Hearings**

20. On February 26, 2018, the Department mailed a notice of the Application to the US Army Corps of Engineers-CDA, Idaho Department of Fish and Game, Idaho Department of Environmental Quality, Idaho Department of Water Resources, Idaho Department of Transportation, Bonner County Marine Division, Bonner County Public Works, Lakes

Commission, Idaho Conservation League, Lake Pend Oreille, Pend Oreille Lake\*A\*Syst Coordinator, and adjacent neighbors.

21. On February 26, 2018, IDL mailed courtesy notifications of the Application to the City of Sandpoint, Allen G. Family, LLC, Waterfront Property Management, LLC, Alan A. Berryman, DJ Land Corporation, and Condo Del Sol Association, Inc.

22. According to a March 7, 2018 *Affidavit of Publication*, signed by the legal clerk of the *Bonner County Daily Bee*, notice of the Application ran for a period of two consecutive weeks, commencing on February 28, 2018 and ending March 7, 2018. The *Notice of Application* published in the *Bonner County Daily Bee* stated, in pertinent part: “BNSF Railway Co. has made application to add a second train bridge adjacent to and west of the existing train bridge across Lake Pend Oreille.” The *Notice of Application* stated, “Written comments on this matter must be on file with the Idaho Department of Lands . . . within thirty (30) days after the first appearance of this notice.”<sup>1</sup>

23. On March 14, 2018, David Groeschl, Deputy Director (“Director”), appointed Chris M. Bromley as “‘Hearing Coordinator’ to conduct a hearing in the above-captioned matter. The hearing will be conducted pursuant to Idaho Code § 58-1306(c). The Hearing Coordinator has the scope of authority delineated by IDAPA 20.01.01.413.01 and by IDAPA 20.03.04.05.” *Notice of Appointment of Hearing Coordinator and Hearing* at 1. The Deputy Director “delegate[d] initial decision-making authority to the Hearing Coordinator pursuant to Idaho Code § 67-5245.” *Id.* “Notice is hereby given that a public hearing in the above-captioned matter will be conducted in accordance with IDAPA 20.01.01.000 *et seq.* on Wednesday, May 23, 2018. The first session of the hearing will start at 8:00 a.m. Pacific Time at the Ponderay Events Center

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<sup>1</sup> As will be stated later, all comments received prior to the close of the public hearing on the evening of May 23, 2018 are timely and were considered by the hearing coordinator.

located at 401 Bonner Mall Way, Suite E, Ponderay, Idaho. The second session of the hearing will start at 6:00 p.m. Pacific Time at the Sandpoint Middle School Gymnasium located at 301 South Division, Sandpoint, Idaho.” *Id.* at 2. “The Hearing Coordinator shall submit a preliminary order to the Director of the Idaho Department of Lands, who shall issue a Final Order no more than thirty days after the conclusion of the hearing.” *Id.* at 1. Thirty days after conclusion of the May 23, 2018 hearings is June 22, 2018.

**D. Written Comments**

24. Prior to the hearings, approximately 1,100 written comments were received by the Department in response to the Application. The overwhelming majority of written comments were in favor of the Application. Of the written comments in favor of the Application, nearly all were identical in their form and substance, stating the Application should be approved because the project will promote the economy, reduce waiting times at crossings, and increase safety. Comments in favor of the Application that were uniquely written made similar statements. Comments opposed to the Application were concerned with harm to the environment due to pollution (noise, water, air), and wanting to see completion of a full “Environmental Impact Statement” (“EIS”) as opposed to simply an “Environmental Assessment” (“EA”). Written comments came from all areas of the country, including Idaho.

**E. The Public Hearings**

25. The public hearings took place on May 23, 2018, at the times and locations described in the *Notice of Appointment of Hearing Coordinator and Hearing*.

26. At the morning hearing, verbal comments were given by the United States Coast Guard (“USCG”), USACE, BNSF, the Idaho Department of Fish & Game (“F&G”), IDL, and members of the public. With one exception, members of the public who provided verbal

comment at the morning hearing were opposed to the Application for reasons consistent with the written comments. The morning hearing concluded at approximately 9:30 a.m.

27. At the evening hearing, verbal comments were given by USCG, USACE, BNSF, IDL, the Mayor of the City of Sandpoint, two Bonner County Commissioners, the Idaho Conservation League, and members of the public. Most of the verbal comments taken during the evening hearing were opposed to the Application for reasons consistent with the written comments. The evening hearing concluded at approximately 8:15 p.m., at which point the record was closed.

28. All written comments received by the close of the evening hearing are timely and were considered by the hearing coordinator.

29. Of the verbal comments made in opposition to the Application at both the morning and evening hearings, a commonality was the request that a federal EIS be performed, as opposed to simply a federal EA. As previously stated, a similar theme of wanting to see an EIS over an EA is found in the written comments submitted in opposition to the Application.

30. At both the morning and evening hearings, Shelly Sugarman, chief of bridge permitting and policy for the USCG, addressed the issue of a federal EA or EIS. According to Ms. Sugarman, the USCG is the lead federal permitting agency for the BNSF project, and is in the process of reviewing the need for an EA or EIS:

As part of our permit process we evaluate the navigational and environmental impacts of each proposed project. The Coast Guard has jurisdiction over Lake Pend Oreille because it is a navigable waterway of the United States. We are presently reviewing the application from BNSF to add a second railroad bridge across Lake Pend Oreille and Sand Creek. In April we received a preliminary draft environmental assessment for review as part of BNSF's bridge permit application. The Coast Guard is the lead federal agency under the national environmental policy act and all other federal environmental control laws for this project.

The Corps of Engineers will be a cooperating agency for us. To better inform our decision as to whether the environmental document should be an environmental assessment or an environmental impact statement we have been reviewing the draft environmental assessment and all public comments submitted to the Corps of Engineers and the Idaho Department of Lands in response to their recent public notices. By early June we expect to decide whether the environmental document will be an environmental assessment or an environmental impact statement. Once drafted, the environmental document will be made available for public review and comment through the federal register at [www.regulations.gov](http://www.regulations.gov). Comments submitted through that website will be available for everyone to view.

The Coast Guard will also hold one or more public meetings here in Idaho during the comment period. We will also provide public notices via US mail to announce that environmental documents are available for review and to provide public meeting details. If you have any questions I will be available throughout the hearing.

*Evening Transcript* at 9-10 (emphasis added).

31. A number of written comments were received by the Department after the close of the evening hearing. Comments received after the close of the evening hearing were untimely and were not considered.

### **CONCLUSIONS OF LAW**

1. The Hearing Coordinator was tasked by the Department to issue a preliminary order. Idaho Code § 67-5245 governs preliminary orders and states as follows:

- (1) A preliminary order shall include:
  - (a) A statement that the order will become a final order without further notice; and
  - (b) The actions necessary to obtain administrative review of the preliminary order.
- (2) The agency head, upon his own motion may, or, upon motion by any party shall, review a preliminary order, except to the extent that:
  - (a) Another statute precludes or limits agency review of the preliminary order; or
  - (b) The agency head has delegated his authority to review preliminary orders to one (1) or more persons.
- (3) A petition for review of a preliminary order must be filed with the agency head, or with any person designated for this purpose by rule of the agency, within fourteen (14) days after the service date of the preliminary order unless a different time is required by other provision of law. If the agency head on his own motion decides

to review a preliminary order, the agency head shall give written notice within fourteen (14) days after the issuance of the preliminary order unless a different time is required by other provisions of law. The fourteen (14) day period for filing of notice is tolled by the filing of a petition for reconsideration under section 67-5243(3), Idaho Code.

(4) The basis for review must be stated on the petition. If the agency head on his own motion gives notice of his intent to review a preliminary order, the agency head shall identify the issues he intends to review.

(5) The agency head shall allow all parties to file exceptions to the preliminary order, to present briefs on the issues, and may allow all parties to participate in oral argument.

(6) The agency head shall:

(a) Issue a final order in writing, within fifty-six (56) days of the receipt of the final briefs or oral argument, whichever is later, unless the period is waived or extended with the written consent of all parties, or for good cause shown;

(b) Remand the matter for additional hearings; or

(c) Hold additional hearings.

(7) The head of the agency or his designee for the review of preliminary orders shall exercise all of the decision-making power that he would have had if the agency head had presided over the hearing.

Idaho Code § 67-5245.

2. According to the *Notice of Appointment of Hearing Coordinator and Hearing*:

The Hearing Coordinator shall submit a preliminary order to the Director of the Idaho Department of Lands, who shall issue a Final Order no more than thirty (30) days after the conclusion of the hearing. As provided in Idaho Code § 67-5240, the contested case provisions of the Administrative Procedures Act do not apply where the legislature has directed the use of alternative procedures. Because the legislature has enacted specific alternative procedures in Idaho Code § 58-1306 that require a final order to be issued within 30 days of the hearing, and leave insufficient time to consider petitions for review of the preliminary order, the procedures of Idaho Code § 67-5245 addressing petitions for review of preliminary orders are not applicable.

*Notice of Appointment of Hearing Coordinator and Hearing* at 1-2 (emphasis added).

All such hearings shall be public and held under rules promulgated by the board under the provisions of chapter 52, title 67 of the Idaho Code. The board shall render a decision within thirty (30) days following conclusion of the hearing and a copy of the board's decision shall be mailed to the applicant and to each person or agency appearing at the hearing and giving testimony in support of or in opposition to the proposed encroachment. Any applicant or other aggrieved party so appearing at a hearing shall have the right to have the proceedings and

decision of the board reviewed by the district court in the county where the encroachment is proposed by filing notice of appeal within thirty (30) days from the date of the board's decision.

Idaho Code § 58-1306(c).

3. All hearings in this matter concluded at approximately 8:15 p.m. on May 23, 2018, with the matter now before the hearing coordinator to issue a preliminary order.

4. The proposed activity over Bridge Street does not impact lands within the jurisdiction of the Department. The proposed activity over Lake Pend Oreille and Sand Creek involves temporary and permanent bridges, along with temporary and permanent fill, with areas coming within the Department's jurisdiction pursuant to Idaho's Lake Protection Act, Idaho Code § 58-1301 *et seq.*

**A. Burden Of Proof**

5. As the applicant, BNSF bears the burden of persuasion. "The customary common law rule that the moving party has the burden of proof—including not only the burden of going forward but also the burden of persuasion—is generally observed in administrative hearings." *Intermountain Health Care, Inc. v. Bd. of County Comm'rs of Blaine County*, 107 Idaho 248, 251, 688 P.2d 260, 263 (Ct. App. 1984) *rev'd on other grounds* 109 Idaho 299, 707 P.2d 410 (1985).

6. Under Idaho law, "preponderance of the evidence" is generally the applicable standard for administrative proceedings, unless the Idaho Supreme Court or legislature has said otherwise. *N. Frontiers, Inc. v. State ex rel. Cade*, 129 Idaho 437, 439, 926 P.2d 213, 215 (Ct. App. 1996). "Absent an allegation of fraud or a statute or court rule requiring a higher standard, administrative hearings are governed by a preponderance of the evidence standard." *Id. citing* 2 Am. Jur. 2d *Administrative Law* § 363 (1994). In civil cases, the well-settled principle is that the



burden of proof is preponderance of the evidence. *Nield v. Pocatello Health Services, Inc.*, 156 Idaho 802, 848, 332 P.3d 714, 760 (2014). “In most hearings the burden of persuasion is met by the usual civil case standard or preponderance of evidence.” *Intermountain* at 251, 688 P.2d at 263 “A preponderance of the evidence means that when weighing all of the evidence in the record, the evidence on which the finder of fact relies is more probably true than not.” *Oxley v. Medicine Rock Specialties, Inc.*, 139 Idaho 476, 481, 80 P.3d 1077, 1082 (2003).

**B. The Application Meets The Procedural Requirements Of Idaho Code § 58-1306**

7. Certain requirements, contained in Idaho Code § 58-1306, must be met for an application to be considered by the Department.

**i. The Plans are Sufficient**

8. First, “Applications . . . shall be submitted upon forms to be furnished by the board and accompanied by plans of the proposed encroachment containing information required by section 58-1302(k).” Idaho Code § 58-1306(a). Plans are defined as meaning, “maps, sketches, engineering drawings, aerial and other photographs, word descriptions, and specifications sufficient to describe the extent, nature and approximate location of the proposed encroachment and the proposed method of accomplishing the same.” Idaho Code § 58-1302(k). Here, the Application was submitted on the *Joint Application for Permits* form, approved for use by the Department. Through narrative, photographs, aerial images, engineering drawings, and schematics, BNSF describes the work that will occur. Therefore, the Application meets the requirements of Idaho Code § 58-1306(a) and Idaho Code § 58-1302(k).

**ii. BNSF was Granted Title to the Right of Way in the Form of a Limited Fee with an Implied Condition of Reverter**

9. Second, “Applications . . . must be submitted or approved by the riparian or littoral owner.” Idaho Code § 58-1306(a). A riparian or littoral owner is defined as, “The fee

owner of land immediately adjacent to a navigable lake, or his lessee, or the owner of riparian or littoral rights that have been segregated from the fee specifically by deed, lease, or other grant.” IDAPA 20.03.04.010.33 (emphasis added). As will be explained, below, BNSF was granted title to the right of way by the federal government in the form of a limited fee with an implied condition of reverter.

10. Here, BNSF states, “In 1864, the US Congress granted Northern Pacific Railway (now BNSF) the land upon which the current BNSF tracks exist, including where Br. 3.9 crosses Lake Pend Oreille. Subsequently, this property precedes Idaho statehood (1890) and is not formally considered a part of the IDL managed Public Trust Lands.” *Application* at 6.

11. In a comment submitted by ICL, it is requested: “IDL analyze and evaluate the ownership of the beds and banks of Lake Pend Oreille and Sand Creek in which BNSF intends to construct new rail infrastructure for the SJC proposal. BNSF has claimed that the bed and land on which it intends to install pilings and other rail infrastructure is not state trust land owned by the people of Idaho because this land was granted to BNSF before statehood.” *Comment of ICL* at 3 (May 23, 2018).

12. According to the Department: “During the initial review of the Joint Application, IDL requested from BNSF a copy of the BNSF right of way referenced in Block 23 of the Joint Application. A copy of the right of way document is attached to this testimony. This document states that in 1864, the United States granted a right of way to Northern Pacific Railroad Company, predecessors in interest to BNSF. The right of way was therefore granted prior to statehood in 1890 when the State of Idaho obtained title to the beds and banks of navigable lakes and rivers within Idaho. . . . The State of Idaho does not claim ownership of the lakebed within

the BNSF railroad right of way, as this is privately submerged lands.” *IDL Comment* at 2 (May 23, 2018).

13. The “grant” referenced by BNSF, ICL, and the Department derives from an 1864 Act of Congress, “grant[ing] to the Northern Pacific Railroad Company a right of way for a railroad, and lands in aid of the construction thereof, from Lake Superior to Puget Sound. . . . ‘Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through public domain. “ *Crandall v. Goss*, 30 Idaho 661, 664, 167 P. 1025, 1025 (1917) citing Act of Congress, approved July 2, 1864 (13 Stats. At L. 365) (emphasis added). “Known as a land grant railroad statute, the 1864 Act gave Northern Pacific title in the form of a ‘limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted.’” *Avista Corp. Inc. v. Sanders County*, 485 F. Supp. 2d 1176, 1181 (D. Mont. 2007) citing *Northern Pacific Railroad Company v. Townsend*, 190 U.S. 267, 271 (1903) (emphasis added). As further explained by the 9<sup>th</sup> Circuit:

The 1864 Act grew out of Congress’ efforts in the mid-19<sup>th</sup> Century, intensified by the Gold Rush and the Civil War, to settle the American West and provide a direct link to California. *Leo Sheep Co. v. United States*, 440 U.S. 668, 670-77, 99 S.Ct. 1403, 59 L.Ed.2d 677 (1979) (discussing in detail the history of this period of railroad development). Beginning in 1850, Congress passed a series of statutes granting public lands to private railroad companies to spur the construction of a cross-country railroad. *Great N. Ry. v. United States*, 315 U.S. 262, 273 & n. 6, 62 S.Ct. 529, 86 L.Ed. 836 (1942). During this period, Congress often granted the railroads alternate sections of land along the right of way-resulting in a “checker-board” of public and private lots-to further subsidize construction. *Leo Sheep Co.*, 440 U.S. at 672, 99 S.Ct. 1403.

In subsequent years, the policy of granting “lavish” subsidies of public lands to railroads was met with increasing public disfavor. *Great N. Ry.*, 315 U.S. at 273-74, 62 S.Ct. 529. In the wake of the Credit Mobilier scandal in 1872, the House of Representatives adopted a resolution condemning the practice. Cong. Globe, 42d Cong., 2d Sess., 1585 (1872); see *Leo Sheep Co.*, 440 U.S. at 670-77, 99 S.Ct. 1403; *Great N. Ry.*, 315 U.S. at 273-74, 62 S.Ct. 529. Although this marked the end of

outright land grants, Congress continued to encourage development of the West through the General Railroad Right of Way Act of 1875, which provided easements to railroads across public lands. 43 U.S.C. § 934; *see also United States v. Union Pac. R. R.*, 353 U.S. 112, 119, 77 S.Ct. 685, 1 L.Ed.2d 693 (1957); *Great N. Ry.*, 315 U.S. at 273-76, 62 S.Ct. 529.

Northern Pacific, like other railroad companies granted land prior to 1875, held title in the right of way in the form of a “limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted.” *N. Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271, 23 S.Ct. 671, 47 L.Ed. 1044 (1903). Under *Townsend*, land granted to a railroad would revert to the United States in the event the railroad stopped using the right of way for railroad purposes. *Id.* at 271-72, 23 S.Ct. 671. Because of the United States’ potential interest, a railroad did not have the power to voluntarily transfer its interest in the right of way, nor could a private party acquire title to any portion of the right of way by adverse possession. *Id.*

*Avista Corporation Inc. v. Wolfe*, 549 F.3d 1239, 1242-1243 (9<sup>th</sup> Cir. 2008) (emphasis added).

14. “A grant of land to a railroad for right of way purposes is substantially different from any like grant for other purposes. The character of the contemplated use makes it different. It is intended that the use by a railroad company will be perpetual and continuous. A railroad company performs a public service and is burdened with a public duty. In performance of that duty it is held to the exercise of the highest degree of care, and the complete, convenient, and safe use of its right of way requires that its possession be exclusive – a possession not shared with another; that it have complete dominion over its right of way and that it enjoy all those rights which usually attend the fee.” *Lake CDA Investments, Inc. v. Idaho Dept. of Lands*, 149 Idaho 274, 282, 233 P.3d 721, 729 (2010) (emphasis added).

15. In an attachment to the IDL May 23, 2018 comments that are part of the record, a “Rand McNally & Co.” map, circa 1890, shows the route of “the Northern Pacific Railroad Company Land Grant” in and around “Sand Point.” Current aerial images in the record that

were included with the Application show BNSF is utilizing land in the State of Idaho for a railroad, and that the railroad crosses Lake Pend Oreille and the mouth of Sand Creek.<sup>2</sup>

16. Evidence in the record, supported by the 1864 Act of Congress together with case law, shows BNSF, as a successor in interest to the Northern Pacific Railroad Company, was “granted . . . a right of way,” *Goss* at 664, which is “title in . . . in the form of a ‘limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted.’” *Wolfe* at 1242 citing *Townsend* at 271.

17. There is no evidence in the record suggesting BNSF is operating outside of, or inconsistently with its title to the right of way. As of today, and consistent with the cases cited above, BNSF holds title to its right of way, which is 400 feet wide, in the form of a grant of a limited fee with an implied condition of reverter. It is outside the scope of this proceeding to conclude in whom title to the beds and banks of Lake Pend Oreille and the mouth Sand Creek within the BNSF right of way would rest if there were a reverter. *See Idaho v. United States*, 533 U.S. 262, 272-73 (2001) (discussing Idaho’s admittance into the Union, the equal footing doctrine, and presumptions of State ownership of the beds and banks of navigable waters).

18. As the owner of title to the right of way, which was granted to it by the federal government with an implied condition of reverter, BNSF meets the requirements of Idaho Code § 58-1306(a) and IDAPA 20.03.04.010.33. As will be discussed below, very little of the Application involves land outside the right of way.

### **iii. The Application was Timely Published**

19. Third, “Within ten (10) days of receipt of an application . . . the board shall cause to be published . . . once a week for two (2) consecutive weeks, a notice advertising of the

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<sup>2</sup> The mouth of Sand Creek, as will be explained below, falls within the purview of Idaho’s Lake Protection Act.

application and describing the proposed encroachment and general location thereof.” Idaho Code § 58-1306(b). Here, the Application was received on February 22, 2018. Notice of the Application was published in the *Bonner County Daily Bee* for a period of two consecutive weeks, commencing on February 28, 2018 and ending March 7, 2018. *Affidavit of Publication*. Therefore, the Application was timely published.

**iv. Comments were Taken**

20. Fourth, “Any resident of the state of Idaho, or a nonresident owner or lessee of real property adjacent to the lake, or any state or federal agency may, within thirty (30) days of the first date of publication, file with the board an objection to the proposed encroachment and a request for a hearing on the application.” Idaho Code § 58-1306(c). Here, the Department has been taking written comment for and against the Application since notice was published on February 28, 2018. Some of the comments were styled in the form of an objection requesting a hearing. Not all written comments stated they were filed by a “resident” or a “nonresident owner or lessee of real property adjacent to” Lake Pend Oreille. Indeed, many written comments were submitted by persons from areas outside Idaho, or anonymously. Nonetheless, all timely comments were considered by the hearing coordinator, as there was no way to discern if out-of-state comments were submitted by a nonresident owner or lessee of real property adjacent to the Lake.

21. While the notice stated that comments must have been received “within thirty (30) days after the first appearance of this notice,” the Department continued to take written comments up until the close of the evening hearing on May 23, 2018. Therefore, the Department provided more than the statutorily required period of thirty days for receiving comments. Comments received after the close of the evening hearing on May 23, 2018 are untimely and

were not considered. Comments concerning the preparation of an EA or EIS are questions of federal law that cannot be addressed by the Department, but will purportedly be addressed by the USCG and USACE.<sup>3</sup>

**v. Hearings were Held**

22. Fifth, a “hearing” may be held if an objection requesting a hearing is made, or upon the Department’s own volition. Idaho Code § 58-1306(c). Here, the Director – in an exercise of discretion, and while only one hearing is required – ordered two hearings be held. Therefore, by holding two hearings, the singular hearing requirement of Idaho Code § 58-1306(c) is satisfied.

**C. The Department Has Jurisdiction Over Lake Pend Oreille And Sand Creek**

23. The Department is vested with the authority, in the interest of “public health, interest, safety and welfare [to regulate] all encroachments upon, in or above the beds of waters of navigable lakes of the state . . . 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.” Idaho Code § 58-1301.

24. BNSF proposes work in and above Lake Pend Oreille. *Application* at 2-3. Structures in the Lake include temporary and permanent piers and fill. *Id.* at 2. Structures above the Lake include the temporary construction bridge, and the permanent railroad bridge. *Id.* The

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<sup>3</sup> It is possible there was some confusion regarding the filing of comments due to the fact that multiple agencies are involved. Applications, such as the one at issue in this proceeding, are filed jointly with IDL, the Idaho Department of Water Resources, and the USACE. *Application* at 1. As stated by Ms. Sugarman in her comments, the USCG is the lead agency, with the USACE assisting in a “cooperating” role. It is possible the comments filed after the close of IDL’s hearings may have been directed toward USACE and USCG, which involves a separate, federal process. The conclusion made herein as to comments filed after the close of IDL’s hearing applies only to IDL’s record. No finding or conclusion is made as to the timeliness of any comments directed toward USACE or USCG. USACE and USCG may have different rules for consideration of comments than IDL.

bridge and associated fill over the Lake are visually depicted in the attachments following page 8 of the Application. The Lake is a navigable body of water that is regulated by the Department. *Gasman v. Wilcox*, 54 Idaho 700, 702, 35 P.2d 265, \_\_\_ (1934). “In the early 1950s, the United States Army Corps of Engineers constructed the Albeni Falls dam on Lake Pend Oreille, thereby creating an artificial high water mark (‘AHWM’) approximately eleven and a half feet above the natural high water mark.” *Kaseburg v. State of Idaho*, 154 Idaho 570, 572, 300 P.3d 1058, 1060 (2013). That the Lake is regulated by Albeni Falls dam with differences between the AHWM and Ordinary High Water Mark, is immaterial as to IDL’s jurisdiction. *State of Idaho v. Hudson*, 162 Idaho 888, 893, 407 P.3d 202, 207 (2017).

25. BNSF also proposes work in and above Sand Creek. *Application* at 3. The bridge and associated fill over Sand Creek are visually depicted in the attachments following page 8 of the Application. A marina in the mouth of Sand Creek, which appears to be used to access the Lake, can be seen in the aerial images attached to the Application. The Lake Protection Act applies to “navigable lakes of the state . . . .” Idaho Code § 58-1301 (emphasis added). By its name, Sand Creek is not defined as a lake. However, according to Diane French, Land and Waterways Division Administrator for the Department, “The lake also extends up into the mouth of Sand Creek, which makes Bridge 3.1, the temporary bridge, and associated fills as shown in the application, subject to the Lake Protection Act. IDL has issued encroachment permits for docks and other structures placed in the Sand Creek slough. This includes the bridge and associated fills for the Highway 95 Sand Creek Byway.” *IDL Comment* at 3 (May 23, 2018) (emphasis added). From the aerial images attached to the Application, and consistent with the unrebutted statement of Ms. French, it is difficult to see where Sand Creek ends and where the Lake begins. As the administrator of the Lake Protection Act, the Department’s interpretation



that the mouth of Sand Creek falls within the scope of the Lake Protection Act is reasonable, the Lake Protection Act does not treat the precise issue of a creek whose mouth is effectively one-in-the-same with a lake, and the rationales of deference present. *Pearl v. Board of Professional Discipline of Idaho State Board of Medicine*, 137 Idaho 107, 113, 44 P.3d 1162, 1168 (2002). Therefore, IDL’s interpretation that the Lake Protection Act applies to the mouth of Sand Creek is entitled to “considerable weight.” *Id.* Accordingly, the hearing coordinator accepts IDL’s interpretation of the Lake Protection Act as applying to the mouth of Sand Creek, meaning BNSF’s proposal to place temporary and permanent material and structures in and above Sand Creek is within the Department’s jurisdiction.

**D. The Application May Be Approved Because It Satisfies The Encroachment Standards And Is Consistent With The Public Trust Doctrine**

26. Consideration of an application for encroachment requires the balancing of private versus public interests:

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. No encroachment on, in or above the beds or waters of any navigable lake in the state shall hereafter be made unless approval therefor has been given as provided in this act.

Idaho Code § 58-1301.

27. “Encroachments not in aid of navigation in navigable lakes will normally not be approved by the Department and will be considered only in cases involving major environmental, economic, or social benefits to the general public. Approval under these circumstances is authorized only when consistent with the public trust doctrine and when there is no other feasible alternative with less impact on public trust values.” IDAPA 20.03.04.030.02.

28. The public trust doctrine is “a limitation on the power of the state to alienate or encumber title to the beds of navigable waters as defined in this chapter.” Idaho Code § 58-1203(1). As explained by the Idaho Supreme Court, the following factors should be considered in evaluating an application for encroachment:

[T]he degree of effect of the project on public trust uses, navigation, fishing, recreation and commerce; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource, i.e. in this instance the proportion of the lake taken up by docks, moorings or other impediments; the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited, i.e. commerce, navigation, fishing or recreation; and the degree to which broad public uses are set aside in favor of more limited or private ones.

*Kootenai Env. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 629-30, 671 P.2d 1085, 1092-93 (1983) (hereinafter “KEA”).

29. In evaluating the factors set forth in Idaho Code § 58-1301, IDAPA 20.03.04.030.02, and *KEA*, and as will be explained below, the Application may be approved because it satisfies the encroachment standards and satisfies the public trust doctrine.

**i. Fill and Structures within the BNSF Right of Way**

30. It is important that, according to IDL’s review of the Application, “all permanent fill and structures would occur within the authorized BNSF right of way.” *IDL Comment* at 3 (emphasis added). As the owner of the right of way, albeit with an implied right of reverter, *Townsend, Wolfe, Goss*, BNSF is entitled to exclusive possession to “perform[] a public service and is burdened with a public duty . . . to exercise the highest degree of care, and the complete, convenient, and safe use of the right of way requires that its possession be exclusive . . .” *Lake CDA Investments* at 282, 233 P.3d at 729. Due to the fact that the permanent fill and structures are within the right of way, which is presently within BNSF’s exclusive control, the Lake Protection Act arguably does not apply.

31. If the Lake Protection Act does apply, the Application may still be granted. The Department and BNSF have recognized, in the past, that work within BNSF's right of way requires permitting, as evidenced by prior IDL permit no. *ERL-96-S-96D* (June 1, 2009); *see also IDL Comment* at 2 (May 23, 2018) (discussing prior BNSF permits from IDL). Moreover, in reviewing the Application itself, it can be seen that BNSF does not argue the Lake Protection Act is inapplicable. Indeed, BNSF took all necessary steps to complete the Application, providing the necessary language and plans for review by IDL. Consistent with the testimony of Pierre Bordenave, BNSF reduced the impacted footprint of the project from approximately 5 acres to something closer to one-acre, possibly evidencing BNSF's belief it should take the necessary steps to comply with the Lake Protection Act. *Evening Hearing Transcript* at 28. BNSF could have advanced an argument in the Application, or at the hearings against needing IDL approval for its work; however, BNSF did not.

32. As stated previously, and if the Lake Protection Act does apply, the Application may only be approved if it can 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." Idaho Code § 58-1301. As will be explained, below, weighing the above-stated values against the benefit of the project, the preponderance of the evidence leans in favor of approving the Application.

33. As to protection of property, and as concluded by IDL in its May 23, 2018 comments, the permanent fill and structures will occur wholly within BNSF's right of way. *See Lake CDA Investments* at 282, 233 P.3d at 729 (discussing the exclusive right of way for railroads and its relation to public safety). By staying within the right of way, the project

protects others' property. Arguably, the addition of a second bridge will aid in protection of property by improving emergency response times for first responders, such as fire, medical, and police services. *See Comment from Bonner County Emergency Medical Services* (March 19, 2018).

34. As to protection of navigation and recreation, and as stated in the Application and shown in the PowerPoints, the new spans and piers will be greater than the existing spans and piers in width, and will be equal to or greater than existing vertical clearances. These construction standards should not hinder navigation or recreation, as the area is already occupied by bridges and piers. An addendum to the Application, submitted by BNSF pursuant to IDAPA 20.03.04.015.13.g, further addresses navigational concerns.

35. As to protection of fish and wildlife habitat and aquatic life, there were general comments regarding detriment to aquatic species. *See Morning Transcript* at 39, 48. Those concerns, while well taken, are addressed through comments from F&G. According to F&G, the noise associated with the project will “not produce underwater noise levels harmful to fish . . . vibratory hammers obviate the need for noise attenuation, thus we are no longer recommending bubble curtains.” *F&G Comment* at 2 (May 14, 2018). Furthermore, “Bubble curtains would likely create turbidity problems in Sand Creek Slough. As an alternative, work will be completed during low water, to reduce noise impacts when native salmonids are unlikely to be present.” *Id.*

36. As to protection of water quality, there were general comments made regarding impacts due to coal dust and possible spills. *See Comment from Wes Hanson* (March 23, 2018); *Morning Transcript* at 52; *Evening Transcript* at 49. Those concerns, while well taken, are addressed through comments from DEQ and F&G. Included in the record is a letter from the

Idaho Department of Environmental Quality (“IDEQ”), dated April 13, 2018, to BNSF regarding IDEQ’s draft § 401 Water Quality Certification. That letter indicates there is a separate proceeding, including a public comment period, as to water quality issues. Comments from F&G further address water quality concerns: “Potential containment resuspension associated with pile driving and removal is not expected to affect water quality, thus sediment core samples were not required under the draft 401 Water Quality Certification. We defer to the Idaho Department of Environmental Quality’s assessment of this risk and their condition of the final permit.” *F&G Comment* at 2 (May 14, 2018). “While adding a second bridge increases capacity and improves operational efficiency, BNSF representatives clarified that markets determine rail traffic regardless of whether or not the second bridge is constructed; thus there would be no increase to spill risk beyond the temporary risk associated with construction equipment working over the water. These temporary risks are addressed in the hazmat and water quality protection plans.” *Id.* (emphasis added).

37. As to aesthetic beauty, there were general comments in the record that approval of the Application would result in harm, *see Comment from Ron Giddings* (March 29, 2018); *Morning Transcript* at 43, or create better aesthetics in an area already known for rail traffic, *see Evening Transcript* at 51.

38. The factors discussed above must then be weighed against the “navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment.” Idaho Code § 58-1301. General comments in the record argue for and against the economic necessity for the project. *See Comment from Cynthia Zapotocky* (March 30, 2018); *Comment from Executive Director of the Lake Pend Oreille Waterkeeper* (May 22, 2018); *Comment from John M. Anderson* (May 23, 2018); *Evening Transcript* at 72. Specific evidence

in the record, as shown in the BNSF PowerPoints and testimony of Pierre Bordenave and Courtney Wallace, suggests otherwise. Approval of the Application will result in the investment of “upwards of a hundred million dollars in private investment for world class infrastructure . . . and help improve the flow of traffic both for Amtrak as well as freight. . . . This single track bridge over Lake Pend Oreille funnels rail traffic down to one lane shared by both directions. It slows trains as they come to Sandpoint . . . . By building a second main line bridge over the lake, trains will move across the lake in both directions at the same time reducing the time trains must wait for other trains to cross the bridge. Freight will be able to continue to move and get through the area much more efficiently . . . .” *Evening Transcript* at 20-21, 23 (Courtney Wallace). “I’m sure you’ve heard – many of you have heard or read the claims that by building this connector, it’s somehow going to double the number of trans. And of course, that – there’s no basis to that claim. I’ve already said before, yes, there’s – there has every decade been more trains, but it doesn’t double trains. There’s absolutely no basis to that assumption. That – that then becomes the foundation of speculation and conjecture and then leads to projections and conclusions. . . . This is not a case of Field of Dreams; if you build it, they will come. The project is not based on speculation. . . . This project does not create a demand. What it does is it addresses an existing defined need.” *Id.* at 26 (Pierre Bordenave).

39. Weighing the factors contained in Idaho Code § 58-1301 the preponderance of the evidence leans in favor of granting the Application.

40. Encroachments not in aid of navigation may be “authorized only when consistent with the public trust doctrine and when there is no other feasible alternative with less impact on public trust values.” IDAPA 20.03.04.030.02 (emphasis added).

41. Here, the Application stated it reviewed other alternatives for the project, but that what is proposed “is the least environmentally damaging practicable alternative that meets the project purpose while addressing geographic and BNSF design and safe rail operations constraints.” *Application* at 5. The fact that BNSF possesses a right of way for this project, that BNSF considered other alternatives, and the fact that the right of way is already occupied by railroad development – as will be discussed below – weighs in favor of determining the Application meets the requirements of IDAPA 20.03.04.030.02.

42. If compliance with the public trust doctrine is not met, an encroachment not in aid of navigation cannot be approved. As stated in *KEA*, the public trust doctrine examines “the individual project . . . cumulatively with existing impediments to full use of the public trust resource, i.e. in this instance the proportion of the lake taken up by docks, moorings or other impediments . . . .” *KEA* at 629-30, 671 at 1092-93 (emphasis added).

43. Here, the Application satisfies the satisfies the public trust doctrine. As seen in the aerial images accompanying the Application and the PowerPoints that were presented at the morning and evening hearings, the areas within the BNSF right of way across Lake Pend Oreille and over the mouth of Sand Creek are occupied by railroad development, which are located by virtue of Congress’ 1864 grant of the right of way, and have been present since circa 1890. As also seen in those images, the areas near the railroad development are taken up by State Highway 95, docks, industrial areas, and a marina in the mouth of Sand Creek. When this Application is examined cumulatively with existing impediments in this particular area of the Lake and the mouth of Sand Creek, *KEA* at 629-30, 671 at 1092-93, the Application satisfies the public trust doctrine.

**ii. Temporary Fill and Structures Outside the BNSF Right of Way**

44. As for use of land outside the right of way, IDL’s analysis of the Application states: “About 250 feet of the temporary bridge, and a few square feet of temporary fill on the north side of Sand Creek bridge area, would be outside the right of way. IDL considers this a temporary impact to the area between the Sand Creek shoreline and the existing Highway 95 Bridge, and is not expected to impact the adjacent property managed by the Idaho Transportation Department for Highway 95.” *Id.*

45. The standards for approving encroachments under the Lake Protection Act and the requirement of examining the public trust doctrine have been stated previously and will not be repeated. Furthermore, the analysis for approving permanent and temporary structures within the BNSF right of way have been stated previously and will not be repeated. Both the legal and factual analyses stated above in regard to approval of permanent and temporary structures within the BNSF right of way apply to the approximately 250 feet of temporary bridge and a few square feet of temporary fill on the north side of Sand Creek outside the BNSF right of way. Accordingly, the approximately 250 feet of temporary bridge and a few square feet of temporary fill on the north side of Sand Creek that are outside the BNSF right of way may be approved, provided those lands are restored.

**ORDER**

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that Encroachment Permit Application No. L-96-S-0096E is APPROVED, subject to any conditions imposed by the Director of the Idaho Department of Lands, such as those for construction, bridge lighting, other navigational markings or aids for the project, and restoration



of lands used for the temporary bridge and few square feet of fill on the north side of Sand Creek.

IT IS FURTHER ORDERED that the order issued herein is a PRELIMINARY ORDER. Idaho Code § 58-1306(c); Idaho Code § 67-5240; Idaho Code § 67-5245; *Notice of Appointment of Hearing Coordinator and Hearing*. The hearing in this matter was completed on May 23, 2018. Consistent with the *Notice of Appointment of Hearing Coordinator and Hearing*, “The Hearing Coordinator shall submit a preliminary order to the Director of the Idaho Department of Lands, who shall issue a Final Order no more than thirty days after the conclusion of the hearing.” This Preliminary Order is submitted fewer than thirty days after conclusion of the hearing.

Dated this 14<sup>th</sup> day of June, 2018.



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CHRIS M. BROMLEY  
Hearing Coordinator

**CERTIFICATE OF SERVICE**

I certify that on this 14<sup>th</sup> day of June, 2018, I caused to be served a true and correct copy of the foregoing was served upon the following persons by the method(s) indicated:

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CHRIS M. BROMLEY