

From: [Loren Moore](#)
To: [Rule Making](#)
Subject: IDAPA 20.03.17 Rulemaking Comment
Date: Monday, May 2, 2022 9:40:04 AM
Attachments: [image001.png](#)
[Notice of Negotiated Rulemaking for Leases on Navigable Waterways.pdf](#)
[Lake Protection Act.pdf](#)
[IDAPA rule change 2022.docx](#)
[20220408_Draft-Rule-Text_docket-20-0317-2201.docx](#)

I am forwarding comments regarding Rulemaking for IDAPA 20.03.17 Submerged Land Leases



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From: Ralph Sletager <Ralph@sandpointwaterfront.com>
Sent: Monday, May 2, 2022 9:32 AM
To: Loren Moore <LMoore@idl.idaho.gov>
Subject: RE: Loren Moore - IDL

Hi Loren,

Nice to visit with you this morning.

I received a post card notice from the IDL on the rule changes. Please consider my comments.

I am concerned that the proposed rule changes exceed the state's authority and conflict with the Lake protection Act 58-1301, Idaho code 42-101, Idaho code 58-1201 the Public Trust Doctrine, Idaho code 58-1310, Idaho Code 58-1311 and the State Constitution by asserting ownership of private property.

The fundamental flaw in the proposed rules is the overreach related to the Ordinary High Water. The state's ownership is only the lands lying below the natural or ordinary high water mark of navigable waters.

58-1201. FINDINGS. The legislature hereby finds and declares:

(1) Upon admission of the state of Idaho into the union, **the title to the beds of navigable waters** became state property, and subject to its jurisdiction and disposal under the equal footing doctrine.

The state received the title to the **beds** of navigable waters by admission to the union. The **beds** were defined as those lands lying below the natural or ordinary high water mark" of navigable waters".

58-1202. DEFINITIONS. For the purposes of this chapter, the following definitions apply:

- (1) "Beds of navigable waters" means those lands lying under or below the "natural or ordinary high water mark" of navigable waters.
- (2) (2) "Natural or ordinary high water mark" means the line that water impresses on the soil by covering it for sufficient periods to deprive the soil of its vegetation and destroy its value for agricultural purposes. When the soil, configuration of the surface, or vegetation has been altered by man's activity, the natural or ordinary high water mark shall be located where it would have been if no alteration had occurred.
- (3) (3) "Navigable waters" means those waters that were susceptible to being used, in their ordinary condition, as highways for commerce on the date of statehood, under the federal test of navigability.
- (4) (4) "Private property rights" means the property rights located above the beds of navigable waters.
- (5) (5) "Public trust doctrine" means the common law rule relating to the title to the beds of navigable waters adopted by inference in section 73-116, Idaho Code. "This code states that English Common Law is in force"
- (6) History:
- (7) [58-1202, added 1996, ch. 342, sec. 1, p. 1148.]

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

The public Trust Doctrine defines as "Private property rights" means the property rights located above the beds of navigable waters. The proposed IDA rules affect private property.

The LPA defines the rights of owners/private property as "Riparian or littoral rights" means only the rights of owners or lessees of land adjacent to navigable waters of the lake to maintain their adjacency to the lake and to make use of their rights as riparian or littoral owners or lessees in building or using aids to navigation but does not include any right to make any consumptive use of the waters of the lake.

Public trust doctrine" means the common law rule relating to the title to the beds of navigable waters adopted by inference in section 73-116, Idaho Code. "This code states that English Common Law is in force"

The LPA (Lake Protection Act) defines:

"Natural or ordinary high water mark" means the high water elevation in a lake over a period of years, uninfluenced by man-made dams or works, at which elevation the water impresses a line on the soil by covering it for sufficient periods to deprive the soil of its vegetation and destroy its value for agricultural purposes.

The LPA defines 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."

58-1311. DISCLAIMER OF STATE PROPERTY RIGHTS IN PRIVATE LANDS. While the state asserts the right to regulate and control all encroachments, navigational or nonnavigational, upon, in or above the beds or waters of navigable lakes as provided for in this act, nothing contained in this act shall be construed to vest in the state of Idaho any

property right or claim of such right to any private lands lying above the natural or ordinary high water mark of any navigable lake.

58-1310. EXISTING RIGHTS UNAFFECTED. This act shall not operate or be so construed as to impair, diminish, control or divest any existing or vested water rights acquired under the laws of the state of Idaho or the United States, nor to interfere with the diversion of water from lakes under existing or vested water rights or water right permits for irrigation, domestic, commercial or other uses as recognized and provided for by Idaho water laws nor shall permit be required from a water user or his agent to clean, maintain or repair any existing diversion structure or works provided the board is notified of the work proposed to be done and the work is done as nearly as possible in a manner conforming to rules and regulations of the board for work done under permit nor shall this act be construed to impair existing encroachments in aid of navigation or any right heretofore granted an applicant by the director of the Idaho department of water resources or the director of the department of lands, nor shall this act be construed to impair existing nonnavigational encroachments not extending beyond the natural or ordinary high water mark if they have been in existence at least five (5) years prior to the effective date of this act nor any other existing nonnavigational encroachment unless action to abate the same by legal proceedings be instituted by the board within three (3) years of the effective date of this act. If abatement proceedings be instituted by the board, the court shall hear such evidence as would be pertinent upon an original application and shall consider also the length of time the encroachment has existed and its general acceptance

42-101. NATURE OF PROPERTY IN WATER. Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved. All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state

"Navigable waters" means those waters that were susceptible to being used, in their ordinary condition, as highways for commerce on the date of statehood, under the federal test of navigability.

"Navigable lake" means any permanent body of relatively still or slack water, including man-made reservoirs, not privately owned and not a mere marsh or stream eddy, and capable of accommodating boats or canoes. This definition does not include man-made reservoirs where the jurisdiction thereof is asserted and exclusively assumed by a federal agency

I have cut and pasted the conflicting language from the Lake Protection Act and other statute in green on the word document titled IDAPA rule change.

The 2nd attached word document is the Draft rule change without my comments.

I have also included the Lake Protection Act for your convenience.

Thanks again rs