

Wendy J. Earle, Esq. ISB #7821
WENDY EARLE, LAW LLC
120 E. Lake Street, Suite 205
Sandpoint, ID 83864
(509) 280-0741 Phone
(208) 597-3400 Phone
(208) 263-5169 Fax
wearle@idahowashingtonlawpractice.com

Counsel for Petitioner: Wild Idaho Rising Tide

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,

vs.

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.

BNSF Railway Company, Intervenor.

Case No.: CV09-18-1084

**PETITIONER'S OPENING BRIEF ON
JUDICIAL REVIEW**

(Appeal from Idaho Department of Lands
Final Order for Encroachment Permit No. L-
96-S-0096E)

Honorable John Judge

I. REVIEW AND RELIEF REQUESTED

Petitioner Wild Idaho Rising Tide (“WIRT”) by and through its counsel of record, Wendy J. Earle of WENDY EARLE, LAW LLC, pursuant to Idaho Rule of Civil Procedure 84 and the Idaho Administrative Procedure Act I.C. §67-5201, *e. seq.*, respectfully submits this Brief in support of its “Petition for Judicial Review” of the Final Order for BNSF Encroachment Permit (filed June 14, 2018). This Brief is supported by the official Agency Record (filed September 20, 2018). WIRT now seeks review by this Court and remand to the agency for further consideration on the issues presented for review. The Petition seeks relief from a Final Agency Decision regarding BNSF Encroachment Permit No. L-96-S-0096E (“Permit”). Petitioner’s appeal from Idaho Department of Land’s (“IDL”) final agency action was timely. This Court issued an Order granting BNSF’s motion to intervene on November 8, 2018. Oral argument is set for March 1, 2019. WIRT respectfully requests that this Court remand the agency actions addressed in WIRT’s Petition for further agency consideration.

II. APPLICABLE STANDARDS ON A BOARD OF LAND COMMISSIONER’S AND DELEGATED AGENCY DECISION

The applicable standard of review is as set forth in I.C. §67-5279(3):

When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the Court shall affirm the agency unless the Court finds that 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 procedures;
- (d) Not supported by substantial evidence on the record as a whole; or
- (e) Arbitrary, capricious, or abuse of discretion.

If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. I.C. §67-5279(3). Judicial review shall be conducted by the Court without a jury. I.C. §67-5277. Judicial review of disputed issues of fact must be confined to the agency record. *Id.*

Specifically, as applied to the Board of Land Commission, the reviewing Court is not required to affirm an agency decision if the Court determines that the Board's "findings, inferences, conclusions, or decisions, are in violation of constitutional or statutory provisions or statutory authority of the agency, made upon unlawful procedure, not supported by substantial evidence on the record as a whole, or arbitrary, capricious or an abuse of discretion." *Idaho Watersheds Project, Inc. v. State Bd. Of Land Comm'rs*, 918 P.2d 1206 (1996).

On appeal, the District Court defers to the administrative interpretation unless such interpretation or application is capricious, arbitrary, or discriminatory. *See, e.g., Rural Kootenai Organization, Inc. v. Bd. of Comm'rs*, 133 Idaho 833, 842, 993 P.2d 596 (1999). Black's Law Dictionary defines "arbitrary and capricious" as: "Characterization of a decision or action taken by an administrative agency... meaning willful and unreasonable action without consideration or in disregard of facts or without determining principle." *Black's Law Dictionary* (5th Ed.) (1983); *accord, Dexter v. Idaho State Bd. of Comm'rs*, 116 Idaho 790, 794, fn. 3, 780 P.2d 112 (1989) (citing with approval the above-quoted definition from Black's Law Dictionary).

The Idaho Court of Appeals has further expounded upon the nature of the definition of "arbitrary" governmental action:

An arbitrary act is one done without any apparent reason, therefore. ... Arbitrary means without rational basis. Action is not arbitrary when based on a candid judgment of the facts. ... It is also recognized that "[t]he term "arbitrary" has been variously defined, but in general is defined as willful and unreasoning action,

without consideration and regard for the facts and circumstances presented, and without adequate determining principle.

State v. Hayes, 108 Idaho 556, 560-61, 700 P.2d 959 (Ct. App. 1985) (internal citations omitted).

“Generally, we have found agency interpretations reasonable unless the agency relied on erroneous facts or law in its determination.” *Duncan v. State Bd. of Accountancy*, 149 Idaho 1, 4 (2010); quoting *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 313, 208 P.3d 289, 295 (2009) (finding an interpretation unreasonable because the Department of Insurance erroneously relied on practices from other states that did not have the same statute as the one enacted in Idaho).

III. ISSUES FOR REVIEW

The issues for review mirror those put forth in WIRT’s Amended Notice of Appeal/Petition for Judicial Review (“Petition”) with the exception of Issue No. 1 challenging the Hearing Officer’s failure to properly publish a final record signed by the recorder.¹ That issue is hereby withdrawn from consideration.

IV. BRIEF OVERVIEW

A. Agency Action and Procedural History

The IDL is an agency of the State of Idaho, created and existing under the authority of Idaho Code § 58-101, *et seq.*, which has responsibility of managing the public lands of Idaho. On February 22, 2018, BNSF filed a Joint Application for Permits (“Application”) with the IDL, the Idaho Department of Water Resources (“IDWR”), and the U.S. Army Corps (“ACE”) for “bridges” across Bridge Street, Lake Pend Oreille (“Lake”), and Sand Creek. *See*, AR 001-254; Preliminary Order. AR 002061-90. The bridges are to be part of the greater BNSF Sandpoint

¹ A true and correct copy of the Petition is attached hereto as Exhibit A.

Junction Connector Project and expand BNSF’s present single-track rail configuration with a second parallel set of tracks. *Id.* IDL granted BNSF an encroachment permit on June 14, 2018. Final Order. AR 2091-2102. IDL granted the encroachment pursuant to the authority granted by a provision of the Idaho Lake Act, I.C. §58-1306. The Final Agency Order (“Order”) constituted final agency action for purposes of appeal under the Idaho APA.

B. Brief Summary of WIRT’s Primary Objections

WIRT, an Incorporated Idaho Non-Profit Organization objects to IDL’s erroneous application of governing law along with the lack of a reasonable review that takes all factors in to consideration resulting in IDL erroneously issuing a project permit authorizing substantial infrastructure construction, including installation of “48 in-water ... pier bents” totaling “288 pilings” located in Lake Pend Oreille, and “8 steel pilings” all “within the navigational channel”. AR, App at 2-3. The total amount of pilings to be located in Sand Creek is “projected to be 64, 22 of which will be below the regulated OHWN (20262, 5)”. Only two of the piers will fully within the creek’s navigational channel. *Id.*

IDL considered the contested agency action pursuant to the Lake Protection Act (“LPA”), I.C. §58-1350 (b) and corresponding administrative rules promulgated by the State Board of Commissioners, IDAPA 20.0304.000 et seq.² Accordingly, IDL is required to balance the competing interests involved while determining whether to approve permits for navigational

² For purposes of a contested action agency means “[e]ach state board, commission, department or officer authorized by law to make rules or to determine contested cases,” I.C. §67-5201(2).

encroachments. I.C. § 58–1301, et seq.; IDAPA 20.03.04.011. In accord with the “public trust doctrine,” IDL is required to reasonably administer public lands and waters on behalf of all Idaho constituents. However, the final agency decision unduly disregards all facts in the record regarding significant adverse impacts (*e.g.*, local economic and property impacts, safety at railroad crossings, first responder delays at tracks, potential transport spills, preservation of a historic train station, aesthetic values, and water quality) to a small, local tourist community that proudly touts and profits from its natural beauty. Disregard of insightful and studied comments and testimony in the record resulted in weighing potential increased economic benefits to the community and greater region allowed the IDL to reach an unreasonable decision. Little weight was given to potential adverse effects to the waters of Lake Pend Oreille and Sand Creek and their aquatic species in the agency record.

The BNSF project will involve installation of 22 pylons which will be below the regulated OHWN affecting and displacing water flows below the ordinary high-water mark (“OHWM”) in Sand Creek which flows in to Lake Pend Oreille.³ App at 2-3. 2 of the pylons will be directly in the creek channel. *Id.* IDL has erroneously rushed to judgment by deciding that the waters of Sand Creek come within its unambiguously stated statutory permitting authority. The Idaho Stream Protection Act § 42-3801, *et seq.*, controls alterations to stream channels below the OHWM. The Idaho Board of Water Resources is charged with oversight of stream channel alterations and the administering agency is the IDWR. Alterations are defined as modifications that impact the “direction of stream flow.” §42-3802(b). Alterations to stream

³ Photos depicting Sand Creek can be found in the official record. AR 43.

channels falling below the “mean high water mark” as defined by §42-3802(h) require initial approval by the IDWR “director.” I.C. §42-3803. IDL exceeded its statutory authority.

Most egregiously, IDL failed to properly research, evaluate, and analyze the clear cross-section of State and Federal law raised by BNSF’s stated project purposes in its Joint Agency Application. The Application clarifies that “[i]n 1864, the United States Congress (“Congress”) granted Northern Pacific Railway the land on which the current BNSF tracks exist, including where Br. (“Bridge”) 3.9 crosses Lake Pend Oreille.” AR 0005. The 1864 charter grant to Northern Pacific Railway preceded Idaho’s admission to the Union in 1890. In 1864, Idaho was still a territory. Idaho had yet to be granted title to lake beds pursuant to the equal footing doctrine. The timing of the federally granted right-of- way (“FGROW ”) by Congress over submerged public lands claimed by the federal government is significant as it presents for consideration the notion that Idaho decision making authority is displaced in this instance by federal law. Thus, as a threshold matter federal agency law preempts issuance of a project permit applicable to BNSF infrastructure improvements affecting Lake Pend Oreille.

C. Standing

WIRT maintains its principal place of business in Sandpoint, Idaho. It is made up of approximately 1000 members collectively sharing in WIRT’s organizational values. Recently, WIRT incorporated to reflect an expanded mission. The WIRT member collective was originally formed as part of the national branch of Rising Tide USA in 2011. WIRT’s community organizer Helen Yost, on behalf of WIRT as well as other associated members, appeared and testified at the agency’s (IDL) public comment hearing held on March 23, 2018 in Sandpoint, Idaho and

commented on the record.⁴ Accordingly, WIRT and its members fall well within the definition of “aggrieved” parties pursuant to I.C. 58-1306(c).

Standing requires that an aggrieved party show a “distinct palpable injury and fairly traceable causal connection between the claimed injury and the challenged conduct.” *State v. Philip Morris, Inc.*, 158 Idaho 874, 881, 354 P.3d 187, 194 (2015). “This Court has defined palpable injury as an injury that is easily perceptible, manifest, or readily visible.” *Id.* The injury cannot be “one suffered alike by all citizens in the jurisdiction.” *Troutner v. Kempthorne*, 142 Idaho 389, 391, 128 P.3d 926, 928 (2006). WIRT and its member’s injuries can be distinguished from those suffered by all citizens in the jurisdiction where venue is properly lodged— “Agency action shall be affirmed unless substantial rights of the appellant have been prejudiced.” *Brett v. Eleventh Street Dockowner’s Ass’n, Inc.*, 141 Idaho 517, 521. (2005); I.C. §67–5279. WIRT’s members have been directly and substantially prejudiced and harmed by IDL’s handling of the encroachment permit application, and IDL’s decision to issue an encroachment permit to BNSF. IDL’s decision to grant BNSF a permit in contravention of reasoned considerations of law and fact presented in the record has caused WIRT’s members to sustain a “distinct palpable injury.” Among other goals, on behalf of itself and its local community members, WIRT is committed to protecting and restoring the ecological conditions of air and lands in the Sandpoint, Idaho area. WIRT members combat effects of carbon emissions from fossil fuels, protect the water quality of navigable lakes and associated fish and wildlife habitat, and preserve air quality. WIRT’s concerns encompass preservation of the water quality of the waters and lake beds of Lake Pend

⁴ WIRT members, in association with other parties, requested a formal public hearing after the record was issued for public review on February 28, 2018. AR 270-274, 291, 296-341.

Oreille and its associated aesthetic values. Members often recreate on both Lake Pend Oreille and Sand Creek and enjoy associated aesthetic qualities. Several WIRT members are registered on the rolls of the Confederated Salish band of tribes and are thus, subject to an 1859 Steven's Treaty granting reserved fishing rights in Lake Pend Oreille, which provides habitat for threatened Bull Trout. Many members of WIRT reside in Bonner County and are thus, affected by increased rail travel, safety at railroad crossings, and emergency response times which could be inhibited by increased rail traffic. WIRT members daily monitor the passage of BNSF coal transports on the local railway track. Concerns exist about train derailment and coal pollution dangers affecting the waters of Lake Pend Oreille especially, where transportation of fossil fuels and hazardous waste is involved. WIRT and its members will suffer actual and direct harm and particularized damages if the challenged decision to grant BNSF a permit is not remanded for further consideration including withdrawal.

IV. ARGUMENT

A. **IDL erred in Granting an Encroachment Permit to BNSF without due Consideration of Ownership of the Lake Bed thereby Violating Idaho Constitutional Provisions, and Clearly Exceeding its Legal Authority as a State Project Permitting Agency.**

On the issue of ownership of “beds and banks,” David Groeschl, Director of IDL, engaged in an erroneous legal analysis. Final Order ¶¶ 2, 4, & 6-9. 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 lack a basis in law in light of competing federal ownership of the beds and banks of Lake Pend Oreille. For instance, IDL chose to ignore a particularly salient comment addressing this precise issue. Matt Nykiel, on behalf of the Idaho Conservation League, requested that “IDL analyze and evaluate the ownership of the beds and banks of Lake Pend

Oreille and Sand Creek in which the BNSF intends to construct new rail infrastructure for the SJC proposal. BNSF has claimed that the bed and land on which it installs pilings and other rail infrastructure is not state trust land owned by the people of Idaho because this land was granted to BNSF before statehood.” AR 342.

The Land Board is charged with the “direction, control and disposition of the public lands of the state, under such relations as may be prescribed by law.” Idaho Constitution, Art. IX, § 7. The 1864 railroad grant to “Northern Pacific Railroad Company, pursuant to an act of Congress, provided a 400-foot rail road right of way with (debatably) a reversionary interest.⁵ Final Order at 3. FGROW’s over public lands were granted by Congress for purposes of spurring westward expansion from the earliest years of railroad transportation development commencing in the mid-19th Century. *See e.g., Great N. Ry v. United States*, 315 U.S. 262, 273 & n.6 (1942); *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979); also, *Marvin M. Brandt Revocable Trust*, 572 U.S. 93 (In the mid-19th Century, Congress began granting private railroad companies rights of way over public lands to encourage the settlement and development of the West).

In the final decision, IDL’s Director looked to the equal footing doctrine to justify IDL’s jurisdiction over the beds and water of Lake Pend Oreille. Final Order ¶7. Mr. Groeshl’s

⁵ In determining that Northern Pacific took title pursuant to a “limited fee, made on an implied condition of reverter” should the company cease to use the lake bed for intended railway purposes, the appointed hearing officer referenced *Avista Corp., Inc. v. Wolfe*, 549 F. 3d 1239,1242-43 (9th Cir. 2008), citing *Northern Pac. RR. Co. v. Townsend*, 190 U.S. 267 (1903). *See*, PI, AR. The analysis stopped there. However, a subsequent United States Supreme Court decision casts doubt on the nature of the interest granted by Northern Pacific to BNSF. *See, Marvin M. Brandt Revocable Trust v. U.S.*, 572 U.S. 93 (2014) (expressly overturning *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942) and its progeny treating FGROW’s as reversionary interests, and instead affirming earlier in time precedent holding that FGROWs are in fact easements with the federal government reserving a “servient” estate). Because WIRT is constrained by a 20-page limit further discussion of the effect of *Marvin B. Brandt Revocable Trust* will not be addressed but will be reserved for its Reply if deemed necessary.

application of the equal footing doctrine is misplaced. Idaho joined the Union on July 3, 1890 on an “equal footing with the original States.” *Idaho v. United States*, 533 U.S. 262 (2001) *citing* Act of July 3, 1890, Ch. 656, 26 Stat. 215. The equal footing doctrine is however subject to exceptions as applied to pre-statehood publicly held submerged lands under navigable waters. *Id.*; *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197 (1987). BNSF’s 1864 FRGOW precedes Idaho statehood.

Title to subsurface lands under navigable waters can be defeated by a “prestatehood conveyance of the land to a private party for a public purpose appropriate to the Territory.” *Utah Div. of State Lands v. United States*, 482 U.S. at 197 [italics added], or by a *reservation of submerged lands to keep them “under federal control for an appropriate public purpose,” United States v. Alaska*, 521 U.S. 1, 33-34 (1997) [italics added], *see, also Idaho*, (holding that the U.S. had reserved part of the bed of Lake Coeur d’ Alene and part of the St. Joe River for tribal use thus barring transfer of title to Idaho). U.S. Const. Art. IV, § 3, Cl. 2, Sec. 3, Cl. 2. (Public Lands)⁶.

IDL identified the specific purpose of the 1864 grant of a FGROW as limited to private railroad purposes including railroad tracks adjacent to and over Lake Pend Oreille. Final Order ¶¶ 1-6. The encroachment permit approved by IDL is clearly confined to the expansion of railroad tracks over both Lake Pend Oreille and Sand Creek. App, AR at 2-3. According to BNSF, “The project purpose is to provide improvements for freight and passenger rail traffic to meet existing and ongoing capacity needs. Rail traffic volumes have significantly increased for the past 30-years [sic] to the point that section [sic] of the BNSF rail system has [sic] become a constraint for

interstate commerce.” App, AR at 5. This is an activity derived from a private railroad purpose and furthers advances that sole purpose. In connection with the overall connector project, BNSF seeks to install pylons in the submerged bed of Lake Pend Oreille. Incontrovertibly, pursuant to the pre-statehood 1864 grant for strictly railroad transportation purposes, BNSF holds either a limited defeasible fee or an easement. These facts fall well within the purview of one or both of the exceptions defeating a claim of Idaho state title to submerged lake beds identified in *Utah Div. of State Lands; Idaho, supra*.

Federal “agency regulations implementing federal statutes have been held to pre-empt state law under the Supremacy Clause,” *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-296 (1979). The legislature enacted Chapter 13 to regulate “Navigational Encroachments” placed in *navigable waters in the state of Idaho.*’ *Lovitt v. Robideaux*, 139 Idaho 322,325 (2003). [Italics added]. Federal interest in congressional grants of federal railroad rights of way is so dominant that IDL, a state agency must be precluded as the permitting agency in favor of federal permitting laws applicable to proposed lake bed infrastructure installations in and over the waters of Lake Pend Oreille. Any other conclusion constitutes an error of law. On the above issue alone, this Court’s inquiry need go no further.

B. IDL erred in granting a project permit to BNSF for Sand Creek.

In considering applications for encroachment permits as applied to Idaho state waters, IDL operates strictly under the purview of I.C. §58-101. However, the Idaho Stream Protection Act § 42-3801, *et seq.*, controls alterations to stream channels below the OHWM. IDL

⁶ The Congress shall have Power to dispose of and make all needful Rules and Regulations *respecting the Territory* or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State. [Emphasis added].

unlawfully and without justification usurped the Idaho Stream Protection Act's review requirements required by IDWR and improperly exercised jurisdiction to grant a permit impacting and encompassing alterations to Sand Creek, a stream channel with a perennial flow.⁷

IDWR specifically requires pre-licensing review in comportment with I.C. § 42-3801:

Legislature of the state of Idaho hereby declared that the public health, safety, and welfare requires that the stream channels of the state and their environments be protected against alteration for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. No alteration of any stream channel shall hereafter be made unless approval therefore has been given as provided in this act.

Accordingly, §42-3803(a) mandates that proposed stream channel alterations be submitted for IDWR review and go through a permitting process. The purpose of the ensuing review process is: “[T]o determine ...likely effects of the proposed stream channel alteration upon the fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality values of the stream.”

I.C. §42-3803. The record is altogether void of substantial evidence confirming IDL's discretionary decision that Sand Creek constitutes a “slough” rather than a creek. In fact, the agency record contains at least 10 references identifying Sand Creek as either a “creek” or a “channel.” App. 3, 19, 94, 163-165, 167-168; PI at 6, AR. Conversely, the record is devoid of any reference to Sand Creek as a listed navigational water body which by definition would come under the auspices of the IDL and the Lake Protection Act. Accordingly, IDL erred by asserting jurisdiction over Sand Creek. Approval of the project required prior BNSF submission of an Application to IDWR and ensuing review pursuant to I.C. §42-3803. On this issue as well, IDL's

⁷ I.C. §42-3802 imposes a constant flow requirement in its restrictive definition of a “stream channel”.

issuance of a project permit to BNSF for insertion of pylons affecting water flow in Sand Creek must be remanded on the basis that IDL exceed its statutory authority.

C. IDL Acted Arbitrarily and Capriciously and Without Balanced Consideration of All Evidence.

For purposes of judicial review of actions affecting public lands, the Idaho Board of Land Commissions (“IBLC”) is an “agency.” *Idaho Watersheds Project, Inc.*, 918 P.2d 1206. The ICBL specifically delegated authority to the IDL for purposes of administering public lands including consideration of applications for issuance of navigational encroachment permits on Idaho’s navigable waters. *See*, I.C. §58-101 and §58-1306.

1.) IDL erroneously failed to measure or quantify the benefit to BNSF to be gained or to explain by reference to “substantial evidence” how such benefit outweighs the injury occasioned to competing public interests.

“While [T]he Lake Protection Act certainly contemplates that IDL will weigh the economic benefits and detriment of a proposed navigational encroachment, it is not the only factor considered in the determination. IDL must weigh environmental, navigational, recreational and other impacts associated with a proposed encroachment.” *Brett v. Eleventh Street Dockowner’s Association, Inc.*, 141 Idaho 517, 523 (2005). IDL acted arbitrarily and capriciously when it failed to consider all relevant evidence and information submitted by the Petitioner and other testifiers at the public comment hearings and in pre-public hearing comments and improperly weighed the “lake values,” including adverse effects on water quality and aquatic species, as articulated in I.C. §58-1301. This despite multiple comments and testimony reflected in the record herein. Of particular evidentiary relevance is the comment provided by Shannon Williams with Idaho Water Keepers on March 21, 2018. AR 00570. Ms. William’s comment specifically draws attention to the requirement set forth in I.C. §58-101 requiring that the IDL

must abide by “[T]he Idaho Legislature’s intent in balancing the benefit of a project against its harm.” *Id.*

Instead, in granting the project permit, IDL based its arbitrary, capricious, and discriminatory decision to favor economic values over other articulated values on receipt of 1096 letters touting the economic benefits flowing from expanded railroad capacity. See, e.g. AR 275-89, 342-51, 364-424, 432-433, 435-454, 460-472, 482-516 (non-exhaustive list of form letters). To wit, by the appointed hearing officer’s own admission, nearly all of the written comments submitted favoring BNSF’s position were “identical in their form and substance.” PI at 9. Yet, the record herein is replete with well-considered comments and testimony, urging IDL to consider other community related values as opposed to BNSF’s self-serving, economic interests and the assumed public interest in expanded railroad capacity. See, AR 1946 (“There will be potential, significant, adverse impacts on environmental quality, endangered species, regional safety, emergency response, vehicle traffic flow, noise and pollution levels, recreational experiences, tourism businesses, economic opportunities &...our critical lake and acquirer water resources”). See, also AR 1690-91(requesting “due consideration” of all lake protection values).

IDL erroneously failed to measure or quantify the benefit to BNSF to be gained or to explain by reference to “substantial evidence” how such benefit outweighs the injury inflicted upon competing public interests including to local Sandpoint residents. Instead, IDL unfairly chose to “rubber stamp” BNSF’s permit application by giving unjustifiable weight to form comment letters produced by BNSF in close temporal proximity. See, Final Order.

2.) IDL’s Failure to Delay the Project Permit Pending Federal Agency Review Was an Abuse of Discretion Precluding Consideration of All Potential Alternatives and Impacts.

In approving BNSF's Application, Mr. Groeshel specifically adopted the findings of the Hearing Office's Chris Bromley. Final Order at 2, ¶ II, A. "According to Ms. Sugarman, the USCG (United States Coast Guard) is the lead federal permitting agency." Preliminary Order at 10. IDL unreasonably and without justification failed to give "due consideration" to the protection of lake and stream water quality because the USCG a federal agency had 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 ("EIS") pursuant to procedural requirements put forth in National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4321, *et seq.* Pursuant to NEPA, federal agencies are required to take a "hard look" at "potential adverse impacts" on the environment requirement and identify such impacts either in an EA or more complete EIS issue.

"NEPA places upon an [federal] agency the obligation to consider every significant aspect of the environmental impact of a proposed action, and it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process." *Standing Rock Sioux Tribe, et al. v. U.S. Army Corps of Engineers, et al.*, 255 F.Supp. 3d 101,113 (D.C.C. 2017) *citing* National Environmental Policy Act of 1969, § 2 *et seq.*, 42. Moreover, "Under NEPA, an agency must prepare an Environmental Impact Statement for any proposed major federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C)." *Id.* The heart of an EA or EIS is the mandatory consideration of alternatives. *Id.* By failing to delay approval of the project permit subject to NEPA review, IDL unreasonably failed to extend its analysis to available and less impactful railroad track

alternatives. Instead, it unreasonably limited its analyses to the “preferred” alternative over Sand Creek and Lake Pend Oreille tendered by BNSF in its application. App, AR 5. Accordingly, IDL willfully made an unreasonable decision and acted in contravention of the many comments, some extremely insightful and based on understanding of the NEPA process in the record requesting a project related EA or EIS. See, e.g. AR at 290-93, 1640134-1935, 1947.

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 a mandatory EA considering the biological impacts to threatened native fish due to habitat modification along with, conservation of native species. IDL unlawfully and without reasonable justification failed to give “due consideration” to protection of water quality in light of a mandatory Idaho Fish and Game biological evaluation and existing tribal claims to fish for bull trout at “customary and usual” places in waters of Lake Pend Oreille. *See, Treaty with The Flatheads, Etc.*, of July 16, U.S. – Confederated Tribes, 1855, Indian Affairs: Treaties, Vol. II pp. 722-725. This despite educated comments in the record referencing laws and regulations germane to preservation of a critical habitat for threatened species pursuant to the Endangered Species Act and C.F.R. § 230.10(b)(3). *See*, AR 1644, 1681-1682. *See, also* AR1682 (discussing tribal rights and use of Lake Pend Oreille and its shores since “time immemorial”). *See, also* AR 1685 ([Lake Pend Oreille] is “arguably, the most famous fishing lake in Idaho,...the site of the world record bull trout (14.5 kg).) *See, also* OR 1940-41, 1946, 2028-99 (discussing tribal need for an EIS). *See, also* AR 2033.

D. IDL Unreasonably Failed to Give Due Consideration to Waters held in Public Trust.

Idaho Courts have upheld the public trust doctrine which has ancient roots in Roman and English law as first adopted in *Central Railroad Co. v. Illinois*, 146 U.S. 387 (1882) (the State cannot alienate submerged harbor lands acquired under the equal footing doctrine). “Under the public trust doctrine “[t]he State of Idaho holds title to the beds of all navigable bodies of water below the natural high water mark for the use and benefit of the public.” *Selkirk–Priest Basin Association, Inc. v. State of Idaho*, 127 Idaho 239 (1994) citing, *Kootenai Env'tl. Alliance v. Panhandle Yacht Club*, 105 Idaho 622, 625, 671 P.2d 1085, 1092 (1983) (FN omitted). In considering an application for encroachment and the impact on public trust uses, *Kootenai* lays out an exhaustive list of factors to consider including “impacts in light of cumulative effect on existing infrastructure in light of full use of public trust resources”; “impact of the of the project on public trust resources when examined in light of the primary purpose of the resource” including “navigation, fishing or recreation”; “and the degree to which broad public uses are set aside in favor of ...private uses.” *Kootenai* at 629-30.

In short the public trust doctrine requires close review of State waters. The citizens of Idaho are the beneficiaries of public trust resources managed by the IBLC. 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. It also unreasonably failed to consider that Lake Pend Oreille is recognized as an “outstanding water body” and thus receives heightened protection pursuant to the definition put forth in I.C. §39-3602(21).⁸ As such, it constitutes an outstanding national or state resource that

⁸ "Outstanding resource water" means high quality water, such as water of national and state parks and wildlife refuges and water of exceptional recreational or ecological significance, which has been so designated by legislature.

requires protection from point source and nonpoint source activities that may lower water quality. *See also*, I.C. §39-3602 (33) (“waters” of Idaho fall under federal clean water act definition).

BNSF’s Application is a joint application with the Army Corps of Engineers (USACE). The BNSF railroad expansion project requires a “dredge and fill” permit pursuant to Section 404 of the Clean Water Act, Federal Water Pollution Control Act Amendments of 1972 at § 1342(c) (CWA). Application for a “dredge and fill” permit triggers water quality impact review pursuant to CWA §401. Because the final Idaho Department of Environmental Quality’s (“IDEQ”) mandatory water quality §401 certification with approval based possible conditions subject to issuance of the same did not issue until September 21, 2018, IDL failed to consider all substantial evidence relating to the project. IDL unlawfully and without justification failed to give “due consideration” to protection of lake water quality as required by both I.C. §58-1301 and the public trust doctrine. This, even though an insightful comment was provided concerning the merit of delaying the Final Order pending the final IDEQ §401 certification assessment in light of the potential for “...significant water quality standards violations.” *See*, AR 1644.

Even though an Idaho Fish and Game assessment is presented in the Application materials, see AR 83-133 the record does not contain the mandatory biological EA required by overarching federal laws including the Endangered Species Act (ESA) where applicable. Bull Trout are listed as endangered pursuant to the ESA which is one level below possible extinction. *See*, <https://www.fws.gov/pacific/bulltrout/>, last searched on 12/13/18. Accordingly, IDL failed to give “due consideration” to an aquatic species inhabiting the clear waters of Lake Pend Oreille. *Id.*

Likewise, the required USACE §404 “dredge and fill” permit has yet to issue either. Collectively the CWA §404 permit, the §401 certification, and an EA or EIS as well as a biological EA are all intended to assure diligent consideration of potential water quality “adverse impacts” prior to issuance of a permit. These documents incorporate information and analysis critical to a reasoned evaluation of adverse impacts to lake water quality. Notably, without the benefit of review of these documents at the time of the public comment hearings, interested parties and beneficiaries of Idaho’s public trust resources were precluded from providing comprehensive outcome-based comments.

V. CONCLUSION

Based upon the reasons and authorities set forth above, WIRT respectfully requests that this Court reverse the final agency action of IDL, find that the Lake Protection Act does not apply, and remand the matter with directions to withdraw the permit. WIRT requests that the Court award its reasonable costs and attorney fees associated with bringing this petition for review under I.C. §§ 12-117, 12-121.

DATED this 13th day of December 2018.

Respectfully submitted,

WENDY EARLE, LAW LLC

By: /s/Wendy J. Earle
Original on file with Wendy Earle, Law Office LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 13th day of December, 2018 I caused to be served a true and correct copy of the foregoing Petitioner's Opening Brief on Judicial Review by means of electronic iCourt to the following parties:

Angela Shaer Kaufmann, Deputy AG
Joy M. Vega, Deputy AG
700 W. State Street, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010

angela.kaufman@ag.idaho.gov
joy.vega@ag.idaho.gov

Attorneys for Respondents

Stephen Thomas
Cathy R. Silak
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 100
P.O. Box 1617
Boise, ID 83701-1617

stthomas@hawleytroxell.com
csilak@hawleytroxell.com

Attorneys for Interveners

/s/ Wendy J. Earle
Wendy J. Earle