

STATE BOARD OF LAND COMMISSIONERS

October 19, 2021

Regular Agenda

Subject

Adoption of Pending Fee Rule, IDAPA 20.03.09 *Easements on State-Owned Navigable Waterways*

Question Presented

Shall the Land Board adopt the pending fee rule for IDAPA 20.03.09?

Background

The Idaho Department of Lands (Department) manages the beds of navigable lakes and rivers for the benefit of the public. IDAPA 20.03.09 establishes a consistent process to authorize specific uses of state-owned submerged lands. These uses include bridges, utility crossings, and some dams.

The Department received Land Board approval on February 16, 2021 to enter negotiated rulemaking. Following Executive Order 2020-01, Zero-Based Regulation, this rule chapter is scheduled to be repealed and replaced in 2021 for review during the 2022 legislative session.

Discussion

The Department's outreach for negotiated rulemaking included the following:

- Published the Notice of Negotiated Rulemaking in the Idaho Administrative Bulletin.
- Created a rulemaking webpage to post documents, scheduling information, and comments.
- Issued a press release.
- Emailed 51 customers and other interested parties.
- Mailed postcards to 81 customers.

Negotiated rulemaking meetings were held on April 28 and May 5, 2021. A total of three non-agency affiliated people attended these meetings. Some minor changes to the initial draft were made based on comments received and internal discussions. Substantive comments and IDL's responses are summarized in Attachment 1.

The proposed rule was published in the September 1, 2021 Administrative Bulletin. The Notice of Proposed Rulemaking and the published rule text are Attachment 2. No comments were received and the Department recommends no changes for the Pending Rule.

The pending rule reduces the overall regulatory burden by reducing the total word count and the number of restrictive words. The proposed rule includes the following substantive changes:

- The \$300 application fee established in 1993 is increased to \$500. This will cover the Department's cost of reviewing and issuing these easements.
- Appraisals, if needed, will now be paid for by the applicant and will not be performed by qualified Department staff.
- The Director's approval authority is raised from a compensation of \$10,000 up to \$25,000. This corresponds with the same approval authority for easements on endowment lands.

If approved by the Land Board, the Department will submit the Notice of Adoption of Pending Fee Rule (Attachment 3) to the Office of the Administrative Rules Coordinator for the 2022 legislative session.

Recommendation

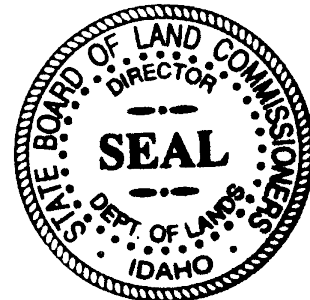
Adopt the pending fee rule for IDAPA 20.03.09 *Easements on State-Owned Navigable Waterways*.

Board Action

A motion was made by Attorney General Wasden that the Board adopt the rule as proposed by the Department. Controller Woolf seconded the motion. The motion carried on a vote of 5-0.

Attachments

1. Summary of Comments from Negotiated Rulemaking
2. Notice of Rulemaking – Proposed Rule with Rule Text
3. Draft Notice of Rulemaking – Adoption of Pending Fee Rule



Response to Comments on Draft Negotiated Rule IDAPA 20.03.09, Easements on Submerged Lands and Formerly Submerged Lands				
Comment	Rule Section	Response	Date	Author
Replacing "Submerged Lands and Formerly Submerged Lands" with "Navigable Waters" makes for a clearer and more concise rule.	General	IDL agrees.	5-May-21	Austin D. Lowe
The term "arm's length sale" detracts from clarity and should be omitted.	010.09	The term "arm's length" is commonly used in real estate and business transactions. This term provides necessary clarity on the desired nature of transactions. The IDL has encountered entities conducting transactions within their ownership groups and a requirement for "arm's length sale" ensures a fair transaction. References added to the research materials and posted on the IDL website at https://www.idl.idaho.gov/wp-content/uploads/sites/2/2021/05/Arms-Length-References.pdf .	5-May-21	Austin D. Lowe
"Information is available from the Department" could be clearer if it specified where or how to get the information.	011.02	All posted rules are now prefaced with a cover sheet that provides information regarding that rule. Regarding the information specific to Subsection 011.02, that information is currently available on IDL's website at: https://www.idl.idaho.gov/wp-content/uploads/sites/2/2020/01/list-navigable-lakes-rivers-1-1.pdf	5-May-21	Austin D. Lowe
Raising the application fee from \$300 to \$500 does not seem to be best course of action in the current COVID-19 economy.	020.01	These easements are part of a self-funded program that receives no taxpayer funds. As a result, the program must try to recoup the cost of each transaction that occurs from the applicants. The fee has been \$300 since at least 1992. Adjusting for inflation alone, a \$300 fee in 1992 would now cost approximately \$580. Executive Order 2020-01 establishes a five-year review cycle for fee rules; if the shortfall in covering transaction costs is not addressed now, it cannot be revisited for another five years. While the timing with COVID-19 is unfortunate, fees must be raised now or the cost of completing easements will be carried by other functions within this program.	5-May-21	Austin D. Lowe

ATTACHMENT 1

IDAPA 20 – IDAHO DEPARTMENT OF LANDS
20.03.09 – EASEMENTS ON STATE-OWNED NAVIGABLE WATERWAYS
DOCKET NO. 20-0309-2101 (NEW CHAPTER, FEE RULE)
NOTICE OF RULEMAKING – PROPOSED RULE

AUTHORITY: In compliance with Section 67-5221(1), Idaho Code, notice is hereby given that this agency has initiated proposed rulemaking procedures. The action is authorized pursuant to Section 58-104(6), Idaho Code.

PUBLIC HEARING SCHEDULE: Public hearing(s) concerning this rulemaking will be scheduled if requested in writing by twenty-five (25) persons, a political subdivision, or an agency, not later than September 15, 2021.

The hearing site(s) will be accessible to persons with disabilities. Requests for accommodation must be made not later than five (5) days prior to the hearing, to the agency address below.

DESCRIPTIVE SUMMARY: The following is a nontechnical explanation of the substance and purpose of the proposed rulemaking:

Following Executive Order 2020-01, Zero-Based Regulation, this rule chapter is scheduled to be repealed and replaced in 2021 for review during the 2022 legislative session. The overall regulatory burden has been reduced by decreasing both total word count and the number of restrictive words in the new rule chapter. Application fees have been increased to cover the costs of reviewing applications. Appraisals, if needed, will now be paid for by the applicant and will not be performed by qualified Department staff. The Director's approval authority is raised from a compensation of \$10,000 up to \$25,000. This corresponds with the same approval authority for easements on endowment lands.

FEE SUMMARY: The following is a specific description of the fee or charge imposed or increased:

The \$300 application fee established in 1993 is increased to \$500. Supplemental compensation for dams is kept at \$1,000 plus \$5 per megawatt up to a maximum of \$20,000. Supplemental compensation for using navigable waterways in lieu of adjacent uplands will be determined based on the market value of those adjacent uplands. Assignment fees remain \$50. Fees are being imposed pursuant to Sections 58-104, 58-127, and 58-603, Idaho Code.

FISCAL IMPACT: The following is a specific description, if applicable, of any negative fiscal impact on the state general fund greater than ten thousand dollars (\$10,000) during the fiscal year resulting from this rulemaking: N/A

NEGOTIATED RULEMAKING: Pursuant to Section 67-5220(1), Idaho Code, negotiated rulemaking was conducted. The Notice of Intent to Promulgate Rules – Negotiated Rulemaking was published in the April 7, 2021, Idaho Administrative Bulletin, Vol. 21-4, pages 47-48.

INCORPORATION BY REFERENCE: Pursuant to Section 67-5229(2)(a), Idaho Code, the following is a brief synopsis of why the materials cited are being incorporated by reference into this rule: N/A

ASSISTANCE ON TECHNICAL QUESTIONS, SUBMISSION OF WRITTEN COMMENTS: For assistance on technical questions concerning the proposed rule, contact Eric Wilson at (208) 334-0261 or ewilson@idl.idaho.gov.

Anyone may submit written comments regarding this proposed rulemaking. All written comments must be directed to the undersigned and must be delivered on or before September 22, 2021.

DATED this 30th day of July, 2021.

Eric Wilson, Resource Protection & Assistance Bureau Chief
Idaho Department of Lands
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THE FOLLOWING IS THE PROPOSED TEXT OF DOCKET NO. 20-0309-2101
(New Chapter – Zero-Based Regulation Rulemaking)

20.03.09 – EASEMENTS ON STATE-OWNED 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 Board 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). ()

001. 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, including dams that span the entire width of a state-owned navigable waterway regardless of the dam's purpose, with the following exceptions: ()

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. ()

002. (RESERVED)

003. ADMINISTRATIVE APPEALS.

An applicant aggrieved by a decision of the Director under these rules may request a hearing before the Board, 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 Board. Pursuant to Title 67, Chapter 52, Idaho Code, the applicant may appeal an adverse decision of the Board. ()

004. -- 009. (RESERVED)

010. DEFINITIONS.

01. Board. The Idaho State Board of Land Commissioners or its designee. ()

02. Dam. Any artificial barrier placed across a navigable river or stream. ()

03. Department. The Idaho Department of Lands. ()

04. Director. The Director of the Idaho Department of Lands or his designee. ()

05. Easement. A non-possessory interest in land for a specific purpose including rights of way. Such interest may be limited to a specific timeframe. ()

06. Grantee. The party to whom the easement is granted and their assigns and successors-in-interest. ()

- 07. Grantor.** The State of Idaho and its assigns and successors-in-interest ()
- 08. Hydroelectric Facilities.** The dam, diversion, penstock, transmission lines, water storage area, powerhouse and other facilities related to generating electric energy from water power. ()
- 09. Market Value.** 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. ()
- 10. Natural or Ordinary High Water Mark.** The line that the water impresses upon the soil by covering it for sufficient periods of time to deprive the soil of its vegetation and destroy its value for agricultural purposes. When the soil, configuration of the surface, or vegetation has been altered by human activity, the natural or ordinary high water mark will be located where it would have been if this alteration had not occurred. ()
- 11. Person.** An individual, corporation, partnership, limited liability company, association, trust, unincorporated organization or other legal entity qualified to do business in the state of Idaho, and any federal, state, county, or local unit of government. ()
- 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 waterways. ()
- 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 the beds of navigable waterways so as to provide for their commercial, navigational, recreational or other public use; provided, that the Board will take no action in derogation of or seeking to interfere with the riparian or littoral rights of upland land owners. ()
- a.** These rules will not be construed as adversely affecting any valid easement or other right granted by the Department prior to May 23, 1984. ()
- b.** The Board or Director will not grant an easement for any use, facility, or structure that would impair those uses of navigable waterways protected under the public trust doctrine. ()
- 02. Exercise of State Title.** The State of Idaho exercises its title over the beds of all lakes, rivers, and streams that are navigable in fact. Information about lakes, rivers, and streams deemed navigable by the State of Idaho is available from the Department. ()
- 03. Stream Channel and Encroachment Permits.** Issuance of an easement 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 Title 58, Chapter 13, Idaho Code. ()
- 04. Other Permits.** Issuance of an easement does not relieve an applicant of acquiring other permits and licenses that are required by law. ()
- 05. Existing Easements.** These rules apply to existing easements on navigable waterways. However, it

is not necessary for a person possessing a valid easement obtained on or after May 23, 1984 to file a new easement application if the location or use of the easement has not changed. ()

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 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 navigable waterways for all other purposes not inconsistent with the grantee's interest remains with the grantor. ()

07. Minimum Width. The minimum width of any easement granted is eight (8) feet. ()

012. -- 019. (RESERVED)

020. FEES AND COMPENSATION.

01. Administrative Fee. Applications for easements must be accompanied by a one-time nonrefundable administrative fee of five hundred dollars (\$500). No supplemental compensation in excess of this fee is required for the following: ()

a. An easement for a use, facility, or structure for which the navigable 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. ()

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 bed at the downstream side. ()

02. Supplemental Compensation. In addition to the fee in Subsection 020.01, supplemental compensation is required for: ()

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 bed at the downstream side. Supplemental compensation for all such easements is one thousand dollars (\$1,000), and hydroelectric facilities will also have an additional payment of five dollars (\$5) per megawatt of installed capacity as determined by the nameplate rating of 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 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 for a hydroelectric 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. ()

b. An easement over navigable waterways for any use, facility, or structure, that is not a dam or hydroelectric facility, and would use navigable waterways as a substitute for, or to reduce or eliminate the use of, uplands. Supplemental compensation for such easements will be a one-time payment based on the market value of the 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 will be determined by appraisal. ()

03. Appraisal. The easement appraisal 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 and the applicant. The expense of the appraisal will be borne by the applicant. ()

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. ()

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. ()

03. Federally Licensed Facilities. The term of an easement for all federally licensed hydroelectric facilities on navigable waterways will run concurrently with the term of such license issued by FERC, or its successor, authorizing the facility. Easements for hydroelectric facilities for which FERC has issued a conduit exemption will not exceed fifty-five (55) years. ()

031. -- 039. (RESERVED)

040. USE, FACILITY, OR STRUCTURE MODIFICATION.

Modification of an existing use, facility, or structure will require an easement or an amendment to an existing easement and 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. ()

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 Department's standard assignment form and forward it and the nonrefundable assignment fee of fifty dollars (\$50) to any Department office. ()

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

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 navigable waterways. ()

02. Non-Use. Upon termination of an easement for any reason, the Director 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 will be deemed a trespass on state-owned navigable waterways. ()

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 Department. Voluntary relinquishment of an easement does not waive or forgive any accrued obligation of the easement holder including the obligation to remove facilities as required in Subsection 060.02. ()

061. -- 069. (RESERVED)

070. PROCEDURE.

01. Application. An easement application submitted to the Department must contain: ()

- a. A letter of request stating the purpose of the easement; ()
- b. A survey of the easement; and ()
- 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 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 navigable waterways. ()

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, must be certified by the engineer under whose direction such surveys or plans were made and filed with the Department and the Idaho Department of Water Resources. ()

03. Decision on Application. Upon proper application and payment of the 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 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 will be in writing within six (6) months of the receipt of a complete application. ()

04. Director's Decision. The Director may grant and renew easements in all cases except when the compensation will exceed twenty-five thousand dollars (\$25,000), exclusive of the payment for any damage or impairment of rights to the remainder of the property. ()

05. Board Decision. Easement applications where compensation exceeds twenty-five thousand dollars (\$25,000), or that are of a complex and unusual nature as determined by the Director, will be presented to the Board for appropriate action. ()

06. Notification. If the application is approved, the applicant 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. ()

071. -- 079. (RESERVED)

080. EASEMENT ACCESS AND EMERGENCY WORK.

01. Use of Land. The grantee has the right to use such portion of the 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 bed below the natural or ordinary high water mark, the grantee will obtain prior written authorization from the Department. The grantee is responsible for any damage to lands or other resources outside the easement area. ()

02. Emergency Work. The grantee is authorized to enter upon navigable waterways lying outside the easement area 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 Department within forty-eight (48) hours of the time work commences. The grantee is responsible for any damage to lands or other resources outside the easement area. ()

081. -- 999. (RESERVED)

IDAPA 20 – IDAHO DEPARTMENT OF LANDS

20.03.09 - EASEMENTS ON STATE-OWNED NAVIGABLE WATERWAYS

DOCKET NO. 20-0309-2101

NOTICE OF RULEMAKING - ADOPTION OF PENDING FEE RULE

EFFECTIVE DATE: This rule has been adopted by the agency and the Idaho State Board of Land Commissioners and is now pending review by the 2022 Idaho State Legislature for final approval. Pursuant to Section 67-5224(5)(c), Idaho Code, this pending rule will not become final and effective until it has been approved by concurrent resolution of the legislature because of the fee being imposed or increased through this rulemaking. The pending fee rule becomes final and effective upon adoption of the concurrent resolution or upon the date specified in the concurrent resolution unless the rule is rejected.

AUTHORITY: In compliance with Section 67-5224, Idaho Code, notice is hereby given that this agency has adopted a pending rule. The action is authorized pursuant to Section 58-104, Idaho Code.

DESCRIPTIVE SUMMARY: The following is a concise explanatory statement of the reasons for adopting the pending rule and a statement of any change between the text of the proposed rule and the text of the pending rule with an explanation of the reasons for the change.

Following Executive Order 2020-01, Zero-Based Review, this rule chapter is scheduled to be repealed and replaced in 2021 for review during the 2022 legislative session. The overall regulatory burden has been reduced by decreasing both total word count and the number of restrictive words in the new chapter. Application fees have been increased to cover the costs of reviewing applications. Appraisal of needs, will now be paid for by the applicant and will not be performed by qualified Department staff. The Director's approval authority is raised from a compensation of \$10,000 up to \$25,000. This corresponds to the same approval authority for easements on endowment lands.

There are no changes to the pending rule as it is being adopted as originally proposed. The complete text of the proposed rule was published in the September 21, 2021 Idaho Administrative Bulletin, Vol. 21-9, pages 93-97.

FEE SUMMARY: The following is a specific description of the fee or charge imposed or increased. This fee or charge is being imposed pursuant to Sections 58-104, 58-127, and 58-603, Idaho Code.

The \$300 application fee established in 1981 is increased to \$500.

FISCAL IMPACT: The following is a specific description, if applicable, of any negative fiscal impact on the state general fund greater than ten thousand dollars (\$10,000) during the fiscal year: N/A

ASSISTANCE ON TECHNICAL QUESTIONS: For assistance on technical questions concerning this pending rule, contact Eric Wilson at (208) 334-0261 or ewilson@idl.idaho.gov.

DATED this 19th day October, 2021.

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