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Subject: Coeur d'Alene Tribe Comments on IDL Negotiated Rulemaking Docket No. 20-0304-2401
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Attached, please find the Coeur d'Alene Tribe's comments on IDL Negotiated Rulemaking Docket No. 20-0304-2401 for IDAPA 20.03.04.

Regards,

Jillian Harmon

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April 30, 2025

Idaho Department of Lands
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Re: Negotiated Rulemaking for IDAPA 20.03.04 Rules for the Regulation of Beds, Waters, and Airspace Over Navigable Lakes in the State of Idaho.

I. INTRODUCTION

In accordance with the Second Notice of Intent to Promulgate Rules – Zero-based Regulation Negotiated Rulemaking, Docket No. 20-0304-2401, published in the Idaho Administrative Bulletin, Vol. 25-4 (April 2, 2025), the Coeur d'Alene Tribe ("Tribe") submits these comments on IDAPA 20.03.04 Draft # 2, for Idaho Department of Lands' ("IDL") consideration.

The Coeur d'Alene Tribe has lived in the Pacific Northwest since time immemorial. The land and waters of this region support a diverse array of natural resources and have provided for the spiritual, physical, and cultural needs of the Tribe for thousands of years. The relationship of the Tribe to water is intrinsic to the Tribe's existence. The Tribe was placed by the Creator in the Coeur d'Alene Lake watershed to be its caretakers, and in turn, the waters have cared for the Tribe. The Coeur d'Alene Lake (the "Lake"), its tributaries, and adjacent wetlands provide year-round sustenance to the Tribe including: historic migrations of anadromous fish, resident and adfluvial trout populations, waterfowl, roots and fibers, and water potatoes—a culturally significant tuber that grows in the wetlands around the Lake.

Pursuant to Executive Orders in 1873 and 1889, the Tribe's land base was decreased by at least three-fourths from its original approximately five-million-acre aboriginal territory to the current approximately 345,000 acres of the Coeur d'Alene Reservation ("Reservation"). The Reservation is located in north Idaho and is comprised of forest land, agricultural land, wetlands, numerous rivers and streams, Coeur d'Alene Lake, the St. Joe River, and a small amount of developed land.

In 2001, after years of litigation, the Supreme Court issued its landmark opinion in *Idaho v. United States*, 533 U.S. 262 (2001), affirming what the Tribe has always known to be true—the

Tribe holds a beneficial interest to the exclusive use and enjoyment of the waters and submerged lands of the Coeur d'Alene Lake and St. Joe River within the boundaries of the Reservation (collectively, "Tribal Waters"). The Tribe exerts jurisdiction over these Tribal Waters, and the State of Idaho has no right, title, or jurisdiction to regulate any Tribal Waters or submerged beds or banks within the Reservation. While the Tribe protects Tribal Waters from pollution, degradation, and harm, the State and Federal Government share authority to protect the remainder of the Lake within the Tribe's aboriginal territory and historically exclusive control.

The pollution, degradation, or harm to any water in the Lake or its tributaries is antithetical to the interests of the Tribe as the caretakers of the Coeur d'Alene Lake watershed. Accordingly, the Tribe has a unique and distinct interest in any rules or regulations promulgated by the State that impact the Lake and surrounding watershed. Additionally, because the Tribe has exclusive jurisdiction to regulate encroachments within Tribal Waters, the Tribe has insight and perspective on how to structure encroachment regulations so they best accomplish underlying statutory obligations and public policy goals while protecting the ecology and water quality of the Lake.

As IDL undergoes the rulemaking process for IDAPA 20.03.04, IDL must ensure that the legislative intent in passing the Lake Protection Act, Title 58, Chapter 13, Idaho Code, remains at the forefront of the rulemaking process. It is the legislature's intent "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." I.C. § 58-1301.

While the Tribe understands IDL is required to review and justify its rules based on the directive in E.O. 2020-01, IDL's primary obligation is to effectuate the statutory purpose and obligations of the underlying Lake Protection Act. Reducing word count for the sake of reducing word count does not reduce regulatory burdens when regulated parties are left to wonder what their legal obligations are. Clarity and simplicity are often best served when administrative rules plainly state what parties and conduct are covered by the rules and what actions are required to be in compliance with the rules and underlying statute. The following comments are provided to aid IDL in adding clarity to the current Draft # 2 of the Negotiated Rule, for the benefit of regulators, regulated parties, and the general public alike.

II. COMMENTS

Comment 1: Scope

1. There is significant inconsistency regarding the scope and applicability of the proposed rules, which must be remedied. The Heading and Sections 20.03.04.012.02., .015.16.a., .015.16.a.(misnumbered in draft rule), .020.01., and .055.02., all state the rules apply to "navigable waterways." Yet the Scope (20.03.04.001) and numerous other Sections, confine the regulations to navigable lakes. The Lake Protection Act, Title 58, Chapter 13, Idaho Code applies specifically to navigable lakes, not navigable waterways. If IDL intends

to extend these rules to all navigable waterways under its authority in I.C. § 58-104(9), then it should clearly state so and remove all inconsistencies.

2. Section 20.03.04.001. Scope reads: “These rules govern encroachments on, in, or above navigable lakes in the state of Idaho.” However, there are navigable lakes in Idaho under the exclusive jurisdiction of the Coeur d’Alene Tribe and the Federal Government. Please revise the Scope to read: “These rules govern encroachments on, in, or above navigable lakes in the state of Idaho, **except where those lakes are in the exclusive jurisdiction of a Federally recognized Indian tribe or the Federal Government.**”

Comment 2: Definitions

1. As a general rule, key terms in regulations should be defined for clarity and simplicity purposes. Defining key terms in administrative rules is particularly important when the statutory definitions referenced by the rules are non-exclusive.
 - a. The statutory definition of Encroachments in Aid of Navigation “means and includes docks, piers, floats, pilings, breakwaters, boat ramps, channels or basins, and other such aids to the navigability of the lake, on, in or above the beds or waters of a navigable lake.” I.C. § 58-1302(h). This key term must be defined in the rules because the insertion of the terms “includes” and “other such aids” renders the statutory list of encroachments non-exclusive—without a definition there is no clarity on what “other such aids” are considered encroachments in aid of navigation.
 - b. The statutory definition of Encroachments Not in Aid of Navigation “means and includes all other encroachments on, in or above the beds or waters of a navigable lake, including landfills or other structures not constructed primarily for use in aid of the navigability of the lake.” I.C. § 58-1302(i). This key term must be defined in the rules because the insertion of the terms “includes” and “all other encroachments . . . not constructed primarily for use in aid of the navigability of the lake,” renders the statutory list of encroachments non-exclusive—without a definition there is no clarity on what “all other encroachments” are considered encroachments not in aid of navigation.
 - c. Beds of Navigable Lakes is a term of art that is defined differently in Title 58, Chapter 13, Idaho Code than in other statutes, federal law, tribal law, and case law. Because I.C. § 58-1302(b) defines beds of navigable lakes “for purposes of this act only,” as the land (1) below the natural or ordinary high-water mark, and (2) between the natural or ordinary high-water mark and artificial high-water mark, the rules should state this departure from regular parlance for clarity purposes. If IDL does not define “beds of navigable lakes,” then it should, at the very least, define the terms “ordinary and normal high-water mark” and “artificial high-water mark,” and state that the rules are applicable to the land between the different high-water marks. It is unreasonable to assume regulated parties, un-represented by legal counsel, will delve into both administrative rules and statutes to determine whether their actions fall within the scope of statutes or regulatory rules.

2. If IDL chooses not to define key terms in its rules, then at the bare minimum, it must state in each definition when a structure is a navigational or nonnavigational encroachment for clarity purposes. It is particularly troubling that the draft rules use terms such as “structure” or “mechanism” in place of “encroachment;” without using the statutorily correct key term, a regulated party cannot know whether the rules apply to them. Absent definitions of key terms, the following definitions should be revised to denote what rules apply to each encroachment:
 - a. 010.03.: Boat Garage. “A **nonnavigational encroachment** with one (1) or more slips that is completely enclosed with walls, roof, and doors.”
 - b. 010.04.: Boat Lift. “A **navigational encroachment** mechanism for mooring boats partially or entirely out of the water.”
 - c. 010.05: Boat Ramp: “A **navigational encroachment** consisting of a structure or improved surface extending below the ordinary or artificial high water mark whereby watercraft or equipment are launched from land-based vehicles or trailers.”
 - d. 010.06.: Breakwater: “A **navigational encroachment** that is designed to protect moorage by reducing wave energy.”
 - e. 010.09.: Community Dock. “A **navigational encroachment** that provides private moorage for three (3) or more adjacent littoral owners, or other littoral owners possessing a littoral common area with littoral rights including, but not limited to homeowner’s associations. No public access is required for a community dock.”
 - f. 010.14.: Float Home. “A **nonnavigational encroachment** that is designed and built to be used, or is modified to be used, as a stationary residential dwelling and is not self-propelled.”
 - g. 010.16.: Jet Ski Ramp, Port, or Lift. “A **navigational encroachment** mechanism for mooring jet skis or other personal watercraft similar to a boat lift.
 - h. 010.24.: Piling. “A **navigational encroachment made of commercially available materials intended to be used for such purpose**, that is driven into the lakebed and used to secure **other encroachments**.”
 - i. 010.27.: Pylon. “A **nonnavigational encroachment made of commercially available materials intended to be used for such purpose**, that is placed into the lakebed and used to support other encroachments.”
3. The definition of Public Trust Doctrine should be revised to reflect the accurate definition, consistent with I.C. § 58-1202(5) and the common law referenced therein. The definition should read: “**The common law doctrine holds, the State owns in trust the beds and banks of navigable waters—not otherwise held in trust by the United States for the benefit of a Federally recognized Indian tribe—for the use and benefit of the public, including the uses of navigation, commerce, ‘fish and wildlife habitation, recreation,**

aesthetic beauty, and water quality.” *Newton v. MJK/BJK, LLC*, 469 P.3d 23, 29 (Idaho 2020); *see also Byrd v. Idaho State Bd. of Land Comm’r*, 505 P.3d 708, 714 (Idaho 2022).

Comment 3: Encroachment Standards

1. Section 20.03.04.015.15. Marine Motor Fuel Dispensing Facilities: Fuel dispensing facilities on, in, or above the waters or beds of navigable lakes present significant environmental and water quality concerns. This section is insufficiently vague; without further regulation there is considerable likelihood that these facilities will irreparably harm Tribal Waters, State waters, and waters of the United States. Water quality standards relating to hazardous spills and petroleum releases should be incorporated by reference; additionally, safety standards for liquified petroleum gas dealers and gas storage facilities should be incorporated by reference.
 - a. A new subsection .015.15.c. should be added to read: **“All Marine Motor Fuel Dispensing Facilities permitted under this section must adhere to the standards set forth in IDAPA 58.01.02. ‘Department of Environmental Quality—Water Quality Standards,’ Subsections: 800. ‘Hazardous and Deleterious Material Storage’; 850. ‘Hazardous Material Spills’; 851. ‘Petroleum Release Reporting, Investigation, and Confirmation’; and 852. ‘Petroleum Release Response and Corrective Action’ as incorporated by reference in Section 003.05. of these rules. Further, such Facilities must adhere to the standards set forth in IDAPA 24.22.01 ‘Division of Occupational and Professional Licenses—Rules for the Idaho Liquified Petroleum Gas Safety Board,’ as incorporated by reference in Section 003.06.”**
 - b. IDL should also incorporate by reference the above regulations at subsection 003.05. and 003.06., respectively.
2. Section 20.03.04.015.16. Fill Material:
 - a. Fill material has significant deleterious effects on water quality and aquatic habitat. IDL should not allow “refuse or waste matter,” to be used as fill material. Any fill material should be naturally occurring and environmentally sound to protect water quality.
 - b. There should be no ambiguity about what rules apply to this kind of encroachment. The section states fill material is an encroachment requiring “written approval by the Department.” The term “written approval” is not synonymous with “encroachment permit,” and must be changed to accurately reflect that an encroachment permit is required, consistent with I.C. § 58-1306.
 - c. The State is not solely responsible for regulating discharge of dredge or fill material into navigable lakes—the rule should reflect that other agencies share regulatory authority to put a regulated party on notice that they must acquire all necessary permits prior to discharging fill material into navigable lakes.

- d. The section should be revised to say: "The placing of dredged or fill material, on or in the beds of waters of any navigable **lake** is an encroachment and requires a **nonnavigational encroachment permit from the Department, in addition to any other requisite permits from state, local, or federal agencies with jurisdiction. Any such fill material shall be naturally occurring and environmentally sound, no encroachment permit shall be issued if fill material will negatively affect water quality or aquatic habitat.**"

The Tribe appreciates the opportunity to provide comments on IDAPA 20.03.04 Rules for the Regulation of Beds, Waters and Airspace over Navigable Lakes in Idaho, Draft # 2. As IDL undergoes the rulemaking process, the Tribe respectfully requests that effectuating the purpose of the Lake Protection Act remains IDL's top priority and that IDL drafts the rules in a manner that adds clarity rather than confusion.

Sincerely,



Cajetan Matheson
Director, Department of Natural Resources
Coeur d'Alene Tribe