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*Attorney for Petitioner*

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

In re the matter of:

WILD IDAHO RISING TIDE  
(An Incorporated Idaho Non-Profit Organization)

Petitioner,

v.

DAVID GROESCHL, in his official capacity as  
Director of the Idaho Department of Lands; CHRIS  
BROMLEY, in his official capacity as Hearing  
Officer appointed by the Idaho Department of  
Lands; and the IDAHO STATE BOARD OF LAND  
COMMISSIONERS,

Respondents.

NO. CV09-18-1084

**AMENDED NOTICE OF APPEAL  
AND/OR PETITION FOR JUDICIAL  
REVIEW**

(Idaho Department of Lands Case No.  
PH-2018-PUB-20-001)

Fee Category: R(2)

Fee Previously Remitted: \$221.00

This Amended Notice of Appeal and/or Petition for Judicial Review is respectfully submitted by Petitioner WILD IDAHO RISING TIDE pursuant to Idaho Code § 58-1301 through Idaho Code Section § 15-1312, and pursuant to the Administrative Procedures Act of Idaho Code § 67-5271 through Idaho Code § 67-5279.

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## PROCEDURAL OVERVIEW

1. The name of the agency for which judicial review is sought is the Idaho Department of Lands.
2. The title of the district court to which the Petition is taken is the District Court of the First Judicial District of the State of Idaho, in and for Bonner County.
3. The Court extended the time for filing an Amended Notice of Appeal and/or Petition for Judicial Review. This Petition is timely filed.
4. This Petition is authorized by I.C. § 67-6521 and venue is proper in this Court pursuant to I.C. § 67-5272. Petitioner has exhausted all administrative remedies.
5. The action of Idaho Department of Lands (IDL) for which judicial review is sought is designated by the agency as “Encroachment Permit Application No. L-96-S-0096E”. The applicant is Burlington Northern Santa Fe Railway (BNSF).
6. After holding two public hearings on May 23, 2018 in Sandpoint and Ponderay, Idaho the Hearing Officer issued a “Final Order” in this matter on June 21, 2018 granting BNSF a navigational encroachment permit for construction work to be performed, in submerged waters of Lake Pend Oreille and Sand Creek.
7. Several public hearings before the agency were conducted in this matter on May 23, 2018. It is believed each was recorded. The IDL website has now prepared and published transcripts of the hearings at: [www.idl.idaho.gov/lakes-rivers/lake-protection/index.html](http://www.idl.idaho.gov/lakes-rivers/lake-protection/index.html). WIRT has printed the published transcripts from the website. However, the published transcripts do not include an executed signature on the signature line following the Reporter’s Certificate. Out of an abundance of caution, a copy of transcripts with the attested signature has now been requested. *See* Wendy Earle – Idaho Department of Lands letter. Exhibit “A” (attached). Additionally, a public records request was propounded to [www.idl.idaho.gov/public-recprd-request.html](http://www.idl.idaho.gov/public-recprd-request.html) on September 3, 2018 at

approximately 4:40 pm. A check in the amount of \$100.00 for estimated copying fees will be deposited with IDL pending identification of the actual copy costs. Petitioner will pay the full amount for preparing the copies in this matter once such amount is determined by the agency.

8. Service of this Petition has been made upon IDL on the date indicated in the Certificate of Service portion of this Petition.

### OVERVIEW OF LAW AND FACTS

#### 1.) Standing

Petitioner Wild Idaho Rising Tide (WIRT) has standing to seek judicial review of the actions at issue in this Petition because collectively, Petitioner is an aggrieved party pursuant to I.C. 58-1306 (c). WIRT's community organizer Helen Yost and board members as well as, associated members appeared at the hearings designated in this action and made comments on the record after multiple WIRT members, in association with other parties, requested a formal public hearing. WIRT seeks to protect environmental values including, but not limited to, water quality of navigable lakes and associated fish and wildlife habitat, and air quality. WIRT members are concerned about environmental health issues due to increased fossil fuel transportation capacity. WIRT members recreate on both Lake Pend Oreille and Sand Point Creek and enjoy associated aesthetic qualities. Several WIRT members are registered on the rolls of the Confederated Salish band of tribes (Flathead and Kootenai) and are thus, subject to an 1859 Steven's Treaty granting reserved fishing rights at Clark's Fork where the river flows into and mingles with Lake Pend Oreille waters which provide habitat for threatened Bull Trout. Many members of WIRT reside in Bonner County and are affected by increased rail travel, safety at railroad crossings and emergency response times which could be inhibited by increased rail traffic. WIRT members are concerned about train derailment dangers affecting the waters of Lake Pend Oreille especially, where transportation of fossil fuels and hazardous wastes is involved. The approved encroachment permit jeopardizes Petitioner's substantial rights. WIRT

has been prejudiced by the decision, and Petitioner will suffer actual and direct harm and a violation of its rights if the challenged decision is not vacated.

## 2.)Standard of Review

Idaho Code § 67-5279(3) provides that a court shall affirm an agency action unless the Court finds the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion.

## 3.)Statement of Issues

- a. The issues for judicial review that Petitioner intends to assert in this proceeding include, but are not limited to, the following:
  - 1. Whether IDL's Final Order is arbitrary, capricious, an abuse of discretion, in violation of statutory and constitutional provisions, in excess of IDL's statutory authority, made upon unlawful procedure, and not supported by substantial evidence on the record as a whole in light of articulated Public Trust standards where:
  - 2. The Hearing Officer failed to properly publish a final record signed by the recorder;
  - 3. IDL failed to consider the relevant evidence and information submitted by the Petitioner and other testifiers at the public comment hearings and improperly weighed the "lake values" articulated in I.C. 58-1301 in favor of the permit applicant;
  - 4. IDL unlawfully and without justification failed to give "due consideration" to protection of lake water quality as required by I.C. 58-1301 because the Idaho Department of Environmental Quality's mandatory water quality certification

with determination of denial or, alternatively approval with possible conditions subject to issuance of the same, has yet to issue.

5. IDL unlawfully and without justification failed to give “due consideration” to protection of lake and stream water quality because the United States Coast Guard agency with jurisdiction over Lake Pend Oreille, has yet to determine potential adverse environmental impacts whether, direct or cumulative, resulting from the project, by means of issuance of either an Environmental Assessment (EA) or a more comprehensive Environmental Impact Statement which, has yet to issue.
6. IDL unlawfully and without justification failed to give “due consideration” to threatened Bull Trout, which inhabit Lake Pend Oreille because the Idaho Department of Fish and Game has yet to issue an EA considering the biological impacts to threatened native fish due to habitat modification along with, conservation of native species.
7. IDL unlawfully and without justification failed to give “due consideration” to protection of water quality in light of tribal claims to fish for bull trout at “customary and usual” places in waters of Lake Pend Oreille.
8. IDL unlawfully and without justification violated its own rule, *see* IDAPA 28.03.04.030.02 prescribing approval of permits in navigable waters only when consistent with the articulated Public Trust considerations.
9. IDL conclusions of law relating to delineation of the scope and legal effect of the 1884 railroad right of way grant upon which the BNSF railway tracks now sit, lacks a basis in law in light of competing ownership of the beds and banks of Lake Pend Oreille.
10. IDL unlawfully and without justification usurped the Idaho Stream Protection Act by improperly exercising jurisdiction to grant a permit impacting and encompassing alterations to Sand Creek, an unlisted stream channel.
11. IDL improperly relied on information not contained in the record to arrive at its findings and conclusions.
12. IDL’s findings, in whole or in part, lack support in the record.
13. IDL’s Order, in whole or in part, lacks a basis in the law.

- b. Whether Petitioner is entitled to its attorney fees and costs under I.C. §§ 12-117 and 12-121.

These issues will be discussed in greater detail and with more specificity once the record and transcript are made available and detailed review has ensued. Pursuant to Idaho R. Civ. P. 84(d)(5), Petitioner reserves the right to include additional issues as may arise upon review of the administrative record.

Wherefore, Petitioner requests the following relief:

1. That the Court vacate either all, or those portions of the Final Order that are in violation of the law; and
2. That the Court remand the application to IDL for further proceedings as necessary; and
3. That the Court award Petitioner its reasonable costs and attorney fees under I.C. §§ 12-117 and 12-121; and
4. For such other and further relief in Petitioner's favor as the Court deems just and proper.

DATED: This 4<sup>th</sup> day of September, 2018.

WENDY EARLE LAW OFFICE, PLLC

BY: Wendy J. Earle, ISB#7821  
Attorney for Petitioner

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4<sup>th</sup> day of September, 2018 I caused to be served a true and correct copy of the foregoing AMENDED NOTICE OF APPEAL AND/OR PETITION FOR JUDICIAL REVIEW by the following method to:

Lawrence G. Wasden, Attorney General  
Darrell G. Early, Chief of Natural Resources  
Division  
Angela Shaer Kaufmann, Deputy AG  
Joy M. Vega, Deputy AG  
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Attorneys for Respondent's

BY: Wendy J. Earle