

**20.03.09 – EASEMENTS ON STATE-OWNED SUBMERGED LANDS
AND FORMERLY SUBMERGED LANDS NAVIGABLE WATERWAYS**

000. LEGAL AUTHORITY.

These rules are promulgated pursuant to, and are to be construed in a manner consistent with, the duties and responsibilities of the Idaho State Board of Land Commissioners as set forth in Title 58, Chapters 1, 6, and 13, Idaho Code, and the Equal Footing Doctrine (Idaho Admission Act of July 3, 1890, 26 Stat. 215, Chapter 656).

~~(3-20-20)T()~~

001. TITLE AND SCOPE.

~~01. Title. These rules are titled IDAPA 20.03.09, “Easements on State Owned Submerged Lands and Formerly Submerged Lands.”~~ (3-20-20)T

~~02. Purpose. These rules set forth procedures concerning the issuance of easements on state owned submerged and formerly submerged lands.~~ (3-20-20)T

~~03. Scope. These rules apply to the issuance of easements for all uses above, across, over, in, through, upon, and under the beds of navigable waterways, other than irrigation facilities, diversion facilities, temporary irrigation berms, headgates, turnouts, and domestic water supply intake lines capable of drawing less than five (5) cubic feet per second of water; except that including dams that span the entire width of a state-owned navigable stream channel-waterway regardless of their the dam’s purpose are subject to these rules, with the following exceptions:~~

~~(3-20-20)T()~~

~~01. Small Water Delivery Structures. Irrigation facilities, diversion facilities, temporary irrigation berms, headgates, and turnouts that do not span the entire width of the navigable waterway, and domestic water supply intake lines capable of drawing less than five (5) cubic feet per second of water;~~ ()

~~02. Uses Authorized by Lease. When a lease issued under IDAPA 20.03.17 is more usual and customary such as for marinas, docks, float homes, and similar facilities; and~~ ()

~~03. Short Term Uses. Temporary uses, facilities, and structures with a lifespan of ten (10) years or less that are authorized by revocable temporary permits.~~ ()

~~04. Exceptions; Permits Required. Easements will not be granted where temporary permits will serve the required purpose or when a lease is more usual and customary, such as for marinas, docks, float homes, and similar facilities. (see IDAPA 20.03.17, “Rules Governing Leases on State owned Submerged Lands and Formerly Submerged Lands.”)~~ (3-20-20)T

~~05. Exceptions; Temporary Structures. These rules do not apply to uses, facilities, and structures considered to be temporary in nature; more specifically, those uses that will be in effect for a period of ten (10) years or less or those facilities or structures with a lifespan of ten (10) years or less. Such uses, facilities, and structures may be authorized by revocable temporary permits.~~ (3-20-20)T

002. (RESERVED)

003. ADMINISTRATIVE APPEALS.

An applicant aggrieved by a decision of the Director under these rules may request a hearing before the bBoard, but must do so within thirty (30) calendar days after receipt of written notice of the Director’s decision. Failure to make said request within the thirty (30) day period constitutes a waiver of the applicant’s right to a hearing before the bBoard. Pursuant to Title 67, Chapter 52, Idaho Code, the applicant may appeal an adverse decision of the Board.

~~(3-20-20)T()~~

004. -- 009. (RESERVED)

Deadline for written comments on this draft: June 30, 2021

010. DEFINITIONS.

~~01. — **Artificial High Water Mark.** The high water elevation above the natural or ordinary high water mark resulting from construction of man-made dams or control works and impressing a new and higher vegetation line (Section 58-1302(d), Idaho Code). (3-20-20)T~~

~~0201. **Board.** The Idaho State Board of Land Commissioners or such representative as may be designated by the board its designee. (3-20-20)T()~~

~~0302. **Dam.** Any artificial barrier, placed across a navigable river or stream ~~channel or watercourse~~. (3-20-20)T()~~

~~0403. **Department.** The Idaho Department of Lands. (3-20-20)T~~

~~0504. **Director.** The Director of the Idaho Department of Lands or such representative as may be designated by the Director his designee. (3-20-20)T()~~

~~0605. **Easement.** A non-possessory interest held by one person in land of another person whereby the first person is accorded use for a portion of such land in land for a specific purpose including rights of way. Such interest may be limited to a specific timeframe. (3-20-20)T()~~

~~07. — **Formerly Submerged Lands.** Formerly submerged beds of state-owned navigable lakes, rivers, and streams which have either been filled or have subsequently become uplands because of human activities, i.e., dikes, berms, seawalls, etc. Included are islands that have been created on submerged lands by natural processes or human activities since the date of statehood (July 3, 1890). (3-20-20)T~~

~~0806. **Grantee.** The party to whom the easement is granted and their assigns and successors in interest. (3-20-20)T()~~

~~0907. **Grantor.** The State of Idaho and its assigns and successors in interest. (3-20-20)T()~~

~~1008. **Hydroelectric Facilities.** The dam, diversion, penstock, transmission lines, water storage area, powerhouse and other facilities related to generating electric energy from water power. (3-20-20)T~~

~~1109. **Market Value.** The amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would be sold by a knowledgeable owner willing but not obligated to sell to a knowledgeable purchaser who desired but is not obligated to buy. The most probable price at a specified date, in cash, or on terms reasonably equivalent to cash, that the property should bring in a competitive and open market under all conditions requisite to an arm's-length sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. (3-20-20)T()~~

~~1210. **Natural or Ordinary High Water Mark.** The line ~~which~~ that the water impresses upon the soil by covering it for a sufficient period of time to deprive the soil of its vegetation and destroy its value for agricultural purposes (Section 58-104(9), Idaho Code). When the soil, configuration of the surface, or vegetation has been altered by ~~man's~~ human activity, the natural or ordinary high water mark ~~shall~~ will be located where it would have been if this alteration had not occurred. (3-20-20)T()~~

~~1311. **Person.** A An individual, corporation, partnership, limited liability company, an association, a joint venture or a corporation trust, unincorporated organization or other legal entity qualified to do business in the Sstate of Idaho, and any federal, state, county, or local unit of government, ~~or an individual~~. (3-20-20)T()~~

~~1412. — **Right-of-Way.** The privilege that one (1) person, or persons particularly described, may have of passing over the land of another in some particular line. Usually an easement over the land of another. — (3-20-20)T~~

~~15. — **Submerged Lands.** The state-owned beds of navigable lakes, rivers, and streams lying below the natural or ordinary high water marks. (3-20-20)T~~

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12. State-Owned Navigable Waterways and Navigable Waterways. As used in these rules, the beds of all navigable waterways up to the natural or ordinary high water mark as of the date Idaho was admitted into statehood. This includes any such bed that was formerly submerged and subsequently filled, and is now uplands because of human activity (e.g., dikes, berms, jetties) or by natural processes, and includes islands within navigable waterways resulting from human activity or by natural processes. ()

13. Temporary Permit. A **revocable** instrument authorizing a specific use on navigable waterways usually issued for five (5) years or less, but that may be issued for up to ten (10) years. ()

~~14.~~ **Uplands.** The land bordering on navigable ~~lakes, rivers, and streams~~ **waterways**. (3-20-20)T()

011. POLICY.

01. Regulation of the Beds of Navigable Waters. It is the policy of the State of Idaho to regulate and control the use or disposition of ~~lands in~~ the beds of navigable ~~lakes, rivers, and streams to the natural or ordinary high water mark thereof,~~ **waterways** so as to provide for their commercial, navigational, recreational or other public use; provided, that the ~~b~~**B**oard ~~shall will~~ take no action in derogation of or seeking to interfere with the riparian or littoral rights of ~~the owners of~~ upland ~~property abutting or adjoining such lands (Section 58-104, Idaho Code)~~ **land owners**. (3-20-20)T()

a. These rules ~~shall will~~ not be construed as adversely affecting any valid ~~existing rights easement or other right granted by the Department prior to May 23, 1984.~~ (3-20-20)T()

b. The ~~b~~**B**oard or Director ~~shall will~~ not grant an easement for any use, facility, or structure that would impair those uses of ~~submerged and formerly submerged lands~~ **navigable waterways protected** under the public trust doctrine. (3-20-20)T()

02. Exercise of State Title. The ~~s~~**S**tate ~~of Idaho~~ exercises its title over the beds of all lakes, rivers, and streams that are navigable in fact. ~~The department will respond to requests or inquiries as to which lakes, rivers, and streams are deemed navigable in fact. Additional i~~Information about **lakes, rivers, and** streams deemed navigable by the ~~s~~**S**tate of Idaho is available from the Department. (3-20-20)T()

03. Stream Channel and Encroachment Permits. Issuance of an easement ~~shall be is~~ contingent upon the applicant first obtaining a stream channel alteration permit if required by the Idaho Department of Water Resources, pursuant to Title 42, Chapter 38, Idaho Code, or a lake encroachment permit if required by the Department, pursuant to ~~the Lake Protection Act, Section 58-1301, Idaho Code~~ **Title 58, Chapter 13, Idaho Code**. (3-20-20)T()

04. Other Permits. Issuance of an easement ~~shall does~~ not relieve an applicant of acquiring other permits and licenses that are required by law. (3-20-20)T()

05. Existing Easements. These rules apply to existing easements on ~~submerged or formerly submerged lands~~ **navigable waterways**. However, it ~~shall is~~ not ~~be~~ necessary for a person possessing a valid easement ~~on the effective date of these rules obtained on or after May 23, 1984~~ to file a new **easement** application ~~pursuant to these rules if the location or use of the easement has not changed.~~ (3-20-20)T()

~~06. Existing Permits.~~ Any person holding a permit, issued after May 23, 1984 during the pendency of the promulgation of these rules, for right of way on submerged or formerly submerged lands shall convert the permit to an easement upon payment of fees and compensation in the amount provided for by these rules. (3-20-20)T

~~07~~**06. Limitation on Easement Grant.** An easement grants only such interest to the grantee as is specified within the document, including the legal right to occupy and use the ~~submerged or formerly submerged lands~~ **navigable waterways** for the specified purpose in the easement without interference by the grantor, except as otherwise provided by law. The legal right to use the ~~submerged or formerly submerged lands~~ **navigable waterways** for all other purposes not inconsistent with the grantee's interest remains with the grantor. (3-20-20)T()

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~~0807.~~ **Minimum Width.** The minimum width of any easement granted ~~shall be~~ is eight (8) feet. ~~(3-20-20)T()~~

012. -- 019. (RESERVED)

020. FEES AND COMPENSATION.

01. Administrative Fee. ~~There shall be a one-time nonrefundable administrative fee of three hundred dollars (\$300) for any use, facility, or structure requiring an easement under these rules. Applications for easements must be accompanied by a one-time nonrefundable administrative fee of five hundred dollars (\$500).~~ No supplemental compensation, in excess of ~~the one-time administrative~~ this fee, ~~shall is~~ required for the following: ~~(3-20-20)T()~~

a. An easement for a use, facility, or structure for which the navigable ~~lake, river, or stream~~ waterway poses an obstacle or barrier for construction or operation of the use, facility, or structure, or where the applicant demonstrates, and the Director or Board concurs, that the impact of the use, facility, or structure on the navigable waterways is less than the impact on the other values associated with the adjacent upland such as conservation of resources, significant cost savings to the public, or accessibility. ~~(3-20-20)T()~~

b. An easement for a dam that does not produce hydroelectric power and is less than ten (10) feet in height ~~(as measured from the natural stream bed at the downstream side).~~ ~~(3-20-20)T()~~

02. Supplemental Compensation. In addition to the ~~one-time nonrefundable administrative fee of three hundred dollars (\$300)~~ in Subsection 020.01, supplemental compensation will be is required for: ~~(3-20-20)T()~~

a. New and renewed easements for all dams of any size that produce hydroelectric power and all dams that are ten (10) feet and higher ~~(as measured from the natural stream bed at the downstream side)~~. Supplemental compensation for all such easements ~~shall be is~~ one thousand dollars (\$1,000), and ~~for a dam including associated hydroelectric facilities, there shall be will also have~~ an additional ~~one-time~~ payment of five dollars (\$5) per megawatt of installed capacity per as determined by the nameplate rating of said that facility. If the facility is situated on a Snake River segment that is a common border with the state of Oregon or the state of Washington, the installed capacity ~~shall will~~ be prorated based on the location of the common border across the dam's centerline for the purpose of calculating the compensation. Total compensation for a new or renewed easement ~~issued for a dam including associated hydroelectric facilities shall not exceed~~ facility is a maximum of twenty thousand dollars (\$20,000). If an easement for a hydroelectric facility has been issued prior to relicensing, the fee will be prorated based on a fifty (50) year use period. The fee for annual extensions that are frequently issued by United States Federal Energy Regulatory Commission (FERC) because of permitting delays prior to issuance of the major FERC license will be prorated based on a fifty (50) year use period. ~~(3-20-20)T()~~

b. An easement over ~~submerged and formerly submerged lands, navigable waterways~~ for any use, facility, or structure, that is not a dam or hydroelectric facility, ~~which and~~ would use navigable waterways as a substitute for, or to reduce or eliminate the use of, uplands. Supplemental compensation for such easements ~~shall will~~ be a one-time payment based on the market value of the ~~submerged or formerly submerged lands adjacent uplands on which the use is avoided. In the case of filled lands, the value will be based on the highest and best use of the adjacent uplands.~~ The compensation ~~shall will~~ be determined by appraisal. ~~For purposes of this subsection, the per acre value of the submerged or formerly submerged lands shall be the same as the per acre value of the adjacent uplands for which the submerged or formerly submerged lands shall serve as a substitute or in the case of filled lands, the per acre value shall be based on its highest and best use. Adjacent uplands are uplands bordered on one (1) side by the water body and extending landward at least one (1) lot in depth or three hundred (300) feet, whichever is greater.~~ ~~(3-20-20)T()~~

03. Appraisal. The easement appraisal of the easement ~~normally will be performed by qualified Department staff. If so desired by the applicant and agreed to by the Director, the applicant may provide the appraisal, which must be acceptable to and meet the specifications set by the Director. will be conducted by a licensed appraiser selected by the Department, although the applicant may propose an appraiser to the Department. The Department will provide appraisal instructions. The appraisal will be performed in a timely manner, and a copy sent to the Department~~

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~~and the applicant. The expense of the appraisal will be borne by the applicant.~~ (3-20-20)T(____)

~~04. **Cost of Appraisal.** Where the appraisal is performed by department staff, the appraisal costs shall be the actual cost and shall be charged to the applicant in addition to those costs outlined in Subsections 020.01 and 020.02. These costs shall include transportation, personnel costs (including per diem), and administrative overhead. An itemized statement of these costs shall be provided to the applicant. The appraisal fee shall be billed separately from the nonrefundable administrative fee established in Subsection 020.01.~~ (3-20-20)T

021. -- 029. (RESERVED)

030. **TERM OF EASEMENT.**

01. **Permanent Uses.** A permanent easement will be issued for uses, facilities, and structures that are normally considered permanent in nature, such as bridges, utility crossings, highway fills, and dams. (3-20-20)T

02. **Term Easements.** A term easement will be issued for a specific time period of ten (10) to fifty-five (55) years and will be issued for those uses, facilities, and structures not normally considered permanent in nature. (3-20-20)T

03. **Federally Licensed Facilities.** The term of an easement for all federally licensed hydroelectric facilities on ~~submerged or formerly submerged lands shall be~~ navigable waterways will run concurrently with the term of such license issued by ~~the United States Federal Energy Regulatory Commission (FERC),~~ or its successor, authorizing the facility. Easements for hydroelectric facilities for which FERC has issued a conduit exemption ~~shall will~~ not exceed fifty-five (55) years. (3-20-20)T(____)

031. -- 039. (RESERVED)

040. **USE, FACILITY, OR STRUCTURE MODIFICATION.**

Modification of an existing use, facility, or structure ~~shall will~~ require an easement or an amendment to an existing easement and ~~shall will~~ be processed in the same manner as a new application. Modification includes expanding the use or easement area, or changing the location of the use or easement area. Modification does not include ordinary maintenance, repair, or replacement of existing structures such as poles, wires, and cables. (3-20-20)T(____)

041. -- 049. (RESERVED)

050. **ASSIGNMENTS.**

01. **Assignment Fee.** Easements may be assigned upon prior approval of the Director. The assignor and assignee must complete the ~~d~~Department's standard assignment form and forward it and the nonrefundable assignment fee of fifty dollars (\$50) to any ~~d~~Department office. (3-20-20)T(____)

02. **Prior Written Consent.** An assignment is not valid without the written consent of the Director which ~~shall will~~ not be unreasonably withheld. The Department ~~shall will~~ work diligently to complete assignments within sixty (60) days after receipt of the standard assignment forms and all associated information. (3-20-20)T(____)

~~03. **Multiple Assignments.** If all state easements held by a grantee are assigned at one time, only one (1) assignment fee shall be required.~~ (3-20-20)T

051. -- 059. (RESERVED)

060. **ABANDONMENT, RELINQUISHMENT, AND TERMINATION.**

01. **Section 58-603, Idaho Code.** The provisions of Section 58-603, Idaho Code relating to rights-of-way apply to all easements over state-owned ~~submerged and formerly submerged lands~~ navigable waterways. (3-20-20)T(____)

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02. Non-Use. Upon termination of an easement for any ~~cause-reason~~, the Director ~~shall~~will provide the grantee with a specific, but reasonable, period of time (up to twelve (12) months) to remove all facilities or structures. Failure to remove all facilities or structures within such time period established by the Director ~~shall~~will be deemed a trespass on ~~submerged and formerly submerged lands~~ state-owned navigable waterways. (3-20-20)T(____)

03. Voluntary Relinquishment. The grantee may voluntarily relinquish the easement at any time by submitting a letter or relinquishment form in recordable format to the ~~state of Idaho~~ Department. Voluntary relinquishment of an easement does not waive or forgive ~~the~~ any accrued obligation of the easement holder including the obligation to remove facilities as required in Subsection 060.02. (3-20-20)T(____)

061. -- 069. (RESERVED)

070. PROCEDURE.

01. Contents of Application. An easement application ~~shall~~ submitted to the Department must contain: (3-20-20)T(____)

a. A letter of request stating the purpose of the easement; (3-20-20)T

b. A ~~plat of right of way in triplicate~~ survey of the easement; and (3-20-20)T(____)

c. One (1) copy of an acceptable written description based on a survey of the centerline or a metes and bounds survey of the easement tract. The applicant may also describe the area occupied by existing uses, facilities, or structures by platting the state-owned ~~submerged or formerly submerged lands~~ navigable waterways affected by the use and showing surveyed or scaled ties ~~(to a legal corner)~~ at the points where the use enters and/or leaves the ~~parcel~~ navigable waterways. (3-20-20)T(____)

02. Engineer Certification. All maps, plans, and field notes attached to an application for rights-of-way for ditches and reservoirs governed by Section 58-601, Idaho Code, ~~shall~~ must be certified by the engineer under whose direction such surveys or plans were made and ~~four (4) copies~~ filed with the Department and ~~one (1) copy filed with~~ the Idaho Department of Water Resources. (3-20-20)T(____)

03. Decision on Application. Upon proper application and payment of the ~~nonrefundable administrative~~ fees, appraisal costs, and supplemental compensation required pursuant to these rules, the Director may, after appropriate review and consideration of the facts and the law, grant an easement ~~on and over submerged or formerly submerged lands~~ encumbering navigable waterways for any public or private purpose. The Director may deny an application for easement upon a finding that issuance would not be consistent with law or these rules. Such denial or approval ~~shall~~ will be in writing within six (6) months of the receipt of ~~the~~ a complete application. (3-20-20)T(____)

04. Director's Decision. The Director may grant and renew easements in all cases except when the compensation will exceed ~~ten-twenty-five~~ thousand dollars (~~\$1025~~,000), exclusive of the payment for any damage or impairment of rights to the remainder of the property. (3-20-20)T(____)

05. Board Decision. Easement applications where compensation exceeds ~~ten-twenty-five~~ thousand dollars (~~\$1025~~,000), or that are of a complex and unusual nature as determined by the Director, ~~shall~~ will be presented to the Board for appropriate action. (3-20-20)T(____)

~~06. Where to Submit.~~ An easement application may be submitted to any office of the Department. (3-20-20)T

~~0706. Notification of Approval.~~ If the application is approved, the applicant ~~shall~~ will be notified in writing of the amount due to the Department. If the application is denied, the applicant will be notified in writing of the reasons for the denial. (3-20-20)T(____)

~~08. Denial of Application.~~ If the application is denied, the applicant shall be notified in writing of the

~~reasons for the denial.~~ ~~(3-20-20)T()~~

071. -- 079. (RESERVED)

080. EASEMENT ACCESS AND EMERGENCY WORK.

01. Use of Land. The grantee has the right to use such portion of the ~~lands~~ navigable waterways adjacent to and along said easement as may be reasonably necessary in connection with the installation, repair, and replacement of the use, facility, or structure authorized by the easement. If such activities cause soil disturbance, the destruction of vegetation, and/or entering the ~~navigable stream~~ bed below the natural or ordinary high water mark, the grantee will obtain prior written authorization from the ~~grantor~~ Department. The grantee is responsible for any damage to lands or other resources outside the easement area. ~~(3-20-20)T()~~

02. Emergency Work. The grantee is authorized to enter upon ~~lands~~ navigable waterways lying outside the easement area, ~~including submerged or formerly submerged lands and other lands managed by the Department,~~ for the purpose of performing emergency repairs on an easement for damage due to floods, high winds, and other acts of God, provided that the grantee provides written notice to the ~~Director~~ Department within forty-eight (48) hours of the time work commences. The grantee ~~shall be~~ is responsible for any damage to lands or other resources outside the easement area. ~~(3-20-20)T()~~

081. -- 999. (RESERVED)