

Changing the name of the Public Trust Program to Navigable Waterways Program

Issue

There is broad public confusion about IDL authority over the beds and shorelines of navigable waterways within Idaho. IDL staff and engaged stake holders have a good understanding of our regulatory responsibility in this area, but this program knowledge diminishes significantly as we move outside the IDL to the legislature and public at large.

Facts

- The state owns the beds of navigable lakes and rivers up to the ordinary high-water mark (OHWM).
- IDL manages structures on the state-owned beds of navigable lakes and rivers up to the OHWM through leases and easements. This work is comparable to the work performed by the Real Estate Services Bureau on endowment lands.
- In addition, IDL regulates all encroachments on navigable lakes (not rivers; this is done by IDWR) located below the Artificial High-Water Mark ("AHWM"). The state only owns the portion of this land below the OHWM. The strip of land located between the OHWM & AHWM is not owned by the state, but it is still considered the bed of a navigable waterway. Therefore, our regulatory responsibility goes beyond the area owned by the state.
- Example: At Lake Pend Oreille the state owns up to the ordinary high-water mark, however the artificial high-water mark is ~10 feet higher. In these situations, we regulate up to the artificial high-water mark as allowed by statute. If we did not, there would be no effective regulation of encroachments around the edges of the lake.
- There is ongoing confusion between "endowment trust lands" and "public trust lands". This was made evident when the ICL tried to involve the public trust program in the Payette Lake issues last year.
- It is not immediately obvious to the public that the Public Trust Program has anything to do with the beds of navigable waterways. Based on this feedback, IDL's main webpage lists Lakes & Rivers as the link to the services provided by this program.
- 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. These lands are what we consider public trust lands.
- The definition of navigable waterways includes all these public trust lands, and it waterways that have been determined through court decisions to be navigable as a right-of-way such as Silver Creek, Prichard Creek, and Eagle Creek. Navigable waterways also include those areas of privately owned submerged lands when a dam has created an artificial high-water mark above the ordinary high water of an existing lake or river. Lake Pend Oreille, Milner Reservoir, Henrys Lake, and other bodies of water have an artificial high-water mark that enlarges the area regulated for lake encroachments. This

means that actual location and boundaries of navigable waterways are likely different from statehood. The Idaho Legislature requires that these waterways be regulated, and charges IDL with the effective regulation of encroachments on the waterways defined in Idaho Code 58-13.

- If we limited ourselves to only regulating public trust lands (those beds and banks deemed at statehood), there would be large areas not protected. Of course, we don't do this, since that would be in defiance of the Idaho Legislature.

Other States

Andrew Smyth researched what other states call these lands and found:

- Oregon – Aquatic Lands
- Washington – Aquatic Lands
- Utah – Sovereign Lands
- Nevada – Submerged and Sovereign Lands
- Louisiana – Water Bottoms

Benefits

Changing the program name will bring us more in line with the wording used in The Lake Protection Act. Idaho Code § 58-13 refers to navigable lakes, not public trust lakes. Idaho Code § 58-1 refers to navigable waterways, not public trust lands. Idaho Code § 58-12 talks about the Public Trust Doctrine but refers to navigable waters and not public trust lands. None of the rules administered in this program refer to public trust lands. The rules variously refer to navigable lakes, navigable waters, and the incredibly clumsy “State-Owned Submerged Lands and Formerly Submerged Lands” which will be changed to “state-owned navigable waterways” through rulemaking.

As with many IDL programs community engagement is vital and ongoing. When the general public hears “public trust” we explain what it is. The term is not intuitive. Our hope is that by changing to navigable waterways we can at least get stakeholders to think “waterway beds and banks”. While not perfect, navigable waterways is more intuitive than public trust.

To help alleviate confusion the RPA bureau began using the term navigable waterways a few years ago to help the public and other stakeholders understand our role. This has helped the audience focus in on the areas we manage. This transition from public trust has been mostly informal with the exceptions of changing the title of the program manager from public trust to navigable waterways and titling the IDAPA 20.03.09 rulemaking Easements on State-Owned Navigable Waterways.

It is likely impossible to explain what our program does in a simple title. IDL staff that work in this program are adept at explaining our role when presenting to the public, engaging in hearings, and offering support to engaged citizens and legislators.