



Disclaimer of Interest Procedures

This guidance document is not a new law. This document is an agency interpretation of existing law, except as authorized by Idaho Code or incorporated into a contract.

Agency Contact

Navigable Waterways Program Manager, Boise Staff Office

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Documents Referenced in Procedures

DIS-001	Attorney General Opinion 07-1, May 7, 2007
DIS-002	Memorandum of Understanding between IDWR and IDL, November 7, 2007
DIS-003	List of Navigable Lakes and Rivers
DIS-004	Application for Disclaimer of Interest
DIS-005	Disclaimer of Interest Checklist
DIS-006	Disclaimer Land Board Memo Template
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DIS-008	Acquired Easement Template
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Section 5 – Legal Authorities

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I. Authorities and Statutes

- Idaho Admissions Act of July 3, 1890**
- Idaho Code § 58-12**, Idaho Code, Public Trust Doctrine
- Idaho Code § 73-116**, Common Law in Force
- Idaho Code § 58-104**, Idaho Land Board - Powers and Duties
- Idaho Code § 58-119A**, Reservation of Public Use Right-of-Way for Disclaimers of Interest
- Idaho Code § 58-132**, Extension and Declaration of Powers and Duties of State Board of Land Commissioners
- Idaho Code § 58-601**, Rights of Way for Ditches and Reservoirs
- Idaho Code § 36-1601**, Public Waters – Highways for Recreation

II. Case Law

- Pollard v. Hagen**, 44 U.S. 212, (1844) (All new states enter the union under equal footing. Therefore, all of the states own the lands beneath the navigable rivers and lakes.)
- Shively v. Bowlby**, 152 U.S. 1, (1894) (State obtained title to lands below ordinary high water mark of navigable bodies of water at statehood.)
- Illinois Central Railway Co. v. Illinois**, 146 U.S. 387 (1892) (State as administrator of trust of beds of navigable bodies of water does not have power to abdicate its role as trustee in favor of private parties.)
- Scott v. Lattig**, 227 U.S. 229, 33 S.Ct. 242 (1913) (Snake River is navigable and state owns the bed. This case reaffirmed the equal footing doctrine in Idaho.)
- Callahan v. Price**, 26 Idaho 745, 146 P.2d 732 (1915) (Salmon River is navigable, and establishes the idea of the public trust doctrine in Idaho.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Land Board Policies

To see the original Land Board policies, please see the **Land Board Policies: Navigable Waterways Disclaimers of Interest** document.

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

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

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

April 18, 2023 Authority for the Director to approve disclaimers is delegated by the Land Board, given that the disclaimers are within the following six conditions:

1. Gross acreage of the disclaimed parcel is not over 25 acres.
2. There are no existing structures (non-agricultural) in the proposed disclaimer area.
3. Land Board staff has reviewed the disclaimer to determine if the disclaimer warrants being brought before the Land Board as a consent item.
4. If requested, information gathered as part of the disclaimer process, such as tax and deed records, will be provided to Land Board staff.
5. The proposed public use right-of-way is not less than or greater than twenty-five feet (25') in width.
6. The Department has not received public inquiries or media questions regarding the proposed disclaimer.

September 19, 2023 Modification of the delegation of authority by replacing the fifth condition with "For navigable rivers, the proposed public use right-of-way is not less than or greater than twenty-five feet (25') in width. For navigable lakes, a public use right-of-way is not required."

IV. Attorney General Opinions

Attorney General Opinion 07-1 (DIS-001), Clarifies state's role in managing public trust lands, the legal basis for that role, and how it applies to the 25-foot public use easement reserved in disclaimers of interest.

V. Interagency Agreements

Memorandum of Understanding, Idaho Department of Water Resources and Idaho Department of Lands (**DIS-002**).

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I. Ownership and Title

A. Navigability for Title

The State of Idaho owns the beds and banks of all navigable waters below the Ordinary High Water Mark (OHWM), assuming the waterways were navigable at the time of statehood (**List of Navigable Lakes and Rivers, DIS-003**). These sovereign lands were acquired by virtue of the Equal Footing Doctrine established by the Pollard v. Hagen case and included in the Idaho Admissions Act. Navigable waters are administered by the Idaho Department of Lands (IDL) for the benefit of the public in accordance with the Public Trust Doctrine. The Shively v. Bowlby case established that states obtain title to navigable waters at statehood. The Scott v. Lattig and Callahan v. Price cases established the Equal Footing Doctrine and the Public Trust Doctrine in Idaho. The Public Trust Doctrine was further defined in Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc. (KEA), and is now in statute as Idaho Code § 58-12. The courts, however, are the final arbiters of the Public Trust Doctrine (KEA).

All lakes and streams that are navigable for title purposes are also navigable as a right-of-way. While IDL has a list of waterways considered navigable, the list is not set in stone. The criteria for navigable waters includes its use for commerce or navigation at or prior to statehood. Only the Land Board, the courts, or a combination of the two, have the authority to change the list of navigable waterways.

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

B. Meander Lines

Meander lines are shown on the land records system as the Government Lot lines adjacent to navigable waterways. They are from the original surveys of navigable waters. These surveys were conducted from about 1867 to the early 1900s. Many surveys were done by the United States General Land Office (GLO).

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

C. Navigability for Right-of-Way

Some streams were declared navigable as a right-of-way after statehood. The State of Idaho does not claim ownership of the beds and banks of these navigable waters, but they may be navigated by the public without interference from the underlying and adjacent landowners. This is affirmed by the Burrus v. Rutledge case. Eagle Creek (Shoshone County), Pritchard Creek (Shoshone County), and Silver Creek (Blaine County) are the only three streams with this designation shown on the **List of Navigable Lakes and Rivers (DIS-003)**, and all three are a result of legal actions. Southern Idaho Fish and Game v. Picabo Livestock is the landmark case for navigability as a right of way, and it was later placed in statute as Idaho Code § 36-1601. Further designations may only be done by order of the Land Board or by court order.

II. Movements of Navigable Waters

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

A. Accretion

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

B. Avulsion

Avulsion is a sudden change of course in a river, often from a catastrophic flood. The old channel is abandoned, and a new channel is cut through former upland areas. A remnant of upland should exist between the old and new channels. The ownership lines do not change if avulsion occurs, so the state does not have clear title to the new segment of river channel. Claims of avulsion have to be dealt with on a case by case basis.

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

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

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

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

IV. Islands

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

A. Islands Present Before Statehood

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

B. Islands Formed After Statehood

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

Growing crops for many years indicates that private ownership is a possibility. Generally speaking, this situation may come up when the river actually did move through avulsion. Since

the state's interest is mainly the area below the OHWM, gaining clear title and pedestrian easements may be worth ceding ownership of the island and avoiding a legal dispute. Consultation with the Program Manager and Deputy Attorney General staff is advised.

Section 15 – Processing Disclaimers of Interest

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I. Why Disclaimers of Interest Are Used

- A. Through the disclaimer process, IDL has an opportunity to determine where the state ownership of navigable waters is located. As established in the Rutledge v. State case, former public trust lands are subject to adverse possession by adjacent upland landowners if the public trust lands have lost their public trust values. Essentially, if the public trust lands are no longer within or below the ordinary high water mark (OHWM), then they may not be public trust lands anymore. The title to these lands is clouded, and the current location of the public trust lands must be identified in order to clear the title to the adjacent uplands and the river.
- B. Disclaimers do not have the expense and uncertainty of adverse possession or quiet title actions, which is why IDL prefers to use disclaimers. Deeds and quit claim deeds were issued in the past and can be found on the land records system. Since IDL does not necessarily own the lands, however, that is no longer considered an appropriate method for clearing the titles. It also brings into question the Land Board’s requirement to auction land instead of just disposing of it. The doctrine of accretion, reliction, and avulsion governs ownership along rivers and only adjacent landowners generally have a legal claim to uplands that have been formed through accretion. The Land Board directed IDL to use disclaimers on September 11, 1984.

II. Tools Used for Disclaimers

A. Disclaimer of Uplands to Adjacent Upland Landowners

Uplands that lie within the original surveyed meander lines, but above the current OHWM, may be disclaimed from IDL to the legal owner of the adjacent upland property. If two or more upland owners claim the same accretion land, they must sort out their differences before IDL will process a disclaimer. A written letter, quit claim deed, or other documentation is needed to ensure that the parties involved have reached agreement on the new boundaries. Generally, the ¼-¼ lot lines are extended across the accretion land to divide it between adjacent landowners. In some situations, a boundary line perpendicular to

the river is a more equitable solution. When an entire former river channel is surrounded by two different landowners, splitting the accretion land down the middle may be the best solution. While department personnel can offer their opinion on the most logical division of accretion land, the department must not take sides in any dispute between upland owners. The department should only get involved if a landowner attempts to claim ownership of land below the OHWM.

B. Acquired Disclaimer of Interest

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

C. 25 Foot Public Easements

Since statehood, alterations of navigable waters have resulted from artificial means such as dikes, fill, irrigation diversions, and dams. These actions have diminished the public trust lands, and the identification of the OHWM is not a straightforward task. IDL will often use the existing OHWM providing the requesting party will grant a 25 foot public use right-of-way along and adjacent to the existing OHWM along rivers. The reservation of this easement is also allowed by Idaho Code § 58-119A. This easement is generally not reserved along navigable lakes. It is also generally not reserved along rivers with an artificial high water mark due to a downstream dam. IDL must be the recipient of the easement, pursuant to **Attorney General Opinion No. 07-1 (DIS-001)**.

The easement may differ in dimension or location, or it may not be reserved at all in certain circumstances. These exceptions must be carefully weighed against the needs of the public trust and should be in the minority of situations. Moving greenbelts away from the river for the convenience of a developer is not sufficient reason for diminishing the public trust. Any deviation from the 25 foot easement must be thoroughly documented by the Area Office and this information must be included in the **Land Board Memo (DIS-006)**.

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

D. Conservation Easements

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

(DIS-001). These easements are not very common, and consultation with the Program Manager is suggested.

III. Disclaimer Requests

A. Identify Supervisory Area

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

B. Application

If Area personnel determine a subject land parcel qualifies for a disclaimer of interest, and the requesting party is interested in pursuing the disclaimer, the Area will supply them with an **Application for Disclaimer of Interest (DIS-004)**. No other work should be done on the disclaimer until a completed application and the nonrefundable application fee of \$300 is received by the Area. In most cases, a site visit is not needed before receiving a completed application and the application fee. The name on the application must be the owner of record for the upland property.

C. Time Recording

After the completed form and \$300 application fee are received, the Area will place copies of the form and deposit slip in the LMR Document Exchange and request a disclaimer number and a project number. All time spent on the disclaimer will then be coded on employee time sheets to the project number under the Public Trust PCA. The project number will be used through the end of the disclaimer process. The total time spent will be used to help determine any processing costs due by the requestor in excess of the base \$600 fee (\$300 application fee and minimum \$300 final processing fee).

D. Preliminary Office Review

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

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

E. Field Survey of the OHWM

An IDL representative will visit the site with the surveyor to establish the OHWM. The angle points where the OHWM survey begins and ends and where the OHWM changes bearing are

the only points that need to be surveyed. The requesting party may accompany the surveyor, but they are not required to be present. The OHWM can be marked with stakes or flagging during this site visit, and the surveyor can follow up independently with the actual survey and placement of monuments or pins. See Section 30 of these Procedures for more details concerning the identification of the OHWM. IDL staff identifying the OHWM must prepare an inspection report documenting how the OHWM was determined and if any structures are present in the proposed area to be disclaimed.

F. Survey Requirements

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

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

IV. Final Application Package

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

A. Letter of Request

A brief letter of request for the Disclaimer of Interest is sent from Area staff to the Bureau which includes the acreage of accretion land requested and the exact name and address requested to appear on the disclaimer. This must be the owner of record for the adjacent uplands; and

B. Survey and Legal Description

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

C. Tax Payment History

Property tax payment history for the last three (3) years, if available; and

D. Proof of Ownership

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

V. Approval/Denial Process

A. Area Approval or Rejection

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

Once the Area has determined that an application package is complete and contains all the information in Subsection IV, they will forward the letter of request, surveys, legal descriptions, deeds, tax payment history, inspection report, and other documents to the Program Specialist.

B. Draft Documents by Program Specialist

The Program Specialist will work through the **Disclaimer of Interest Checklist (DIS-005)** to ensure the disclaimer follows all procedures. The Program Specialist will draft the **Land Board Memo (DIS-006)**, **disclaimer (DIS-007)**, **acquired easement (DIS-008)**, **acquired disclaimer (DIS-009)**, and other needed documents using the current templates. If questions arise, the Program Specialist will work with Area staff to complete these documents. The Applicant's signature block must be formatted as needed for individuals, LLCs, Trusts, etc.

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

When drafts are completed, they will be forwarded to the Program Manager.

C. Approval/Review by Program Manager

The Program Manager will review the disclaimer application package and draft documents for consistency with the Land Board policy and these procedures. The application package will then be sent to the Attorney General's office for first review. At the same time, the Program Manager will schedule the disclaimer for the next available Land Board staff meeting. The Program Manager will also talk to GIS staff to create a map for the Board Memo. The Board Memo, map, tax payment history, and deed are required for the consent agenda item. The Land Board staff will review at the staff briefing meeting, and given that all of the conditions for Director approval are met, will approve the disclaimer.

In circumstances where the disclaimer does not meet any of the requirements for the Delegation of Authority for Land Board staff, the disclaimer will need to be presented formally at the Land Board meeting for approval.

D. Bureau Action

Following approval by the Land Board/staff, the Program Specialist will request that the Area obtain a recorded Record of Survey to include as an attachment to the disclaimer(s) and/or easement. The Program Specialist will prepare the final documents for final execution. The Program Specialist will then include the disclaimer in the action log and send two original **acquired easements (DIS-008)**, two originals of land being disclaimed (**acquired disclaimers, DIS-009**) to IDL if applicable, and a draft of the **disclaimer (DIS-007)** from IDL to the applicant along with a **letter to request signatures and final payment (DIS-010)**. All original documents must be signed and notarized by the applicant and returned to IDL along with the final processing fee.

After the signed documents and processing fee are received by IDL, the Program Specialist will send the two original documents to the Program Manager, who will forward to the Attorney General's office for second review. After that review is completed, the Program Specialist will forward the documents to the Director (or Land Board as needed) for signature.

The fully signed documents will then be recorded by the Program Specialist in the county where the disclaimer property is located. Following recordation, support staff will scan for land records updating. One original will be returned to the applicant, and the other will be retained by the Bureau. A copy of the final documents will be forwarded to the Area office.

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

Section 30 – Identifying the Ordinary High Water Mark

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I. Definitions

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

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

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

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

II. Identifying the Ordinary High Water Mark

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

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

2. Sandy or gravelly areas without well developed A and B soil horizons can suggest the area is below the OHWM. Steep rivers in a canyon will often have a scour line on the banks that has stripped the soils and exposed mostly rock. The OHWM is often the highest scour line, as per the definitions in statute and rule.
3. Small, or large, steps in the riverbank may mark the OHWM.
4. Vegetation, especially naturally occurring perennial vegetation, may or may not be useful. Grasses and small willows will often grow all the way down to the low water line, and thus may not be very useful. Plants associated with upland environments may be helpful, but ponderosa pines have been observed happily growing below the ordinary high water mark of large rivers. The river may not stay at the high stage long enough to drown the trees. A large number and variety of upland plants, however, may indicate the area is above the OHWM. Annuals are generally not very indicative.

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

5. Lichen lines on the trunks of larger trees, when present, may indicate water levels that are sustained during high water. If high water persists long enough, it will kill off the submerged lichen on the trunk. After the water recedes, a discernable horizontal line may be left on the tree trunk. These lines can also sometimes be seen on fence posts or other objects with lichen. The lines are especially helpful during the summer following an ordinary high water flow.
6. Moss on rocks or riprap along a shoreline may also have a discernable line created by consistent levels of high water. Bridge piers or abutments can also be used. The moss will grow where the rock or concrete has been submerged long enough for the moss to grow. The moss may dry out between inundations, but it is just dormant. The moss often stops growing at a depth where the scouring action is too great for it to stay put, or where the water depths are too great for it to grow. More than one moss line may be present. The OHWM may be one of the higher moss lines, and not one of the lower moss lines.
7. Flood debris is an important line of evidence. Grass, driftwood, sticks, garbage, and other flotsam often accumulate at the OHWM. Extreme flood events may, however, carry debris higher than the OHWM.
8. Fences may also be considered evidence of the OHWM, especially old fence lines. Fences are often put up to define ownership boundaries, and they are often located at the edge of arable fields near the river.
9. If an easement will be part of the disclaimer package, then the location of the OHWM may be influenced by where a path could reasonably be constructed. The Public Trust Doctrine partly governs the decisions regarding the OHWM.

10. The top of an old dike could be a good place to locate the OHWM, and then the dike can be used for a greenbelt or pedestrian access. Newly constructed dikes could be ignored, as per Idaho Code § 58-1202(2).
11. Anecdotal evidence can sometimes be helpful. Local residents may have a good idea of how high the river usually gets.
12. Flow gauge records can be used, but correlation between the OHWM at a disclaimer location and a specific, preferably nearby, gauging station would be needed. The gauge should be close to the area of interest so the two locations will be more likely to experience the same high water timing and conditions. If major tributaries are between the disclaimer location and the gauge, then the two locations could have different high flow timing or conditions. The best data is available on the USGS website at <https://waterdata.usgs.gov/id/nwis/current?type=flow>.

Data tables can be downloaded into excel and analyzed to determine what appears to be an ordinary high flow. The highest daily peak flow (peak streamflow) in a given year is the best data to use. If direct observations of rivers can be made at a specific location and at the suspected ordinary high flows, then the flow recorded from that gauge and the OHWM at that location can be correlated. The flows that correlate to an OHWM on Idaho rivers often have a recurrence interval of four (4) to seven (7) years.

13. Some dam controlled rivers, such as the Lower Boise, do have a designated discharge for ordinary high water. It is 6,500 cubic feet per second (cfs) as measured at the Glenwood Bridge. This flow was determined by the U.S. Army Corps of Engineers as the level required to maintain a free flowing channel in the Lower Boise River. It is also the level used by the Idaho Department of Water Resources for determining where Stream Channel Alteration Permits may be needed. For reference, flood stage on the Lower Boise is 7,000 cfs. The 10-year flood event is 7,200 cfs, the 50-year flood event is 11,000 cfs, and the 100-year flood event is 16,600 cfs.
14. Air photos may be used to help determine the current location of the OHWM, and the evolution of the OHWM through time. The Boise River has the best catalogue of photos. It was flown in 1996 when the river ran at the designated ordinary high water of 6,500 cfs. If flowing water covers ground in those photos, then it should probably be below the OHWM. Standing water in fields or riparian areas, however, may or may not be below the OHWM. Most river air photos are not flown during high water, but they can still be used to identify where scouring flows appeared to exist during high water. The entire state was photographed recently with high resolution color orthophotography. These can be compared with past air photos to determine how the river is moving over time, or what encroachments may be helping the river to move. The photos can also be used to help determine if past river movements were through avulsion or accretion. If you anticipate a substantial number of disclaimer requests in the future, then you may want to consider contacting other agencies and having some photos taken at an approximation of ordinary high water.

The USGS Earth Explorer website has a huge volume of aerial imagery:

<https://earthexplorer.usgs.gov/>

Google Earth Pro also has good aerial imagery. It is a free download, and a clock tool in the top toolbar provides imagery from several years.

When using aerial imagery, take note of the date each image was taken. These dates can then be looked up in the USGS flow data at the nearest stream gauge.

Images from different years can be imported into PowerPoint or some other program and then scaled and formatted to show the exact same area of interest through time. This can be used to see how rivers have moved or been altered over time. Clicking back through time with these images can be a powerful visual aid.

15. Lidar data is increasingly available in Idaho. Check with the GIS folks in Technical Services for available data. It is very helpful when vegetative cover is thick, and can help locate human alterations in the landscape.
16. IDL's land records system with the orthophoto overlay is an important tool for determining how the current location of the river compares with the original surveys. They also indicate what areas have already been addressed by disclaimers or quit claim deeds. These previous disclaimers could be used as starting points if they are adjacent to the parcel of interest, and if the previously marked OHWM has not moved since that disclaimer was completed. The datasheets must also be examined to determine if ownership has been handled through deeds in the past. Not all of these appear on the map view.
17. ArcView maps with GCDBs and state land records on top of recent color orthophotos are good maps to use in the field. GPS locations of angle points can later be overlaid on the same map.
18. 7.5 minute topographic maps and other maps can be useful to see topographic contours and how rivers have changed over time. They are also used for the location map in the Land Board materials package.
19. Previous surveys from the county recorder's office.
20. County assessor maps can also be used to gather information. These records are most helpful when determining who is eligible to acquire accretion land. County parcel boundaries and the fact that someone has paid taxes on current riverbed are not the strongest pieces of information for determining the location of the OHWM. Navigable waters are generally not subject to adverse possession, and counties will let a landowner pay taxes on anything they wish. Unless a landowner tells the county otherwise, they could pay dozens of years of taxes on land that they do not own. It does not prove ownership, and the counties do not give refunds after such mistakes are identified.
21. Public use of the area should be documented. This has been used in past court cases to justify public easements.

22. Wildlife use of the area should be documented, as that is also an important part of the public trust values of navigable waterways. Deer, elk, beaver, waterfowl, hawks, eagles, and other animals are either important for hunting or trapping, or important indicators of habitat quality.

III. Inspection Report

An inspection report is **required** for inspections identifying the ordinary high water mark. This report may be needed to defend the disclaimer. Also, if the landowner chooses to not go forward with a disclaimer, the notes can be saved for later use. It is common for these properties to change hands, and new owners often come in with a new request. Having the prior documentation on hand will save a lot of time and effort in processing the new disclaimer request. If a few years elapse between a survey of the OHWM and the submittal of a complete disclaimer package, the survey pins should be relocated in the field to make sure nothing substantive has changed. Movements of 20 feet or more within a few years is not unusual.

A. Ordinary High Water Mark

Two things should be documented:

1. The approximate location of the OHWM on an air photo or map. GPS points can be taken and then imported later onto an orthophoto base. This can then be compared with the survey when it is received. This will allow IDL to check if the location of the OHWM was changed after being flagged with the surveyor.
2. The evidence used to establish the OHWM along the property. If the landowner does not believe the OHWM was properly established, this information can be used to explain why the OHWM was established. The information can also be used, if needed, to defend IDL's decisions in a quiet title action.

B. Land Uses

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



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

ATTORNEY GENERAL OPINION NO. 07-1

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

Per Request for Attorney General's Opinion

INTRODUCTION

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

QUESTIONS PRESENTED

You ask the following questions:

1. What is the Board's role with respect to management of submerged lands?
2. What are the legal principles that establish the State's interest to lands adjacent to navigable streams?
3. What is the legal basis for the Board's long-standing practice of requiring the exchange of a 25-foot public use easement for the grant of a disclaimer of the State's interest to formerly submerged lands?
4. Does the exchange of a 25-foot public use easement for the grant of a disclaimer of the State's interest to formerly submerged lands constitute a taking of private property for a public purpose?

CONCLUSIONS

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

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

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

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

ANALYSIS

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

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

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

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

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

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

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

[P]ublic trust resources may only be alienated or impaired through open and visible actions, where the public is *in fact* informed of the proposed action and has substantial opportunity to respond to the proposed action before a final decision is made thereon.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

There is a defense, however, to a claim of title to the formerly submerged lands under a claim of adverse possession. In IFI, Justice Huntley's concurrence⁴ cited with approval the principle that man-made alterations below the OHWM will not result in the loss of public trust resources. Justice Huntley noted that the Rutledge case only addressed adverse possession resulting from natural forces without the contribution of man-made alterations to the natural river system. 112 Idaho at 521, 733 P.2d at 742. In establishing the rationale for this precedent, Justice Huntley stated that if artificial modification of river systems could result in adverse possession: "the state would be left vulnerable to surreptitious drain and fill operations which would destroy important wetlands and rob Idahoans of the associated resources and values." *Id.* Relating this precedent to the public trust obligation, Justice Huntley noted that:

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

AUTHORITIES CONSIDERED

1. United States Constitution:

Fifth Amendment.

2. United States Statute:

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

3. Idaho Code:

§ 58-104(9).

§ 58-1301.

Title 58, chapter 13.

4. U.S. Supreme Court Cases:

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

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

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

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

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

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

5. Idaho Cases:

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

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

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

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

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

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

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

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

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

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

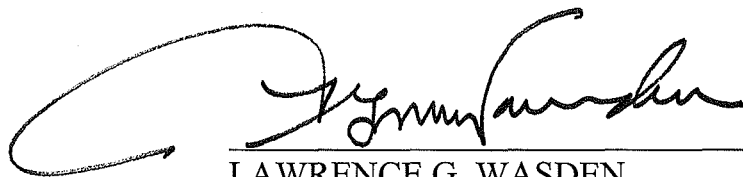
Smith v. Long, 76 Idaho 265, 281 P.2d 483 (1955).

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

6. Other Cases:

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

DATED this 7th day of May, 2007.



LAWRENCE G. WASDEN
Attorney General

Analysis by:

C. NICHOLAS KREMA
Deputy Attorney General
Department of Lands

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

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

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

I. PURPOSE:

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

II. STATEMENT OF MUTUAL BENEFIT AND INTERESTS:

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

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

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

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

III. INTER-AGENCY PROCEDURES:

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

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

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

IV. OPERATIONS ON ENDOWMENT OR PUBLIC TRUST LANDS:

IDAHO DEPARTMENT OF WATER RESOURCES SHALL:

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

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

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

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

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

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

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

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

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

IDAHO DEPARTMENT OF LANDS SHALL:

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

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

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

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

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

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

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

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

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

V. OPERATIONS ON PRIVATE LANDS:

IDAHO DEPARTMENT OF WATER RESOURCES SHALL:

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

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

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

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

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

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

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

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

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

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

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THE IDAHO DEPARTMENT OF LANDS SHALL:

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

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

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

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

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

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

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

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

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

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

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

VI. MAINTENANCE AND REVISION PROCEDURES:

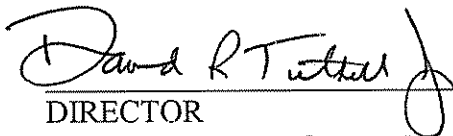
The Idaho Department of Lands and Idaho Department of Water Resources will hold a state level meeting in Boise, whenever mutually agreed to be necessary, to discuss a broad policy, standards and procedures of mutual interest and to consider the adequacy of the terms of this memorandum. This Memorandum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



DIRECTOR

Idaho Department of Lands

11-7-07
Date



DIRECTOR
Idaho Department of Water Resources

Oct 25, 2007
Date

LAKEs CONSIDERED NAVIGABLE FOR STATE TITLE PURPOSES

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

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

RIVERS CONSIDERED NAVIGABLE

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

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



Application For Disclaimer of Interest

Disclaimer Number (Bureau use only) _____

Acquired Easement Number (Bureau use only) _____

Acquired Disclaimer Number (Bureau use only) _____

GENERAL INFORMATION

The State of Idaho owns the beds and banks of all navigable waters below the Ordinary High Water Mark (OHWM). These sovereign lands were acquired by virtue of the Equal Footing Doctrine and are administered by the Idaho Department of Lands (IDL) for the benefit of the general public in accordance with the Public Trust Doctrine.

If a river or lake has moved through accretion or reliction and the waterbed has become upland, a disclaimer of interest may be granted upon request by the adjacent upland landowner to provide clear title to their land. This means that the state is disclaiming any underlying interest in this portion of former state-owned waterbed.

PROCEDURE

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

1. Contact the appropriate IDL Supervisory Area Office to determine if the subject property qualifies for issuance of a disclaimer.
2. If the property does qualify, a completed and signed application for Disclaimer of Interest and a \$300 application fee will be required prior to any extensive consultations or surveys. The exact name(s) and address you wish to appear on the disclaimer should be on the form.
3. The subject property will require a legal land survey. An IDL representative must visit the site with the applicant's land surveyor to establish the OHWM. The applicant may also be present.
4. In cases where the present river has moved onto lands outside the General Land Office (GLO) meander lines, the IDL will require the requesting party to disclaim to the State that portion of the present riverbed.
5. The applicant is responsible for coordinating with adjoining landowners who could have a competing claim to the same property. Quit claim deeds from neighbors may be required.
6. IDL will require the applicant to grant a 25-foot public use right-of-way easement along and adjacent to the existing OHWM of rivers. This serves to protect the public trust values associated with rivers and the disclaimed lands by providing river access to the public.
7. The surveyor will submit a record of survey and legal descriptions which show: 1) areas to be disclaimed from the state to the property owner; 2) areas to be disclaimed from the property owner to the state; and 3) the 25-foot public use right of way easement. The record of survey must show the present OHWM, as identified by IDL, in relation to the original GLO meander line. The survey must be tied to at least one, and preferably two, PLSS corner(s).

APPLICATION

When the record of survey has been completed, submit the following documents to the Department of Lands Supervisory Area Office:

- 1) A full size copy of the record of survey and a copy of the legal descriptions. A digital copy of each will also need to be provided, the legal descriptions as an MS Word file, and the record of survey as a PDF file.
- 2) Property Tax payment history for three (3) or more years.
- 3) Proof of ownership of the upland property adjacent to the area to be disclaimed. A copy of the property deed is preferable. The applicant must be the legal owner.
- 4) Any additional documentation needed to prove ownership and/or legal authorization to sign the disclaimer application and related documents (e.g. quit claim deeds from neighbors).

This is not to be considered an exhaustive list of all the information the Idaho Department of Lands may require. Additional information may be required as needed on a case by case basis.

The final fee for the disclaimer is the actual cost of the field inspection and preparation of the required documents minus the \$300 application fee, but not less than \$300. The applicant will be billed for the remainder following approval by the State Board of Land Commissioners and before the final documents are issued.

APPLICATION INFORMATION

1. NAME: _____ d/b/a: _____
2. ADDRESS: _____
3. CITY, STATE, ZIP CODE: _____
4. TELEPHONE: _____
5. EMAIL: _____
6. LEGAL DESCRIPTION (Government Lot, Section, Township, and Range) TO THE QUARTER-QUARTER SECTION:

7. RIVER/LAKE: _____
8. COUNTY(ies): _____

ACKNOWLEDGEMENT

I hereby request a disclaimer of interest from the state of Idaho and acknowledge that I understand my obligations described herein, including the granting of a twenty-five (25) foot wide public use access easement if the disclaimer is for former riverbed.

APPLICANT(S) SIGNATURE: _____ **DATE:** _____



Disclaimer of Interest Checklist

Instructions: This form is used by the Program Specialist for each Disclaimer of Interest.

Applicant Name:		
DI #:	AE #:	DA #:
Application Acceptance	Yes	N/A
1. Applicant is <u>not</u> on Default List.	<input type="checkbox"/>	<input type="checkbox"/>
2. Application is complete and \$300 received.	<input type="checkbox"/>	<input type="checkbox"/>
3. Update IMS and create Navision Customer Card	<input type="checkbox"/>	<input type="checkbox"/>
4. Provide numbers to Area (DI, project number, AE and/or DA as applicable).	<input type="checkbox"/>	<input type="checkbox"/>
5. Drop documents to Fiscal.	<input type="checkbox"/>	<input type="checkbox"/>
6. Create electronic and physical file.	<input type="checkbox"/>	<input type="checkbox"/>
Processing a Disclaimer		
1. Received from area:	<input type="checkbox"/>	<input type="checkbox"/>
A. Legal Description and Record of Survey	<input type="checkbox"/>	<input type="checkbox"/>
B. Land Records Approved Legal Description	<input type="checkbox"/>	<input type="checkbox"/>
C. Proof of Ownership of Upland (deed and tax)	<input type="checkbox"/>	<input type="checkbox"/>
2. Program Specialist creates:	<input type="checkbox"/>	<input type="checkbox"/>
A. Draft Land Board Memo	<input type="checkbox"/>	<input type="checkbox"/>
B. Draft Disclaimer	<input type="checkbox"/>	<input type="checkbox"/>
C. Draft Easement	<input type="checkbox"/>	<input type="checkbox"/>
D. Draft Acquired Disclaimer	<input type="checkbox"/>	<input type="checkbox"/>
3. Notify PM	<input type="checkbox"/>	<input type="checkbox"/>
4. Receive from PM:	<input type="checkbox"/>	<input type="checkbox"/>
A. Approved Land Board Memo	<input type="checkbox"/>	<input type="checkbox"/>
B. Final Disclaimer	<input type="checkbox"/>	<input type="checkbox"/>
C. Final Easement	<input type="checkbox"/>	<input type="checkbox"/>
D. Final Acquired Disclaimer	<input type="checkbox"/>	<input type="checkbox"/>
5. Request and Receive Project Number Report and Invoice from Fiscal	<input type="checkbox"/>	<input type="checkbox"/>
6. Send Packet to Applicant (Cover letter, invoice, disclaimer for review, easement for signature and if applicable acquired disclaimer for signature)	<input type="checkbox"/>	<input type="checkbox"/>
7. Receive from Applicant	<input type="checkbox"/>	<input type="checkbox"/>
A. Payment	<input type="checkbox"/>	<input type="checkbox"/>
B. Signed and Recorded Easement and if applicable Acquired Disclaimer	<input type="checkbox"/>	<input type="checkbox"/>
C. Revised Disclaimer	<input type="checkbox"/>	<input type="checkbox"/>
8. Execute Disclaimer	<input type="checkbox"/>	<input type="checkbox"/>
9. Record Disclaimer	<input type="checkbox"/>	<input type="checkbox"/>
10. Send Disclaimer to:	<input type="checkbox"/>	<input type="checkbox"/>
A. Applicant	<input type="checkbox"/>	<input type="checkbox"/>
B. Land Record	<input type="checkbox"/>	<input type="checkbox"/>
C. Area	<input type="checkbox"/>	<input type="checkbox"/>
11. Update IMS, MasterTrak, and Transaction Report	<input type="checkbox"/>	<input type="checkbox"/>
Preparers Signature	Supervisors Signature	

STATE BOARD OF LAND COMMISSIONERS

Meeting date [Click to enter meeting date](#)

Consent Agenda

Subject

DI600296, Disclaimer of Interest for the former bed of the Payette River, Payette County, Idaho.

Question Presented

Shall the Land Board approve Disclaimer of Interest DI600296?

Background

Idaho holds title to the beds and banks of navigable waterways below the ordinary high water mark (OHWM). The State Board of Land Commissioners (Land Board) is the statutorily designated trustee of these lands. When a river moves due to accretion (the natural, gradual process whereby deposited material causes the river to move), title to the riverbed moves as well. These accreted lands are subject to adverse possession by the adjacent upland landowner through a quiet title action. Land Board policy directs the Idaho Department of Lands (Department) to work with these landowners and pursue disclaimers of interest for clearing title to the accreted land.

Discussion

The City of Payette has applied for a disclaimer of interest for one parcel of accretion land totaling 0.87 acres, more or less. This parcel is located within the original surveyed river meander lines of the Payette River adjacent to the applicants' deeded property in Government Lot 1 of Section 33, Township 9 North, Range 5 West (Attachment 1-Map).

After the applicant paid the \$300 application fee, the Department identified the OHWM on site and the applicant's licensed surveyor completed a survey. The Department reviewed the survey, deeds, and tax documents, and determined that the disclaimer was ready to move forward.

The City of Payette will grant the State of Idaho an easement 25 feet in width for a public use right of way along, and adjacent to, the existing OHWM of the Payette River. In addition, the City of Payette will also grant the State of Idaho a disclaimer of interest for one parcel of land located below the ordinary high water mark totaling 0.028 acres.

State Board of Land Commissioners

[Brief description of subject](#) [Enter brief description of subject](#)

Regular Meeting – [Meeting date](#) [Click to enter meeting date](#)

Recommendation

Direct the Department to issue a Disclaimer of Interest for one parcel totaling 0.87 acres of the former bed of the Payette River, to the City of Payette following their payment to the Department of the remaining processing fee of \$300.

Board Action

Attachments

1. Map
2. Tax History
3. Deed(s)

STATE OF IDAHO

DISCLAIMER OF INTEREST NO. DI600283

THE STATE BOARD OF LAND COMMISSIONERS, whose mailing address via its administrative agency, the **IDAHO DEPARTMENT OF LANDS**, is 300 N. 6th Street, Suite 103, P.O. Box 83720, Boise, Idaho 83720-0050 ("**Disclaimant**"), does hereby release and disclaim to that **Applicant's name**, whose mailing address is **Applicant's address, City, State Zip code** ("**Releasee**"), its successors and assigns, all interest set forth herein to the following described parcel of accretion land being a part of the former bed of the **Boise** River to the extent that, and for so long as, said parcel is and remains above the ordinary high water mark. Said parcel is more particularly described in the legal description (Exhibit A, attached hereto and incorporated herein by reference) and record of survey (Exhibit B, attached hereto and incorporated herein by reference), recorded as Instrument No. **County record number**, dated **Date recorded with county**, records of **County Name** County, Idaho.

This disclaimer is given upon the express condition that Releasee expressly accept and acknowledge that this Disclaimer is contingent on said parcel being below the ordinary high water mark and that title to said parcel is expressly subject to the existence and validity of the following specifically identified easements, and is **SUBJECT TO** all matters whether or not of record, including, but not limited to:

1. The reservation by Disclaimant of a twenty-five (25) foot easement adjacent to and upland of the ordinary high water line of the **Boise River**.
2. IDL Acquired Easement **Acquired Easement Number**, recorded as Instrument No. **County record number**, dated **Date recorded with county**, records of **County Name** County, Idaho, for a public use right-of-way adjacent to the **Body of water**.

[remainder of page intentionally left blank]

STATE BOARD OF LAND COMMISSIONERS

DIS-007

STATE OF IDAHO)
)ss.
COUNTY OF ADA)

On this ____ day of _____, 20____, before me, a Notary Public in and for said State, personally appeared PHIL MCGRANE, as Secretary of State of Idaho, that executed the within instrument, and acknowledged to me that he executed the within instrument as said Secretary of State and that the State Board of Land Commissioners and the State of Idaho executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on the day and year last above written.

(seal)

Notary Public for State of Idaho

My Commission Expires: _____

STATE OF IDAHO)
)ss.
COUNTY OF ADA)

On this ____ day of _____, 20____, before me, a Notary Public in and for said State, personally appeared DUSTIN T. MILLER, the Director of the Idaho Department of Lands and Secretary of the State Board of Land Commissioners, and acknowledged to me that he executed the within instrument as said Director and Secretary, and that the State Board of Land Commissioners and the State of Idaho executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on the day and year last above written.

(seal)

Notary Public for State of Idaho

My Commission Expires: _____

STATE OF IDAHO

ACQUIRED EASEMENT NO. IDL Instrument Number

KNOW ALL MEN BY THESE PRESENTS that **Applicant's name**, whose mailing address is **Applicant's address, City, State Zip code** ("**Grantor**"), does hereby grant and convey unto the **STATE OF IDAHO, STATE BOARD OF LAND COMMISSIONERS** ("**Grantee**"), a non-exclusive public use easement and right-of way, reserving to Grantor any use not incompatible to the easement over and across the following described real property as set forth herein:

A strip of land twenty-five (25) feet in width, upland and adjacent to the Ordinary High Water Mark of **Body of water** according to the legal description (Exhibit A) and record of survey (Exhibit B), recorded as Instrument No. **County record number**, dated **Date recorded with county**, records of **County Name** County, Idaho.

There are no implied easements across Grantor's land to access this easement and right-of-way, nor does Grantor grant, or guarantee, any access to this easement; provided however, that Grantor's grant is intended to, and shall, follow any change in location to coincide with the **Body of water**.

[remainder of page intentionally left blank]

TO HAVE AND TO HOLD the said easement unto Grantee, its successors and assigns forever, for the purposes herein above-described.

IN WITNESS WHEREOF, Grantor has caused these presents to be duly executed by their signature(s).

Signature block may need modification based on type of Grantor.

Dated: _____
_____ [print name]

Dated: _____
_____ [print name]

STATE OF IDAHO)
) ss
COUNTY OF _____)

On this ____ day of _____, 20____, before me, a Notary Public in and for said State, personally appeared _____ and known to me to be the person(s) whose name(s) are subscribed to the said instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on the day and year last written above.

NOTARY PUBLIC in and for the State of Idaho
Residing at _____
My commission expires _____

STATE OF IDAHO

DISCLAIMER OF INTEREST IDL Instrument Number

Applicant's name, whose mailing address is **Applicant's address**, **City**, **State** **Zip** **code** ("**Disclaimant**"), does hereby release, remise and disclaim to the **STATE BOARD OF LAND COMMISSIONERS**, whose mailing address via the **IDAHO DEPARTMENT OF LANDS**, is 300 N. 6th Street, Suite 103, P.O. Box 83720, Boise, Idaho 83720-0050, its successors and assigns, all interest to any and all portions of the **River Name** River being located below the current ordinary high water mark lying adjacent to Disclaimant's land described in the legal description attached hereto as Exhibit A and incorporated herein by reference; and the record of survey attached hereto as Exhibit B and incorporated herein by reference, which is recorded as Instrument No. **County record number**, dated **Date recorded with county**, records of **County Name** County, Idaho.

This disclaimer was approved by the State Board of Land Commissioners on **Date approved by Land Board**.

APPLICANT'S NAME

Dated: _____
_____ **Applicant's name**

STATE OF IDAHO)
)ss
COUNTY OF _____)

On this ____ day of _____, 20____, before me, a Notary Public in and for said State, personally appeared **APPLICANT'S NAME**, known or identified to me to be the person(s) whose name(s) are subscribed to the within instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on the day and year last written above.

NOTARY PUBLIC in and for the State of Idaho
Residing at _____
My commission expires _____

**MINERALS, NAVIGABLE WATERS, OIL & GAS
RESOURCE PROTECTION & ASSISTANCE BUREAU**
300 N. 6th Street Suite 103
PO Box 83720
Boise, ID 83720-0050
Phone (208) 334-0200
Fax (208) 334-3698



**STATE BOARD OF LAND
COMMISSIONERS**
Brad Little, Governor
Phil McGrane, Secretary of State
Raúl R. Labrador, Attorney General
Brandon D Woolf, State Controller
Debbie Critchfield, Sup't of Public Instruction

[Date]

[Disclaimant Name]

[Street Address]

[City, State Zip]

Subject: Disclaimer of Interest No. DIXXXXXX, Acquired Disclaimer of Interest DAXXXXXX and
Acquired Easement No. AEXXXXXX

Dear Mr. Fuhriman,

Your request for a disclaimer of interest of accretion land adjacent to your property along the X River in
Section X, Township X, Range X, was approved at the Land Board meeting on [Land Board Meeting
Date], for a fee of \$300.00.

Enclosed for your review is a draft copy of the Disclaimer of Interest No. DIXXXXXX, which the State
of Idaho is prepared to issue.

Also enclosed are two originals of Acquired Easement No. AEXXXXXX, AND Acquired Disclaimer of
Interest DAXXXXXX, which you will grant to the State of Idaho.

If the documents are satisfactory, please sign both originals of the Acquired Easement No. AEXXXXXX
and Acquired Disclaimer of Interest DAXXXXXX, have your signature notarized, and return all originals
to this office, along with the \$300.00 remaining fee within 30 days of receipt of this letter. The
Department will then have Disclaimer of Interest No. DIXXXXXX, Acquired Easement No.
AEXXXXXX, and Acquired Disclaimer of Interest DAXXXXXX signed and recorded. An original of
each signed and recorded document will be returned to you for your records.

If you have any questions, please call our [AREA] area office at (208) XXX-XXXX.

[Name]

Program Specialist, Navigable Waters

Enclosures\4\as: 1-Disclaimer of Interest DIXXXXXX, 2-Acquired Easement AEXXXXXX, 1-
Acquired Disclaimer of Interest DAXXXXXX and a Return Envelope

cc: Bureau File
Area Office