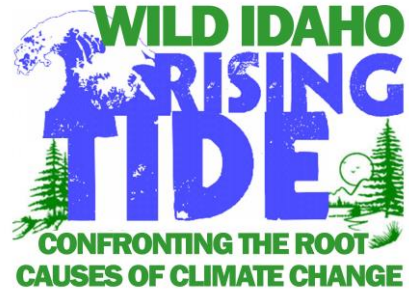


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July 12, 2019

Idaho Department of Lands
Attention: Andrew Smyth - Rulemaking
300 North Sixth Street, Suite 103
Boise, Idaho 83702

Sent as partial comment via the IDL website at <https://www.idl.idaho.gov/comment.html>
and as entire comment by email message and 11 PDF attachments to rulemaking@idl.idaho.gov

**WIRT Comments on Docket 20-0304-1901 Negotiated Rulemaking
for IDAPA 20.03.04 Rules Governing the Regulation
of Beds, Waters, and Airspace over Navigable Lakes in the State of Idaho**

I respectfully offer these written comments and accompanying documents on behalf of Wild Idaho Rising Tide (WIRT) and its over 3,200 climate activists, members, friends, supporters, and allies, including U.S. citizens owning property, working, and/or residing on and near Lake Pend Oreille, Sandpoint, and Bonner County, north Idaho, and in the inland Northwest and surrounding watersheds, who would be potentially and directly impacted by revisions of IDAPA 20.03.04, the administrative rules “governing the regulation of beds, waters, and airspace over navigable lakes in the state of Idaho,” and by Burlington Northern Santa Fe (BNSF) Railway’s proposed, Sandpoint Junction Connector project construction and operation of railroad bridges across Sand Creek and almost one mile over Lake Pend Oreille (“project” herein). We object to BNSF’s project invasion of the Pend Oreille lake and river ecosystem, and to its significant, direct and indirect, cumulative impacts on reasonable, public needs of navigation, as described in December 19, 2018, U.S. Coast Guard (USCG) public notices D13-PN05-18 and D13-PN06-18 and other, pertinent, state and federal government documents. WIRT and its associates also assert that USCG, the Idaho Department of Lands (IDL), and other agencies have insufficiently identified and analyzed the socioeconomic and environmental factors significantly impacted by the BNSF project, and have offered limited, public information about them, in the USCG draft environmental assessment (EA) and 13 accompanying documents, and in the IDL preliminary and final orders authorizing a BNSF, non-navigational encroachment permit. These circumstances highlight the necessity of modifications of IDAPA 20.03.04, which IDL has not proposed.

WIRT incorporates by reference into these remarks the written and oral comments of WIRT associates and all persons and organizations raising concerns about this project, its draft EA, its

Idaho water quality certification and encroachment permit, and related documents and processes, through all local, state, and federal, public input avenues before, during, and after this IDL comment period on IDAPA 20.03.04 negotiated rulemaking. We also incorporate by reference into these remarks all of the WIRT website and facebook posts and linked articles and documents relevant to this rulemaking and BNSF project analyses and their issues of concern, especially such posts tagged with #No2ndBridge and #IDoiltrainwatch and #WAoiltrainwatch, as further, public input and information shared with IDL.

The Idaho Department of Lands is initiating negotiated rulemaking for IDAPA 20.03.04 until July 12, 2019, and hosted statewide, public meetings from June 12 to 20, 2019, in Pocatello, Sandpoint, Coeur d'Alene, McCall, and Boise, Idaho [1, 2]. IDL's modifications of different sections of the rules than WIRT challenged in our eight-month petition for judicial review of the IDL-granted, June 2018, encroachment permit for BNSF's proposed, north Idaho rail bridges do not directly address the embarrassing lack of clarity in encroachment statutes that forced citizens to confront our state government, to protect Idaho's precious waters and local economies reliant upon them, and to continue to seek recourse for unfair litigation results. After the May 23, 2018, state hearings on the proposed, BNSF bridges, and concurrent with our First District Court case during 2018 and 2019, IDL also pursued lake rules amendments and hearings for regulations involved in the project [3]. The Idaho Legislature approved the resulting, negotiated rules mere weeks after Judge John Judge dismissed our earnest appeal, on statutory standing issues, not the merits of our arguments. However, the current sections under revision sidestep permit protocol for non-navigational encroachments, like industrial-scale, railroad bridges, and do not remedy the state violations of "public trust" that concerned citizens opposed through comments, hearings, and the courts.

The notice of intent to promulgate rules, on page 64 of the June 5, 2019, state administrative bulletin, and the first, preliminary draft of the negotiated rule posted to the IDL website on June 11, 2019 (one week after the comment period opened on June 5), address IDL shortfalls of funding to manage navigable waterway beds and process encroachment permit applications, collected exclusively from application fees for docks, water-intake lines, and assignments, not from general tax revenue. Because current, IDL costs exceed these fees, IDL is considering raising such fees, and potentially removing the fee schedule from the rules, to have encroachment permit fees set within Idaho code limitations by the Idaho land board (the other WIRT lawsuit opponent, besides IDL and intervenor BNSF). WIRT suspects that IDL is raising section 25, navigational encroachment application fees and adjacent landowner notification standards, to shift the burden to Idaho property owners of the huge costs and rules deficiencies of BNSF's section 30, non-navigational encroachment permit. IDL should instead or additionally propose lake rules modifications and raising fees and notification standards for section 30, non-navigational encroachment applications, like for BNSF's railroad bridges, not just section 25, navigational encroachment applications, such as for family docks, etc. If IDL ignores this opportunity to protect some of Idaho's most treasured water resources from section 30-allowed, industrial invasion and devastation, WIRT will more productively seek and secure Idaho lawmaker champions of our #No2ndBridge goals.

The presently proposed, IDAPA 20.03.04 changes would specify that IDL provide notice to adjacent property owners of applications for all noncommercial, navigational encroachments

covered in section 25 of the lake rules, but not similarly notify impacted parties of potential, non-navigational encroachments, as prescribed in section 30. While scrutinizing the state administrative record for the WIRT appeal of BNSF's permit, we noticed many, missing, IDL letters to neighbors directly adjacent to the railroad right-of-way/easement. Item 29 on page 7 of BNSF's application to IDL requires railroad provision of contact information of all adjacent property owners [4]. As apparent in records supplied to the court, rubberstamping IDL sent letters to only four of the 14 BNSF-listed parties, at the onset of permitting and public participation processes in February 2018. In an IDL Pend Oreille Supervisory Area memorandum dated February 26, 2018, "to...Idaho Department of Transportation...[and] Adjacent Neighbors," IDL stated that, "if you do not submit a comment, IDL will assume you have no objections to the [BNSF] application." According to IDL records, the bolded names of immediately adjacent land and property owners in the following list did not receive this February 26 memo or IDL letters of notification of the major, railroad infrastructure expansion project proposed to occur on the other side of their property lines:

- 1) City of Sandpoint
- 2) Jacquita D. Cox
- 3) Alan A. Berryman
- 4) DJ Land Corporation
- 5) **Seasons at Sandpoint 8, LLC**
- 6) **Campus House, LLC**
- 7) **Michael B. & Suzanne Jewell**
- 8) **David & Mary Eacret**
- 9) **Edward C. Van Vooren**
- 10) **David & Marilyn Dalby**
- 11) **Robert M. Weaver**
- 12) **Constance D. Nelson**
- 13) **William P. Weaver, Jr.**
- 14) **Stephen F. & Yulanda K. Smith**

BNSF's bridge and track construction and continued operation would directly impact and degrade the private, public, and commercial property values, use, and enjoyment of these stakeholders, who had previously shared their concerns about the project with state and federal agencies. IDL dismissed its own blatant disregard of the public trust, through May 23, 2018, hearing testimony given by Dianne French of IDL, and repeated verbatim, except the last sentence, in the preliminary order recommending a BNSF rail bridges encroachment permit:

About 250 feet of the temporary bridge and a few square feet of the temporary fill on the north side of the Sand Creek bridge area would be outside of the right of way. IDL considers this a temporary impact to the area between the Sand Creek shoreline and the existing Highway 95 bridge. And it is not expected to impact the adjacent property managed by the Idaho Transportation Department for Highway 95. **No other adjacent properties are expected to be impacted by the proposed project, due to the width of the BNSF right of way** [4, bolded emphasis added]

Although WIRT is reticent to become untangled in administrative and judicial processes that seem to silence dissent, divert creative actions, and block issue resolution, we intend to fully avail ourselves of this opportunity to insert into the public record the numerous, BNSF-permit-granting, IDL snafus described or not in our recent #No2ndBridge lawsuit. To IDL, we provide these extensive, written comments and accompanying information extracted from court records and litigation insights, to request and encourage IDL to expand the scope, extend the comment period, and hold additional public meetings for negotiated rulemaking on IDAPA 20.03.04, specifically section 30, so that more Lake Pend Oreille littoral rights holders and impacted citizens can participate in this rulemaking, and IDL can remedy the unaddressed issues and citizen-unfavorable outcomes arising from past and present, BNSF permit proceedings.

We earnestly ask and respectfully encourage the Idaho Department of Lands to: 1) Accept and include these and all of our oral and written remarks and attached documents in the public record for docket 20-0304-1901 negotiated rulemaking and related, rules and project comment periods, 2) Extend this rulemaking comment period to 90 days, to better involve seasonal residents in IDL decisions, 3) Make all documents that are part of the official record for BNSF's bridges permit applications publicly available for review, comment, and testimony, including the USCG draft EA, 4) Propose negotiated rulemaking for both sections 25 and 30 of IDAPA 20.03.04, and hold hearings for it in the most impacted communities of Idaho, 5) Require core samples of lakebed sediment and pollution in the BNSF right-of-way/easement project area, before all government environmental review and permit decisions, 6) Obtain all federal, state, Bonner County, and City of Sandpoint land ownership and lease records for railroad right-of-ways and easements, 7) Deliberate off-lake, downstream, less environmentally damaging, practicable, alternative rail and bridge routes and designs for the BNSF project, and 8) Revoke, deny, and postpone state decisions on BNSF encroachment permits, until federal agencies conclude a community-preferred, scientifically rigorous, independent, unbiased, full environmental impact study and statement (EIS) examining this BNSF infrastructure expansion scheme.

Idaho negotiated rulemaking is typically a dead-end, citizen-dismissive, state agency distraction and co-option of citizen acceptance of kinder, gentler industry rape of public and private resources, instead of direct, Idahoan confrontation of destructive projects, as witnessed through the WIRT and allied participation in and results of years of citizen resistance to IDL oil and gas rulemaking and WIRT's district court lawsuit against BNSF's railroad bridge encroachment permit. We regret missing alternative opportunities to stage #No2ndBridge protests and testify at every one of these statewide, purportedly negotiated, lake rules hearings. Instead, we are again creating a voluminous paper trail against the rules that permitted BNSF's bridges expansion, and insisting that those IDAPA 20.03.04 section 30 rules change, too, in many more ways than described herein, but adequately covered in our court documents.

WIRT requests that IDAPA 20.03.04 decision-makers consider and include as part of the official record for this 2019-20 negotiated rulemaking the attached comments submitted on BNSF's bridge permit application, during the spring 2018, IDL, public comment period. Because the federal and state records for that BNSF issue are not readily available for public review among the documents posted at this state docket 20-0304-1901 portal [1], we provide the attached, selected, administrative record of the IDL encroachment permit for this BNSF project (Attachment 2, Attachment 3, Attachment 4, Attachment 5, Attachment 6, Attachment 7, and

Attachment 8), as well as the original and amended, WIRT notices of appeal and/or petition for judicial review (Attachment 9 and Attachment 10) and petitioner WIRT's opening brief on judicial review of the same IDL encroachment permit (Attachment 11), all part of the record of Idaho First Judicial District Court case number CV09-18-1084, involving WIRT as petitioner versus IDL, the Idaho State Board of Land Commissioners, and IDL hearing officer Chris Bromley as respondents, and BNSF as intervenor (<https://mycourts.idaho.gov/odysseyportal/>).

We offer these documents for several reasons. As the lead, state agency overseeing BNSF bridge permits and project analysis and pertinent, negotiated, lake rulemaking, IDL needs to, by law, hear from north Idahoans and our regional neighbors, via this potentially last opportunity to request that IDL require additional, project impact evaluations and state rules clarification that eliminate litigation confusion for all involved parties concerned about non-navigational encroachment applications and permits, especially issuance of the final, IDL order favoring BNSF over Idaho citizens. Individually unique comments and letters, which substantively address the deficiencies of current, IDAPA 20.03.04 rulemaking and IDL/BNSF project documents and processes, provide the counterbalance of local wisdom so crucial to community and state government protection of the Pend Oreille and all regional watersheds.

Thank you for reviewing and posting our comments on docket 20-0304-1901, intended to improve IDAPA 20.03.04, and to advocate for state of Idaho consideration and acceptance in its rulemaking processes justifiably anticipated, better, administrative regulation of the often conflicting uses of navigable lakes in Idaho.

/s/ Helen Yost, MSEE
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[1] *Public Trust: Rulemaking for IDAPA 20.03.04, Docket 20-0304-1901*, Idaho Department of Lands

<https://www.idl.idaho.gov/rulemaking/20.03.04-2019/index.html>

[2] *Idaho Navigable Lakes Negotiated Rulemaking*, Wild Idaho Rising Tide

<https://wildidahorisingtide.org/2019/06/17/idaho-navigable-lakes-negotiated-rulemaking/>

[3] *Public Trust Lands: Rulemaking for IDAPA 20.03.04, Docket 20-0304-1801*, Idaho Department of Lands

<https://www.idl.idaho.gov/rulemaking/final-effective/20.03.04/index.html>

[4] *Case No. PH-2018-PUB-20-001*, Idaho Department of Lands

<https://www.idl.idaho.gov/hearings/PH-2018-PUB-20-001-BNSF/index.html>