

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

IN THE MATTER OF ENCROACHMENT PERMIT	)	
APPLICATION NO. ERL-96-S-219E	)	Case No. CC-2015-PUB-20-001
	)	
	)	<b>FINAL ORDER</b>
PETER KASEBURG,	)	
APPLICANT.	)	
	)	

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Applicant Peter Kaseburg, his wife Shelagh Kaseburg, and the Kaseburg Family Trust have petitioned the Director of the Idaho Department of Lands (IDL) to review the Findings of Fact, Conclusions of Law, and Preliminary Order (Preliminary Order) issued by Hearing Officer Edward Lockwood in this contested case regarding Peter’s application for a noncommercial navigational encroachment permit. By this Final Order, I affirm the Hearing Officer’s ultimate conclusion that Kaseburg’s application should be denied.

**NATURE OF PROCEEDINGS**

The purpose of this proceeding is to determine whether Kaseburg should be granted a permit for a noncommercial navigational encroachment under Idaho Code § 58-1305 and the IDL’s Rules for the Regulation of Beds, Waters, and Airspace Over Navigable Lakes in the State of Idaho, IDAPA 20.03.04. Kaseburg filed his application on April 24, 2015, proposing to build a walkway and floating dock that would extend 140 feet from his property up to the line of navigation (LON), allowing year-round access to the waters of Glengary Cove, which is an indentation in the larger Glengary Bay on Lake Pend Oreille. George Congleton, acting in his

capacity as managing partner for Sequoia Glen South Partners, LLC,<sup>1</sup> objected to Kaseburg's application on behalf of himself and all of the LLC's members. On June 29, 2015, I appointed the Hearing Officer, and a contested case hearing was held on August 19, 2015. Kaseburg, Congleton, and the IDL each appeared with counsel at the hearing, questioned witnesses, and presented documentary evidence. The matter was fully submitted to the Hearing Officer on September 11, 2015, and the Hearing Officer issued the Preliminary Order on September 22, 2015.

The Preliminary Order concludes that Kaseburg's application should be denied for three reasons: (1) the proposed encroachment creates "the most unusual of circumstances" because it would, in combination with an existing encroachment, restrict boating access to Glengary Cove; (2) the proposed encroachment may infringe upon Congleton's littoral rights; and (3) the proposed encroachment could create a navigational hazard, particularly during the low-light, low-water conditions characteristic of the winter months.

Kaseburg petitioned for review of the Preliminary Order on October 5, 2015. On October 6, 2015, I granted Kaseburg's petition and set a schedule for the parties and the IDL to brief their exceptions to the Preliminary Order. Kaseburg, Congleton, and the IDL submitted opening briefs on October 16, 2015 and reply briefs on October 21, 2015. After considering the Hearing Officer's Preliminary Order, the record of this proceeding, and the exceptions and objections set forth in the briefs, I adopt the Preliminary Order in full except as specified below.

### **ISSUES PRESENTED FOR REVIEW**

Arguing the permit should be granted, Kaseburg raises three general issues for review. First, Kaseburg contends there is no support in the record for the Hearing Officer's conclusion of law that the "restriction of more than one-half of the boating access to the Cove by the combination of an

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<sup>1</sup> Although Sequoia Glen South Partners owns the property south-adjacent to Kaseburg's property, this Final Order will, consistent with the parties' and the Hearing Officer's usage, refer to both the Objector and the owner of the south-adjacent property as "Congleton."

existing encroachment and Kaseburg's proposed encroachment presents the most unusual of circumstances to require denial of the application." Prelim. Order at 21. This first issue is a challenge to both the factual finding—that boating access to the Cove would be restricted—and the legal conclusion that such restriction constitutes "most unusual circumstances" for purposes of Idaho Code § 58-1305(a). Second, Kaseburg claims the record does not support the Hearing Officer's conclusion that the proposed encroachment may infringe upon Congleton's littoral rights. Third, Kaseburg asserts there is no support for the conclusion that the proposed encroachment will create a navigation hazard during low-light, low-water conditions. Kaseburg also requests corrections to two typographical errors in the Preliminary Order.

Congleton primarily argues that substantial evidence supports the portions of the Preliminary Order challenged by Kaseburg. Congleton also requests further factual findings regarding the circumstances surrounding Kaseburg's application. Additionally, Congleton argues the proposed encroachment does not comply with applicable weather-related standards under IDAPA 20.03.04.015.13.<sup>2</sup>, nor does it provide benefits that outweigh the likely impacts to the public interest.

IDL's briefing highlights the testimony of James Brady, an IDL Resource Supervisor for Lands and Waterways, who concluded the benefits of Kaseburg's proposed encroachment do not outweigh its detriment to the public. In addition, IDL requests further factual findings based on Brady's testimony. IDL also requests corrections to three typographical errors, two of which are the same as those identified by Kaseburg.<sup>3</sup>

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<sup>2</sup> Although there is conflicting evidence on this point, I find the Hearing Officer's conclusion that the dock design did not "fall short of the regulatory requirement for durability" is supported by substantial evidence and need not be addressed further. Prelim. Order at 19-20.

<sup>3</sup> Kaseburg and the IDL agree that the first Conclusion of Law in Preliminary Order contains a typographical error in that the name "Holman" appears in place of "Kaseburg." See Prelim. Order at 20. It is otherwise undisputed that the "IDL has jurisdiction to process [Kaseburg's] application for the encroachment permit," as the Hearing Officer apparently intended to conclude. *Id.*

## FINDINGS OF FACT

On review of the Preliminary Order, I exercise all of the decision-making powers I would have had in presiding over the hearing myself. Idaho Code § 67-5245(7). I am free to affirm, reject, or alter the Hearing Officer's findings of fact, but, if I reject the Hearing Officer's findings, I should articulate a basis in the record for doing so. *N. Frontiers, Inc. v. State ex rel. Cade*, 129 Idaho 437, 440–41, 926 P.2d 213, 216–17 (Ct. App. 1996), *review denied*. Except where specifically noted, I accept the the Hearing Officer's Findings of Fact because they are supported by substantial evidence in the record. Based on my independent review of the record in light of the briefing, I make the following additional or corrected findings.

1. The IDL takes issue with the Hearing Officer's first finding of fact, which states that the IDL, the Army Corps of Engineers, and the "State of Idaho Department of Water Resources" jointly manage and regulate Lake Pend Oreille. Prelim. Order at 5, ¶ 1. At least for purposes of Kaseburg's navigational encroachment application under Lake Protection Act, there is no dispute that the IDL, not the Idaho Department of Water Resources, is the state agency responsible for managing and regulating Lake Pend Oreille.

2. Kaseburg and the IDL agree that the Hearing Officer's sixth finding of fact incorrectly states "the water level in the Cove can fluctuate up to 16 inches per day." *Id.* at 9, ¶ 6. The Hearing Officer repeats this finding in his Discussion of the evidence. *Id.* at 18. Both Kaseburg and the IDL contend the correct finding is that the water level in the Cove fluctuates up to 6 inches per day. However, the testimony on this point is not so clear cut. While witnesses testified that the Army Corps of Engineers has a rule limiting lake level changes to six inches per day, Tr. 85 (Brady), 147 (Trulock), there was also testimony that the lake level can rise "much more than [6] inches per day" during flood events such as the spring runoff and winter thaw. Tr.

147 (Trulock). On the whole, this testimony indicates that the water level in the Cove does not fluctuate more than 6 inches per day except during periods of flooding, when the fluctuations can be greater.

3. Kaseburg disputes the Hearing Officer's finding that boating access to Glengary Cove would be restricted by more than one-half if the proposed dock is built. Relying on a series of measurements displayed on his Exhibit 7, Kaseburg argues his proposed 140-foot dock, in combination with the existing 234-foot marina dock across the Cove, would leave 338 feet of water in the middle of the Cove open for navigation. Thus, Kaseburg's exhibit shows the 712-foot wide Cove would be constricted by 374 feet of encroachments, which, as the Hearing Officer found, is more than half the total width.<sup>4</sup> Stated differently, the exhibit shows that Kaseburg's proposed 140 foot dock would occupy approximately 30 percent of the 478 foot opening that presently exists near the mouth of the Cove. Tr. 82 (Brady). Because Kaseburg's own exhibit substantially supports the Hearing Officer's finding, I conclude the finding was not erroneous and therefore accept it.

4. Although the Hearing Officer discussed the testimony of IDL Resource Supervisor James Brady, Prelim. Order at 12, ¶14, Congleton and the IDL urge additional, specific findings of fact based on Brady's testimony. At the time of the hearing, Brady had been employed by the IDL for almost 23 years and had processed over 1,000 encroachment permits, including permits for encroachments on the various lakes in North Idaho. Tr. 77, 85. Kaseburg does not dispute that substantial evidence in the record supports the requested additional findings, nor has he presented evidence that tends to rebut Brady's testimony. Instead, Kaseburg claims Brady's testimony does not support the legal conclusion that the application presents

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<sup>4</sup> As the Hearing Officer noted, it is unclear whether Kaseburg's Exhibit 7 displays measurements of the Cove at AHWM or OHWM levels. See Prelim. Order at 12 n.7.

“most unusual circumstances,” an issue that I address below. Here, I find as follows based on Brady’s testimony:

- a. Applications for navigational encroachments into Lake Pend Oreille typically seek access to the LON during summer when the lake is high. Tr. 79.
- b. It is unusual for an encroachment permit application to seek access to the LON during the winter months when low water conditions prevail. *Id.* at 79.
- c. Because it seeks year-round access to the LON, Kaseburg’s application 96-S-219E is the first time the IDL has had to determine littoral lines from Lake Pend Oreille’s ordinary high water mark (OHWM), as opposed to the artificial high water mark (AHWM) created by Albeni Falls Dam. *Id.* at 82.
- d. The 140-foot length of Kaseburg’s proposed dock is unusually long in comparison to other single-family docks in Glengary Bay and elsewhere on Lake Pend Oreille. *Id.* at 79.

#### **APPLICABLE LAW**

There is no dispute that the Hearing Officer identified and properly stated the controlling legal principles. Based upon my independent review of the applicable law, I concur with the Hearing Officer’s recitation of the “relevant authorities” and adopt that portion of the Preliminary Order in full.

However, I am of the opinion that certain of Kaseburg’s arguments warrant reiterating the statutory criteria relevant to this application. First, an application for construction of a noncommercial, single-family navigational encroachment not extending beyond the LON

shall be processed by the board with a minimum of procedural requirements and shall not be denied nor appearance required except in the most unusual of circumstances or if the proposed

encroachment infringes upon or it appears it may infringe upon the riparian or littoral rights of an adjacent property owner.

Idaho Code § 58-1305 (emphasis added). As the Hearing Officer reasoned, the plain language of this statute makes clear that no presumption in favor of approval applies if the application presents either “most unusual circumstances” or an actual or possible infringement upon littoral rights. *See* Prelim. Order at 15–16, ¶ 5. Second, the Lake Protection Act expressly requires the benefits of all proposed encroachments to be weighed against the burdens or impacts on a variety of factors. *Brett v. Eleventh St. Dockowner’s Ass’n, Inc.*, 141 Idaho 517, 523, 112 P.3d 805, 811 (2005).

The legislature of the state of Idaho hereby declares 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. No encroachment on, in or above the beds or waters of any navigable lake in the state shall hereafter be made unless approval therefor has been given as provided in this act.

Idaho Code § 58-1301; IDAPA 20.03.04.011. Therefore, the relevant inquiries under the controlling statutes are whether the proposed encroachment (1) presents most unusual circumstances; (2) does or may infringe upon the littoral rights of an adjacent property owner; or (3) negatively impacts “property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality” to an extent that outweighs the proposal’s private benefits.

#### ANALYSIS

After independently reviewing the record, I concur with the Hearing Officer’s “Discussion” and “Conclusions of Law” and make the following additional analysis in light of the briefing on review.

**1. This application presents “most unusual circumstances”**

This application marks Kaseburg’s fourth attempt in six years to obtain a permit for an encroachment into Glengary Cove. His first and second applications were the subject of a 2013 Idaho Supreme Court decision, *Kaseburg v. Idaho State Bd. of Land Comm’rs*, 154 Idaho 570, 300 P.3d 1058 (2013), which resulted in IDL’s 2014 determination of the LON in Glengary Bay. That determination is significant here, as Kaseburg’s proposal to build a 140-foot walkway and dock structure stems from his desire to access the LON year-round. The proposed dock is unusually long compared not only to single-family docks in Glengary Bay, but to single-family docks around Lake Pend Oreille as well. Kaseburg’s latest proposal also marks the first application that has required the IDL’s determination of littoral lines from Lake Pend Oreille’s OHWM.

Also unusual is the extent to which the proposed, year-round single-family dock will constrict the mouth of the Cove. While Kaseburg argues the 338 foot opening that would remain is sufficient for navigation, it is undisputed that the proposed dock would occupy about 30 percent of the existing opening by itself. Moreover, the proposed dock combined with existing encroachments in the Cove would occupy more than half of the space near the mouth. Kaseburg argues this is not unusual because an L-shaped arrangement of wooden pilings extends farther into the Cove than the proposed dock and already restricts navigation. *See Kaseburg*, 154 Idaho at 572, 300 P.3d at 1062 (describing the pilings). But this argument ignores the fact that the proposed dock would be closer than the pilings to the mouth of the Cove and would thus present a new and different navigational hazard—both at summer pool and, as the Hearing Officer found, during the winter when it may freeze to the lakebed and be submerged by rising water. Kaseburg also fails to explain why it is necessary to add another navigational hazard to a Cove



already congested with pilings, a marina, and other encroachments, when Kaseburg has alternative dock sites along his approximately 975 feet of shoreline property. Consistent with substantial evidence in the record, I concur with the Hearing Officer's finding that the proposed dock would "undoubtedly" pose a navigational hazard.<sup>5</sup> Prelim. Order at 18. Taken together, the circumstances of Kaseburg's application "are so out of the ordinary as to make it inadvisable to issue the permit." *Dupont v. Idaho State Bd. of Land Comm'rs*, 134 Idaho 618, 623, 7 P.3d 1095, 1100 (2000).

**2. The proposed dock and walkway "may infringe" on the littoral rights of an adjacent property owner**

Kaseburg claims the Hearing Officer erred by finding that his proposed dock may infringe on Congleton's littoral rights. He first argues the finding is erroneous because the IDL previously determined the relevant littoral lines and, under that determination, the proposed walkway and dock does not infringe on Congleton's littoral rights. As an initial matter, it is important to recognize that the IDL based the previous determination on Kaseburg's application 96-S-219D, which proposed a moveable dock at a different location. Additionally, the IDL's previous determination was based on the AHWM, not the OHWM as in this case. The horizontal distance between the AHWM and OHWM in Glengary Cove is approximately 100 feet. Prelim Order at 11, ¶ 10.

Kaseburg's 219D application was denied on the basis of "most unusual circumstances" because it lacked specificity as to the design of the dock, did not serve Kaseburg's stated purpose, and did not establish Kaseburg owned the land needed to build and operate the dock. In other words, the IDL's previous littoral lines determination was premised on the factual

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<sup>5</sup> Although Kaseburg argues such hazards might be mitigated by flagging or lighting, there is no evidence in the record to show such measures would eliminate the year-round navigational hazard the dock and walkway would create.

circumstances of the 219D application and, in any event, was not a factor in the decision on that application. Further there is no evidence the littoral rights at issue here have been adjudicated in court. *See Lovitt v. Robideaux*, 139 Idaho 322, 328, 78 P.3d 389, 395 (2003) (“While the Department may determine littoral rights under these limited circumstances, nothing in this opinion should be read to divest the district court of its jurisdiction to determine littoral rights, a common law right.”). I therefore reject Kaseburg’s argument that the IDL’s previous analysis is relevant or somehow binding in this matter.

Kaseburg also takes issue with Brady’s use of the equitable allocation method to determine whether his proposed dock may infringe Congleton’s littoral rights. It is undisputed that the lines derived from the chord method show no infringement.<sup>6</sup> The lines derived from the equitable allocation method<sup>7</sup>, however, show the proposed dock may infringe on the 10 foot setback established by IDAPA 20.03.04.015.13.e, thereby raising the rebuttable presumption that the dock will have an adverse effect on Congleton’s littoral rights. Kaseburg offered no evidence to rebut this presumption; he instead claims the shoreline at the boundary between his and Congleton’s property is straight and regular such that the littoral line must be drawn “at right angles with the shoreline towards the low water mark.” Kaseburg Br. Supp. Review at 12 (emphasis omitted).

Kaseburg’s characterization of the shoreline is accurate only if one views the Kaseburg-

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<sup>6</sup> The chord method locates littoral lines by identifying the points where a parcel’s boundary lines intersect the applicable high water mark. A line, or chord, is drawn between the two intersection points, and the littoral lines fall along lines bisecting the angle formed by the chord and the parcel boundaries. *See generally* Brady Memo. Re: Littoral Right Line Evaluation in Glengary Bay of Lake Pend Oreille (Jul. 17, 2015).

<sup>7</sup> The equitable allocation method, by contrast, involves calculating the percentage of total shoreline owned by each parcel, as measured at the applicable high water mark. In addition, the total length of the LON along the entire shoreline under consideration is calculated and multiplied by each parcel’s percentage of the shoreline. The product of this calculation is the length of LON allocated to each parcel. Littoral lines are then drawn from the point where the parcel boundary intersects the applicable high water mark to the appropriate point on the LON. *See generally* Brady Memo. Re: Littoral Right Line Evaluation in Glengary Bay of Lake Pend Oreille (Jul. 17, 2015).

Congleton property boundary in isolation. Such a view ignores the obvious shape of the Glengary Cove shoreline, which, as the Hearing Officer found, is “concave rather than straight.” Prelim. Order at 19. Kaseburg’s view of the shoreline also ignores “the controlling thought in every case,” which is to “treat each case in an equitable manner so that, so far as it is possible, all property owners on such a body of water have access to the water . . . .” *Driesback v. Lynch*, 71 Idaho 501, 509, 234 P.2d 446, 451 (1951) (emphasis added). It would be inequitable to draw littoral lines in Glengary Cove by viewing a single property boundary in isolation. That is because the littoral line drawn for a boundary on the straight portion of the shore would influence and restrict the littoral lines subsequently drawn for other boundaries along curved portions of the shoreline—especially if the method used for the straight portion differed from the methods applied to the nearby curved portions.

For these reasons, the case law recognizes that “no hard and fast rule” governs the drawing of littoral lines in every case. *Id.* The right-angle method Kaseburg proposes in his brief is but one way to draw the line, and, considering the concave shape of the Cove, it may be a less equitable method. *See id.* The equitable allocation method, which accounts for each littoral owner’s proportional share of the total curved shoreline, is likely more equitable under the circumstances. But I need not decide which method is most equitable because the question before me is whether the proposed dock and walkway “may infringe” on Congleton’s rights. Brady’s analysis shows that an infringement is possible when the equitable allocation method is applied to the OHWM, which is necessary because of Kaseburg’s desire for year-round access to the LON. Kaseburg had the opportunity to but did not offer evidence to rebut the presumption that his proposed dock would adversely affect Congleton’s littoral rights. Therefore, consistent with Brady’s analysis and the Hearing Officer’s discussion, I conclude Kaseburg’s requested

encroachment must be denied also because it may infringe on Congleton's littoral rights.

**3. The benefits of the proposed dock do not outweigh its navigational impacts**

In balancing Kaseburg's proposal against the relevant factors, *see* Idaho Code § 58-1301, the Hearing Officer found the dock would detract from the public's ability to navigate the Cove and would create a navigational hazard. The Hearing Officer concluded these considerations outweighed the private benefits Kaseburg would realize from the dock. Kaseburg claims the dock cannot be considered a hazard to navigation because it will not be situated beyond the LON. As discussed above, however, the record establishes that Kaseburg's proposal would add another encroachment to the already-congested Cove and restrict access at the mouth of the Cove. Further, there is substantial evidence to support the finding that the dock may become partially or wholly submerged when frozen to the lakebed, creating a hazard even during times of low-water. Kaseburg presented no evidence to rebut Congleton's testimony that the proposed dock would be difficult for boaters, kayakers, and shell rowers to see, which the Hearing Officer apparently found credible. I find no reason to disregard this evidence and therefore adopt the Hearing Officer's findings as to the navigational impacts of the proposed dock.

The record also reveals that the proposed dock is not navigationally necessary and will provide few offsetting benefits. The primary benefit to Kaseburg is convenience, as the dock and any craft moored to it would be visible from his house. The dock would also be cheaper for Kaseburg to build, compared to locations on his property outside the Cove. However, it is undisputed that the proposed dock is not strictly necessary for Kaseburg to reach the LON because he could build a dock at an alternative location on his property. Indeed, Brady offered un rebutted testimony that Kaseburg could have year-round access to the LON with a significantly shorter dock if he built it outside the Cove. It is also undisputed that the water at

the end of the proposed dock would be only about 16 inches deep during low-water conditions. The proposed dock's questionable utility during such conditions and the availability of alternatives—which would probably not produce the same most unusual circumstances, littoral rights concerns, or navigational hazards—undermine the asserted justifications for and benefits of Kaseburg's proposal. Therefore, based on the Hearing Officer's findings and my independent review of the record, I conclude that the permit should be denied because the benefits of the proposed encroachment do not outweigh its impacts.

### **FINAL ORDER**

I conclude that the Preliminary Order is based on substantial evidence in the record. Therefore, I adopt the Preliminary Order with the above changes and additions. The Preliminary Order is incorporated by reference herein and attached to this Final Order. On the basis of the record, it is my order that the application for Encroachment Permit No. ERL-96-S-219E is denied.

This is a final order of the agency. Any party may file a motion for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. *See Idaho Code § 67-5246(4).*

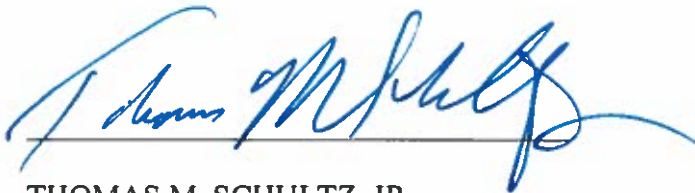
Pursuant to Sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held;
- ii. The final agency action was taken;
- iii. The party seeking review of the order resides; or

- iv. The real property or personal property that was the subject of the agency action is attached.

An appeal must be filed within thirty (30) days (a) of the service date of this final order, (b) of an order denying petition for reconsideration, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. *See Idaho Code §§ 58-1305(c), 58-1306(c), 67-5273.* The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

DATED this 26<sup>th</sup> day of October 2015

A handwritten signature in blue ink, appearing to read "Thomas M. Schultz, Jr.", written over a horizontal line.

THOMAS M. SCHULTZ, JR.

Director, Idaho Department of Lands

**CERTIFICATE OF MAILING**

I hereby certify that on this 26<sup>th</sup> day of October, 2015, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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DEPT. OF LANDS  
2015 OCT 21 PM 4: 13  
BOISE, IDAHO

**BEFORE THE STATE OF IDAHO BOARD OF LAND COMMISSIONERS**

In the Matter of: )  
Encroachment Permit No. L-96-S-219E ) Case No. CC-2015-PUB-20-001  
Peter Kaseburg, Applicant. )  
OBJECTOR'S REPLY  
\_\_\_\_\_ )

Objector George Congleton, individually and as the managing partner for Sequoia Glen South Partners LLC, the adjoining property owner, ("Congleton"), by and through his attorney, Janet D. Robnett of Lake City Law Group PLLC, submits this brief in reply to the briefs filed pursuant to the Order Granting Petition for Review and Scheduling Order dated October 6, 2015 (the "Scheduling Order").

At this point, all of the issues relevant to the application and the evidence have been fully briefed, either in the parties' pre-hearing memoranda, closing briefs, and/or the briefs on review of the Findings of Fact, Conclusions of Law and Preliminary Order dated September 22, 2015 (the "Preliminary Order"). Congleton does not intend to reiterate the arguments set forth in his prior filings, and reference should be made to those for more details. The purpose of this Reply is to identify and address some of the errors and mis-conceptions directions in the Applicant's Brief in Support of Review of Preliminary Order, and why the application should still be denied.

1. The McLean Permit. The existence, and purported assignment, of the McLean permit (219-A) to Kaseburg is moot, and should receive no consideration in this case. The



permit had originally been issued to Douglas McLean in 1975, at a time when McLean owned all of the property at issue in this case, before it was carved up into the Congleton and Kaseburg ownerships. Kaseburg relies heavily upon that assignment, and the location of the pilings shown on the McLean permit, to support his arguments that the proposed encroachment is within his rights and not a hazard to navigation. However, even the Supreme Court observed that at least some of the pilings depicted in the McLean permit are adjacent to Congleton's land, not Kaseburg's. *Kaseburg v. State of Idaho*, 154 Idaho 570, 573, 300 P. 3d 1058, 1061 (2013). All of the pilings are beyond the ordinary high water mark, wholly on state lands, and most are even beyond the line of navigability (*Exhibit IDL-1, Brady Staff Report dated July 17, 2015, Exhibit A*). All were held to NOT be aids to navigation. *Kaseburg, supra* at 578, 300 P.3d 1066. Furthermore, it is undisputed that Congleton received no notice of the purported transfer of the McLean permit to Kaseburg, and that the transfer of 219-A to Kaseburg was probably in error. *Transcript, pages 80-81*. Without written consent from, or notice to, Congleton, the Department of Lands could not have validly assigned the McLean permit to Kaseburg, and Kaseburg acquired no rights to maintain such encroachments. *Lovitt v. Robideaux*, 139 Idaho 322, 326-327, 78 P.3d 389, 393-394 (2003).

Under the circumstances, arguments to the effect that Kaseburg has an ownership interest in or rights to maintain the pilings, or that the scope and impact of his proposed dock should be measured against the scope and impact of the pilings, are without merit.

2. The "Good Location" and Littoral Rights. The prior proceedings and what Kaseburg may or may not have taken away from those in terms of a "good location" for his dock are moot and should receive no consideration in this case. An exhibit was submitted in 219-D that depicted the littoral rights boundaries using the chord method, and it was offered to show

how the proposal *in that case* would result not only in a physical encroachment into Congleton's littoral boundaries, but also a trespass onto his fee own land. Kaseburg re-submitted that exhibit as his Exhibit 17. He then superimposed his 219-E proposal onto that exhibit, or one like it (*Exhibit 14*), and extrapolated from that the argument that since 219-E is outside of the littoral boundaries described in Exhibit 17, everything should be just fine.

That argument ignores several realities. First of all, we know that littoral boundary lines can be determined in a number of different ways (*Exhibit IDL-1*), but the one method was all that was needed to shine a spotlight on the problems with the application in 219-D. The location was not the only objection, of course, but it was enough to require the denial of that application. Secondly, the argument that the location of 219-E passes muster simply because it is more than ten feet from a littoral rights line is not correct. It is presumed that docks inside of ten feet will have an adverse effect, but there is nothing that says that docks outside of ten feet will not. *IDAPA 20.03.04.015.13.e*. Ultimately, littoral rights are more than just lines in the sand. Each case is to be treated in an equitable manner so that all property owners have access to the water, free from unreasonable interference, and such that each shoreline owner receives his proportional share of deep water frontage. *Brett v. Eleventh Street Dockowner's Association*, 141 Idaho 517, 522, 112 P. 3d 805, 810 (2005), citing *Driesbach v. Lynch*, 71 Idaho 501, 234 P.2d 446 (1951); *West v. Smith*, 95 Idaho 552, 555, 511 P.2d 1226, 1331 (1973).

3. Interference with Navigation. If this application were approved, Kaseburg would be taking more than his fair share of navigable waterway into Glengary Cove. No matter which way you look at it, the available space for boating access into the Cove would be restricted significantly by the addition of a 140' long unbroken barrier of a dock. The argument that the other property owners and the public should be satisfied with being able to come down the

middle ignores the fact that one single family dock would take up more than 30% of the available opening into the Cove (*Transcript, page 82*), and that more than 52% of the entry into the Cove would be taken up by two structures. (*Preliminary Order, page 18; Exhibit 7*).

Furthermore, there is ample evidence in the record (previously cited to) to support the conclusion that the dock would be a hazard to navigation under a variety of conditions. There is nothing in the record to support the argument that those hazards do not exist because the dock may not extend as far into the water as the existing piling line. As noted previously, Kaseburg has no legitimate claim to maintain those piling, and it's not like the proposed dock would be lined up against them so as to constitute a single barrier. (*See, e.g., Exhibit 9 and Exhibit 13*). In fact, one could easily make the argument that the existence of the piling would make the Kaseburg dock even more of a hazard to navigation, as people coming into the Cove may be focused on the piling ahead, without noticing the dock lying flat against the water or partially submerged, depending upon the time of year.

Kaseburg also appears to argue that because the proposed dock would be "well within the identified charted navigation hazard line" on the U.S. Coast Guard charts, excerpts from which were provided as Exhibit 11, then his dock could not itself be a hazard to navigation. We are told that the last page of Exhibit 11 identifies the navigation hazard line from the U.S. Coast Guard charts. It is apparent from simply looking at the last page to Exhibit 11 that, if that indeed accurately depicts the U.S. Coast Guard navigation hazard line, the hazard line was established at *low water*, and did not take into account the water depths at summer pool. At summer pool, as it appears to be depicted in Exhibit 11, the shallow depths would obviously be much closer to shore (*see, e.g., Exhibit K*), and the Kaseburg dock would extend into the water in areas that are easily navigable and frequently navigated. The argument is wholly without merit.

The possibility of using flags on the dock to mitigate the hazard to navigation was not significantly explored during the hearing, and there is not substantial evidence in the record to support a conclusion that they could be effectively required and maintained, or that they would be effective to mitigate any hazard.

4. Most Unusual Circumstances. Kaseburg simply takes issue with the notion that his proposal presents the most unusual of circumstances. The multitude of unusual circumstances involving this application have previously been identified and discussed in the prior briefs on behalf of the Objector as well as the State. In addition, the mere fact that it has taken four applications to get to this point could reasonably lead to the conclusion that there must be very unusual circumstances in play here.

5. Negative Impacts Outweigh the Benefits. Kaseburg continues to erroneously maintain that the only grounds for denial of this application would be if there are the most unusual of circumstances or an infringement on littoral rights. He wholly ignores the overriding principle by which ALL encroachments are to 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.**

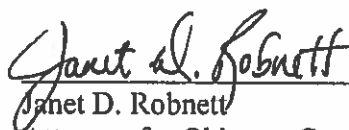
IC § 58-1301, IDAPA 20.03.04.012.01. (Emphasis added). As noted previously, “IDL is *required to balance the competing interests* involved while determining whether to approve permits for navigational encroachments.” *Brett v. Eleventh Street Dockowner’s Association, Inc.*, 141 Idaho 517, 523, 112 P.3d 805, 811 (2005) (emphasis added).

The virtually undisputed testimony, and certainly substantial evidence, in the record supports the conclusion that there would be little benefit to be derived from the proposed dock as

an aid to navigation on a year-round basis. (*See, e.g., Transcript, pages 83-84*). Practically speaking, the dock would still only be useful for moorage at summer pool or a bit thereafter. At summer pool, when recreational use of the water is at its highest, the dock would take up almost 30% of the available opening into the Cove. At low water, it will be grounded, with portions under water; a significant hazard to navigation. Jim Brady ultimately testified unequivocally that the benefit derived is not worth the impact to the public and the lake value factors. (*Transcript, p. 84*).

Under all of the circumstances, the application must be denied.

DATED this 21<sup>st</sup> day of October, 2015.



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Janet D. Robnett  
Attorney for Objector George Congleton,  
and Sequoia Glen South Partners, LLC

## CERTIFICATE OF MAILING

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BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

In the matter of: ) Case No. CC-2015-PUB-20-001  
)  
Encroachment Permit )  
Application No. ERL-96-S-219E ) REPLY BRIEF IN SUPPORT OF  
) REVIEW OF PRELIMINARY ORDER  
)  
Peter Kaseburg, Applicant )  
)  
)

COME NOW the Applicants, PETER KASEBURG and SHELAGH KASEBURG, KASEBURG FAMILY TRUST, by and through counsel JOHN A. FINNEY, and pursuant to the Order Granting Petition For Review And Scheduling Order, dated October 6, 2015, make this reply brief to the Idaho Department of Lands' Exceptions To Preliminary Order dated October 16, 2015 and the Objector's Brief On Director's Review dated October 16, 2015, as follows:

I. Reply To The Department's Brief

A. Typographical Corrections

The Department asserts three typographical errors for correction, two of which the Applicants also stated. The agreed upon corrections are:

1. Page 9, Part III. Findings of Fact, Paragraph 6. The reference to "16 inches" of water level fluctuation

should be "6 inches.

2. Page 1, Part VI Conclusions of Law, Paragraph 1. The reference to "Holman's" should be "Kaseburg's".

The Department also asserts page 5, Part III. Findings of Fact, Paragraph 1 contains an error in referencing the Idaho Department of Water Resources. The sentence that the Department asserts needs corrected provides "The IDL manages and regulates Lake Pend Oreille jointly with the United States Department Of Army Corps of Engineers (Corp) and the State of Idaho Department of Water Resources pursuant to separate state and federal statutory authorities." A review of the Joint Application submitted by Kaseburgs identifies it is a joint permit for the U.S. Army Corps of Engineers - Idaho Department of Water Resources - Idaho Department of Lands with reference to the authorities for each. This does not appear to be a typographical error and the proposed "correction" would reference the Department of Lands twice in the sentence.

B. The Department Seeks An Additional Finding That Unusual Circumstances Includes Seeking To Enjoy The Basic Right to Reach The Navigable Waters Of Lake Pend Oreille All Year Long

The Department seeks a finding not contemplated or suggested by the Hearing Officer. The Department argues that an owners' application to access navigable water at the low water mark is part of an unusual circumstance. The Department argues that applying littoral right lines analysis at the Ordinary High Water Mark and/or the Artificial High Water Mark is part of an unusual



circumstance. The Department argues that the length of the applicants' dock is part of an unusual circumstance as it is longer than other docks (which have been artificially restricted by the Department's requirement of a non-existent "55 foot length rule" that the Idaho Supreme Court said was an "improper determination of the line of navigability [] in violation of a statutory provision and was not supported by substantial evidence." Kaseburg 154 Idaho at 579.).

In Driesbach v. Lynch, 71 Idaho 501, 507, 234 P.2d 446, 451 (Idaho 1951) (emphasis added), the Idaho Supreme Court in determining the littoral rights between two adjoining properties on Lake Pend Oreille, held that "[i]t may be stated as a general proposition that one of the basic rights enjoyed by owners of properties upon a navigable lake is the right to have access to the waters of such lake at the low water mark; this right is valuable and in many instances it is the controlling aspect of the value of such lands."

Similarly, in West v. Smith, 95 Idaho 550, 554, 511 P.2d 1326, 1330 (Idaho 1973) (emphasis added) the Idaho Supreme Court set forth that:

One of the salient features of the shores of navigable lakes is the convergence of the rights and interests of the state, the public and the littoral landowner. The 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 whole people. [FN1] Ordinarily, in Idaho, a riparian owner (on a navigable river or stream) or a littoral owner (on a navigable lake) takes title down to the natural high water mark. [FN2]

\*\*\*

FN1. The Idaho Admission Bill declared that Idaho was 'admitted into the union on an equal footing with the original states in all respects whatever.' 26 Stat.L. 215, ch. 656 s 1. The United States Supreme Court in

the case of *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 557, 38 L.Ed. 331 (1894) ruled that one aspect of the admission of a new state to the union on 'equal footing' with the original states was that title to the beds of navigable waters below the natural high water mark was transferred from the United States to the state. Ever since the case of *Callahan v. Price*, 26 Idaho 745, 754, 146 P. 732, 735 (1915), it has been the settled law in Idaho that the state holds title to the beds of navigable waters below the natural high water mark 'for the use and benefit of the whole people.' *Id.*, 26 Idaho at 754, 146 P. at 735. *Driesbach v. Lynch*, 71 Idaho 501, 507, 234 P.2d 446 (1951); *Gasman v. Wilcox*, 54 Idaho 700, 703, 35 P.2d 265 (1934). State ownership of the beds of inland navigable waters was confirmed in the Submerged Lands Act of 1953, 43 U.S.C.A. s 1311.

FN2. *Driesbach v. Lynch*, supra note 1, 71 Idaho at 507, 234 P.2d 446; *Gasman v. Wilcox*, supra note 1, 54 Idaho at 703, 35 P.2d 265.

Appurtenant to his ownership of lake front property, the littoral landowner normally possesses certain littoral rights. These include the right of access to the water, [FN3] and, subject to state regulation, [FN4] the right to build wharves and piers in aid of navigation. [FN5] The right of access has been said to be a valuable right and, 'in many instances \* \* \* the controlling aspect of the value of (littoral) lands.' [FN6]

FN3. *Driesbach v. Lynch*, supra note 1; *Gasman v. Wilcox*, supra note 1.

FN4. See I.C. s 58-104(9) (Supp.1972) and 42-3801 to - 3810 (Supp.1972).

FN5. E. g., *Hoff v. Peninsula Drainage Dist. No. 2*, 172 Or. 630, 143 P.2d 471, 474 (1943).

FN6. *Driesbach v. Lynch*, supra note 1, 71 Idaho at 508, 234 P.2d at 450.

\*\*\*

The littoral owner's right of access to the lake, free from unreasonable interference, attaches to all points of his shoreline, [FN12]....

FN12. *Johnson v. Jeldness*, 85 Or. 657, 167 P. 798, 799 (1917); *Peck v. Alfred Olsen Construction Co.*, 238 N.W. 416, 89 A.L.R. 1132 (Iowa 1931).

The Department's decades long practice of mis-administering the Lake Protection Act to restrict the length of docks to 55 feet which is a distance landward, rather than waterward, of the low

water mark, cannot be a basis for declaring the Kaseburg dock length as a "most unusual" circumstance. The Kaseburgs are only seeking to exercise their littoral right to the extent recognized as a basic right by the law. There is no exception to the basic right to access the waters of the lake from the low water mark (which is waterward of the ordinary high water mark). By common sense, there is no more of a usual circumstance than exercising a most basic right and which is normally enjoyed. The Kaseburgs' request is wholly within their basic and normal rights.

C. The Department's Comments Regarding Finding of Fact 5.e. are Misplaced

The Department asserts that on page 8, Part III. Findings of Fact, Paragraph 5.e. that the Hearing Officer made a finding of fact regarding 100 foot dock lengths and grandfathered docks, and then sets forth the non-existent "55 foot length" limit. The provision in paragraph 5.e. is the Hearing Officer's description of Congleton's assertions, starting on page 6 paragraph 5. There is no evidence to support a finding of an alleged 100 foot dock length limitation rule.

D. The Purported And Asserted Public Detriment Does Not Exist And If It Did, Does Not Outweigh The Kaseburgs' Right To Access The Navigable Waters

The Department's concluding paragraph seeking a conclusion of law that the Kaseburg dock has a detriment to the public is not supported by the evidence. The Department does not take into account that the line of navigability is at (or at least) at the

end of the Kaseburgs' proposed dock. In addition, Idaho Code 58-1305 recognizes the landowner's rights to access as paramount.

## II. Reply To The Objector's Brief

Almost all of the arguments in the Objector's Brief are directed to the issues raised in the Applicants petition. Those issues are fully addressed in the Kaseburgs' Brief In Support Of Review Of Preliminary Order, with the exception of the Congleton's assertion that the littoral rights of owners in the Cove would be impacted by the length of the dock.


Congleton appears to be arguing that the length would impact navigation to the shoreline by taking up to 30% of the available width. This argument fails to recognize the existing permitted 219A pilings which project further into the Cove. This argument also fails to recognize the basis right of the property owner compared to the public and/or an adjoining owner. An appropriate length dock extends to the line of navigability. Adjacent owners can make the same use and are entitled to the same length. The rights of the public do not outweigh this basic and "most valuable" property right.

## III. The Exceptions By the Department And the Objector Do Not Support Denial of the Dock

By definition, the applied for dock is within the line of navigability in this location. It is also offset from the Congleton's property and from the perpendicular littoral rights line from the straight shoreline. These applications are to be processed with "minimal requirements and are to be approved ("not

be denied") unless certain limited requirements are met by the Objector or the Department. This latest proposed 219E dock application by Kaseburg addressed all the Department's and Objector's prior concerns and deserves approval pursuant to law.

DATED this 21<sup>st</sup> day of October, 2015.

  
\_\_\_\_\_  
JOHN A. FINNEY  
Attorney for Applicants  
Kaseburgs

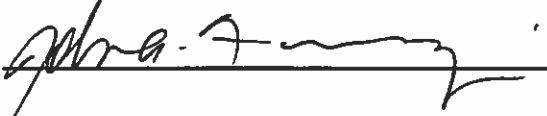
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via e-mail, unless otherwise indicated, this 21<sup>st</sup> day of October, 2015, and was addressed as follows:

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Janet Robnett  
Lake City Law Group PLLC  
Attorney for George Congleton  
Via e-mail: jrobnett@lclattorneys.com

  
\_\_\_\_\_



adjacent landowner.

IDL disagrees with this conclusion. The Applicant Peter Kaseburg (“Kaseburg”) omits Idaho Code § 58-1301, which requires IDL to balance the benefit to be derived from the encroachment against the protection of property rights, navigation, fish and wildlife, and other factors for “all encroachments.” *See also* Rule 012.01 of the *Rules for the Regulation of Beds, Waters, and Airspace Over Navigable Lakes in Idaho*, IDAPA 20.03.04.012.01. It is axiomatic that when interpreting a statute, it is the duty of a Court to ascertain and give effect to the entire act involved. *Gonzalez v. Thacker*, 148 Idaho 879, 881, 231 P.3d 524, 526 (2009). Idaho Code § 58-1301 is part of the Idaho Lake Protection Act and is law applicable to the current dock application. The instant case illustrates why this is important because although the proposed dock appears to be within the line of navigability, under the unique circumstances of this case, it will have an undue impact on public navigation, as explained by the Hearing Officer and discussed *infra*.

**B. It Is Undisputed That The Proposed Encroachment Will Physically Occupy Approximately 30% Of The Remaining Navigable Opening In Glengary Cove For One Single-Family Dock.**

Kaseburg misses the point with respect to IDL’s concern about the impact of the proposed encroachment on public navigation near the mouth of the cove. Kaseburg, at pages 8-9 of the *Kaseburg Exceptions*, performs a number of simple calculations to summarily conclude that “[a] 338 foot wide opening is more than sufficient for navigation in and around the cove.” *Kaseburg Exceptions* at 9.

The Hearing Officer, based upon the calculations of Jim Brady, found that the current opening to the cove is about 478 feet wide, and authorization of the proposed encroachment would occupy about 140 feet, or about 29.2% of the navigable entry to the

cove. Kaseburg has reiterated this calculation, but it is undisputed.

What concerns IDL is the fact that Kaseburg is requesting to utilize almost 30% of this remaining available space for one single-family dock that is an obvious navigational hazard in and of itself when floating properly, not to mention what might occur during freezing periods, and other problems identified with the dock. *See e.g.*, Tr., pp. 145-146 (testimony of Tom Trulock concerning dock stability and seasonal water elevation changes). It is this commitment of such a large percentage of a public navigational way for the use of one person that concerns IDL. Tr., p. 82, l. 14 to end. This is particularly so given that there are numerous alternatives to a dock in the current location, such as other points on the Kaseburg property for an encroachment, use of a nearby marina, or an underwater launch rail system. Tr., p. 83, ls. 1-24. This impact on navigation is part of IDL's consideration of lake value factors, such as impacts on navigation, that IDL must balance against the benefit of navigational necessity pursuant to Idaho Code § 58-1301. *See* Tr. P. 78, ls. 1-7 (Jim Brady's explanation of balancing the benefits of encroachment versus impact on lake value factors).

There is no evidence to support Kaseburg's counsel's conclusion that the 338 foot opening to the cove is "more than sufficient" for public navigation in light of the undisputed hearing testimony that it is not. Additionally, Kaseburg contends that the proposed dock is not a navigational hazard because the dock will be within the identified navigation hazard line on the U.S. Coast Guard's navigational chart. *Id.* This is irrelevant. There is no evidence as to who, if anyone, relies upon these charts when navigating an inland lake, and such a chart does not justify the creation of an additional navigational hazard for use by one landowner. Finally, the reference to the wooden



piling<sup>1</sup> by Kaseburg, *Kaseburg Exceptions* at 9, is a red herring because the dock would be the first hazard encountered before entering the bay.

C. **It Is Undisputed In The Record That The Proposed Dock Would Likely Create A Navigational Hazard.**

Kaseburg takes exception to the Hearing Officer's Conclusion of Law No. 6 and contends as follows: "There is no basis for the conclusion that the Kaseburg dock would create any more navigational hazard than any other dock on the Lake or than the existing breakwater and docks at the Marina in the Cove, or the existing Kaseburg piling (which have a navigational light installed)." *Kaseburg Exceptions* at 116-17. From this statement comes the conclusion that "[i]f not beyond the line of navigation, there is no hazard to navigation." *Id.* at 17.

To the contrary, the undisputed evidence shows why this dock of unprecedented length could very likely create a navigational hazard unlike other encroachments. As discussed in Section B of this Brief, *supra*, Kaseburg is asking the State to approve a single-family dock that would fill 30% of the remaining opening of Glengary Cove. This is partly because the proposed dock would be close to three (3) times the length of the 55-foot docks that are normally permitted on Lake Pend Oreille. *Tr.*, p. 79, ls. 16 to end. The good possibility of the dock freezing to the bed of the lake and becoming submerged during certain times of the year is undisputed. *Tr.*, p. 85, ls. 13-37; p. 146, l. 36 to p. 147, ls. 1-14.

Additionally, Kaseburg ignores the fact that the proposed encroachment would remove from public use a 140-foot swath of lake surface along the shoreline of Glengary

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<sup>1</sup> It is interesting that Kaseburg raises the issue of the wood piling. It is undisputed that these piling constitute a navigational hazard, and these piling serve no known purpose whatsoever. *Kaseburg v. State Board of Land Com'rs*, 154 Idaho 570, 572, 300 P.3d 1058, 1060 (discussion of facts regarding the purpose of the wood piling).

Cove. Even if the public is able to see the dock and avoid a collision, an unreasonable amount of lake surface is being removed from public use for the purpose of the use of one individual.


Finally, the Director should reject the idea that it is acceptable to create a navigational hazard so long as it is flagged or lighted, as suggested by Kaseburg. *Kaseburg Exceptions* at 17. Allowing a party to create a navigational hazard so long as it is properly flagged or lighted for a single family dock is contrary to IDL's duty to protect public navigation. If it applies in the Kaseburg situation, then it should apply to any party seeking a longer than normal single-family dock, so long as it is properly marked. This would create an enforcement nightmare for IDL, which would be required to monitor such permit compliance with warnings on a large scale, and then be required to take administrative action if an encroachment owner does not properly maintain the warning. It also ignores the fact that in addition to concerns for collision with an encroachment, the proposed dock would unreasonably remove water surface from use by the public, and flagging does not mitigate that impact. Kaseburg already owns one undisputed navigational hazard, the wooden piling, and should not be allowed to create another one next to it. Navigational hazards should be avoided, not mitigated.

**D. Conclusion.**

The IDL Director should uphold and confirm the decision of the Hearing Officer's *Findings of Fact, Conclusions of Law and Preliminary Order*. The decision is based upon substantial, competent evidence and correct application of applicable law. The proposed encroachment represents yet another attempt by Kaseburg to experiment with dock designs on public lands and within public waters of the State. *See Tr.*, p. 86, l.

36 to p. 87, l. 1 (question to Brady concerning dock behavior during seasonal lake elevation variations). This experimentation is of particular concern because of the alternatives to the current proposal. The facts and law support the decision of the Hearing Officer.

DATED this 21st day of October, 2015.

  
STEVEN J. SCHUSTER  
Deputy Attorney General  
Department of Lands

**CERTIFICATE OF MAILING**

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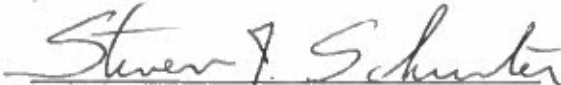
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DEPT. OF LANDS  
2015 OCT 16 PM 4: 24  
BOISE, IDAHO

**BEFORE THE STATE OF IDAHO BOARD OF LAND COMMISSIONERS**

In the Matter of:	)	Case No. CC-2015-PUB-20-001
	)	
Encroachment Permit No. L-96-S-219E	)	OBJECTOR'S BRIEF ON
	)	DIRECTOR'S REVIEW
Peter Kaseburg, Applicant.	)	
	)	
	)	
	)	

Objector George Congleton, individually and as the managing partner for Sequoia Glen South Partners LLC, the adjoining property owner, ("Congleton"), by and through his attorney, Janet D. Robnett of Lake City Law Group PLLC, submits this Brief pursuant to the Order Granting Petition for Review and Scheduling Order dated October 6, 2015 (the "Scheduling Order").

The applicant ("Kaseburg") has taken exception to, and is seeking review of, five conclusions of the Hearing Officer from the Findings of Fact, Conclusions of Law and Preliminary Order dated September 22, 2015 (the "Preliminary Order"). Each of those are generally addressed and responded to below, reserving the right to provide further briefing in reply following Kaseburg's own brief on review.

1. *"The boating access to the cove would be restricted by more than one-half."* Presumably this is a reference to the discussion on page 18 of the Preliminary Order, where the Hearing Officer describes the Cove as being 950 feet across and the existing Heitman Docks' pre-existing encroachment consuming 340 feet of that. If the Kaseburg application were

approved, another 140 feet of the opening into the Cove would be consumed, for a total of 480 feet, or more than one-half.

There is substantial evidence in the record to support the Hearing Officer's observation and conclusion. Kaseburg's own Exhibit 7 sets forth the dimensions of the existing encroachments affecting the entrance into the Cove. Exhibit 7 was prepared by Mr. Kaseburg with the intent to "give a scope of structures in the bay and put some dimension to it." (*Transcript, page 18*). The existing encroachments appear to be drawn to scale on Exhibit 7 (which one would expect given Mr. Kaseburg's background as a civil engineer), and simple measurements would indicate that the outer opening into the Cove is approximately 950 feet across. More than half of that would be taken up by structures (340 feet of the Heitman Docks' breakwater plus 140 feet for Kaseburg) should the Kaseburg application be approved.

Moving into the Cove to where the Heitman Docks' moorage is located, Exhibit 7 reveals that the total width of the entry at that point is 712 feet, 234 feet of which is consumed by the Heitman Docks' structure. If another 140 feet is taken up by the Kaseburg dock, should his application be approved, then more than 52% of the entry into the Cove would be consumed by structures, and unavailable for navigation by the public.

Jim Brady also testified that it would be a significant impact on the public's ability to navigate should 140 feet of the available entry into the Cove be taken up by a single person's dock. (*Transcript, page 82*). He looked at it a bit differently, but using the same numbers. With the existing Heitman Docks taking up 234 feet of the opening, the Kaseburg dock, if approved, would consume almost 30% of what's left. *Id.* The findings of the Hearing Officer in this respect should be adopted.

2. *"The restriction is a most unusual of circumstance."* Jim Brady testified that the impact on the public's ability to navigate into the Cove would be "significant." One dock, for one person, would take up almost 30% of the navigable entry into the Cove. The applicant is playing with semantics. Not only is that "significant", it also amply supports a conclusion that it is a "most unusual circumstance."

3. *"The Kaseburgs' requested encroachment may infringe upon Congleton's littoral rights."* The Hearing Officer primarily relied upon the conclusion of Jim Brady that the proposed encroachment may infringe upon the Congleton littoral rights, which was entirely appropriate as, "[t]he agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence." IDAPA 04.11.01.600. In addition, it was noted that littoral rights are not always determined with mathematical certainty, and any analysis ultimately has to equitably allocate the littoral rights, citing *Driesbach v. Lynch*, 71 Idaho 501, 234 P.2d 446 (1951). It was also noted that the rights of littoral property owners include the right to unobstructed access to the navigable waters along the entire length of their waterfront, and the right to unobstructed access "free from unreasonable interference." (*Ritter v. Standall*, 98 Idaho 446, 566 P.2d 769 (1977); *West v. Smith*, 95 Idaho 550, 511 P.2d 1326 (1973).

Under the circumstances, the conclusion is inescapable that the littoral rights of Congleton and all of the other property owners in the Cove to unobstructed access and ability to navigate to their frontage would be infringed upon, and unreasonably interfered with, with the addition of a single encroachment, for a single individual, consuming almost 30% of the available navigation route into, and out of, Glengary Cove.

4. *"That any purported navigational hazard exists and could not be addressed with markers."* There is substantial evidence in the record to support a finding that the dock would

present a hazard to navigation under a variety of conditions, whether that's because it will become grounded and partially submerged when the water goes down, or become frozen to and stuck to the ground when the water comes back up (see, e.g., *Transcript, pages 82-84*). It was alluded to by counsel for Kaseburg that a flag could be used to warn the public of the hazard (*Transcript p. 86*), but no testimony or evidence that a flag would eliminate the hazard. Logically, warning flags or markers do not eliminate navigational hazards, and are themselves only effective when they can be seen. In this case where the proposed dock would be long, narrow, and invasive out into the opening of the Cove, it could be difficult to see even in good conditions. Add to that the effects of wind, waves, and direct light from a rising or setting sun, and the hazard remains. Any flag or other warning device could be as difficult to see as the dock itself.

5. *"That the Kaseburgs' application should be denied."* This merely reflects Kaseburg's disagreement with the conclusion. There is substantial evidence in the record to support the findings and conclusions of the Hearing Officer that the application should be denied. The "exceptions" to the Preliminary Order noted above are not supported by the record or the law, and thus do not support a conclusion to the contrary.

\* \* \*

Pursuant to Idaho Code § 67-5245 and the Scheduling Order, each party may file exceptions to the Preliminary Order. Generally speaking, Congleton takes exception to the findings and conclusions in the Preliminary Order that are contrary to the positions, arguments and analysis set forth in Objector's Closing Brief. The identification of specific additional exceptions below should not be construed as a waiver of any further exceptions or assignments



of error should this matter be taken up on appeal. For purposes of this review, however, the following exceptions should be noted:

Most Unusual Circumstances. The Preliminary Order identifies “the combination of restricted access to the Cove during prime boating season, and presentation of a hidden navigational hazard in the dark days of winter” as “the most unusual of circumstances”, justifying the denial of the application. *Preliminary Order, page 18.* In fact, Jim Brady testified to a number of unusual circumstances surrounding the Kaseburg application, including:

(a) It is unusual to have an application for access to the line of navigability at low water, and for year-round use. (*Transcript, pages 79, 98*).

(b) It is unusual to be dealing with a different line of navigability at this location as compared to other locations on Lake Pend Oreille.

(c) Because of that, this was the first time he had to evaluate littoral rights boundaries from the ordinary high water mark rather than the artificial high water mark. Lake Pend Oreille is unique because it does have an artificial high water mark, and the littoral right lines basically have to be “ambulatory” as the water levels change. (*Transcript, page 84*).

(d) The length of the structure proposed is unusual for a single family dock. (*Transcript, page 79*).

In addition, Tom Trulock testified that floating docks are unusual, and more susceptible to damage than fixed pier docks, given the impact of the drastic changes in the water levels on Lake Pend Oreille. (*Transcript, page 149*).

These circumstances are in addition to the hazards to navigation and the significant negative impact on the public’s ability to navigate which the Hearing Officer relied heavily upon. These conditions, taken as a whole, do present “most unusual circumstances” under which it would be “inadvisable” to issue the permit, and the application should be denied.

Benefit to be derived is outweighed by the negative impacts. Idaho Code §58-1305(a) and IDAPA 20.03.04.025.01 are not the only criteria for reviewing applications for single-family

docks not extending beyond the line of navigability. The overriding principle in the Lake Protection Act (Idaho Code §§58-1301, *et. seq.*) and the corresponding administrative rules, is that ALL ENCROACHMENTS over the navigable waters 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.**

IC § 58-1301, IDAPA 20.03.04.012.01. (Emphasis added). In fact, “IDL is *required to balance the competing interests* involved while determining whether to approve permits for navigational encroachments.” *Brett v. Eleventh Street Dockowner's Association, Inc.*, 141 Idaho 517, 523, 112 P.3d 805, 811 (2005) (emphasis added).

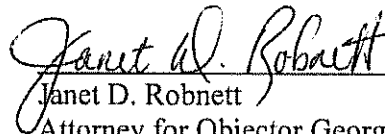
The virtually undisputed testimony in the record is that there would be little benefit to be derived from the proposed dock as an aid to navigation on a year-round basis. (*See, e.g., Transcript, pages 83-84*). Practically speaking, the dock would still only be useful for moorage at summer pool or a bit thereafter. At summer pool, when recreational use of the water is at its highest, the dock would take up almost 30% of the available opening into the Cove. At low water, it will be grounded, with portions under water; a significant hazard to navigation. Jim Brady ultimately testified unequivocally that the benefit derived is not worth the impact to the public and the lake value factors. (*Transcript, p. 84*).

Encroachment Standards. As discussed more fully in Objector's Closing Brief, the weight of the evidence supports a conclusion that the proposed dock will not meet the encroachment standards under IDAPA 20.03.04.015.13.f, in that it is not likely to be able to withstand normally anticipated weather conditions or prevent displacement due to ice, wind and waves. (*Transcript, pages 145-148*).

Other exceptions. As previously noted, highlighting the exceptions noted above should not be construed as a waiver or concession to other findings and conclusions in the Preliminary Order, objections to which are hereby reserved.

Substantial evidence in the record supports not only the findings and conclusions in the Preliminary Order, but also other findings and conclusions noted above and in the Objector's Closing Brief, all of which support the ultimate conclusion that the application be denied.

DATED this 16<sup>th</sup> day of October, 2015.



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Janet D. Robnett

Attorney for Objector George Congleton,  
and Sequoia Glen South Partners, LLC

## CERTIFICATE OF MAILING

I hereby certify that on this 16<sup>th</sup> day of October, 2015, I caused to be served a true and correct copy of the foregoing as addressed to the following:

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BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

IN THE MATTER OF ENCROACHMENT PERMIT	)	
APPLICATION NO. ERL-96-S-219E	)	Case No. CC-2015-PUB-20-001
	)	
PETER KASEBURG,	)	<b>IDAHO DEPARTMENT OF</b>
APPLICANT.	)	<b>LANDS' EXCEPTIONS TO</b>
	)	<b>PRELIMINARY ORDER</b>
	)	

The Idaho Department of Lands ("IDL"), by and through its attorneys of record,  
hereby submits these *Exceptions to Preliminary Order*.

This brief is submitted in accordance with the Director's October 6, 2015, *Order Granting Petition for Review and Scheduling Order*.

IDL asserts that the following typographical errors in the record should be corrected as noted:

1. Conclusions of Law, ¶ 1: "Holman" should be replaced by "Kaseburg."
2. Findings of Fact, ¶ 1: "Water Resources" should be "Lands."

3. Findings of Fact, ¶ 6 at page 9, second line, and in the Discussion, second full paragraph, second line: This also appears to be a typographical error, the “16 inches” should be “6 inches.” Transcript, p. 147, ls. 3-14.<sup>1</sup>  
Sixteen inches refers to the amount of water at the end of the proposed dock with the lake at elevation 2051. Transcript, p. 84, l. 1.

IDL also asserts the Final Order in this matter should include a findings of fact as to the “unusual circumstances,” in addition to that identified in the Discussion at page 18, last full paragraph the following: (1) an application for a dock that seeks access to the line of navigability at low water on Lake Pend Oreille. Transcript, p. 79, ls. 17-23; (2) This is the first time IDL has ever had to consider a determination of littoral rights lines from the ordinary high water mark on Lake Pend Oreille because the littoral rights lines are normally determined from the artificial high water mark of summer pool. Transcript, p. 82, ls. 2-14; (3) the 140-foot length of the proposed structure, is longer than even the longest private single-family docks on lake Pend Oreille, docks which provide access to the line of navigability at the summer pool artificial high water mark. Transcript, p. 79, ls. 24-34, to p. 80, l. 1. This application is unique on Lake Pend Oreille, to the best of the knowledge of Jim Brady of IDL, which qualifies to be described as a “most unusual of circumstance.”

IDL also asserts that the statement in Finding of Fact 5.e., that IDL has a policy that limits dock lengths to no more than 100 feet irrespective of water depth, is a misstatement of Mr. Brady’s testimony. IDL generally limits docks on Lake Pend Oreille to a length of 55-feet, a standard that has been established by docks that have been

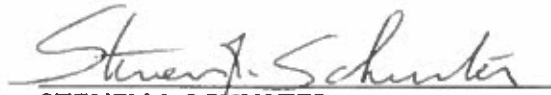
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<sup>1</sup> The lines are simply counted from the top of the page because there are no line numbers on the page.

permitted as grandfathered, and is also a standard adopted by the U.S. Army Corps of Engineers. Transcript, p. 87, ls. 22-end. One-hundred foot docks from the artificial high water mark have been authorized in a few locations because of the extremely gradually slope of the lake bed. Transcript, p. 79, ls. 26-30.

Finally, Mr. Brady concluded, after his review of the application, that the benefits of a 140-foot single-family dock that occupies about 30% of the remaining open water in the mouth of Glengary Cove, and that would have only 16 inches of water at the end of the dock when the lake is at elevation 2051, does not outweigh the detriment to the public. Transcript, p. 84, ls. 1-15.

DATED this 16th day of October, 2015.

  
STEVEN J. SCHUSTER  
Deputy Attorney General  
Department of Lands

**CERTIFICATE OF MAILING**

I hereby certify that on this 16th day of October, 2015, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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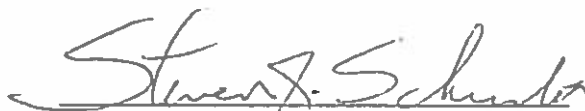
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BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

In the matter of:	)	Case No. CC-2015-PUB-20-001
	)	
Encroachment Permit	)	BRIEF IN SUPPORT OF REVIEW OF
Application No. ERL-96-S-219E	)	PRELIMINARY ORDER
	)	
Peter Kaseburg, Applicant	)	
	)	
	)	

COME NOW the Applicants, PETER KASEBURG and SHELAGH KASEBURG, KASEBURG FAMILY TRUST, by and through counsel JOHN A. FINNEY, and pursuant to the Order Granting Petition For Review And Scheduling Order, dated October 6, 2015, make this brief regarding exceptions to the Hearing Officer Edward C. Lockwood's Findings Of Fact, Conclusions Of Law, And Preliminary Order, dated September 22, 2015 (herein "Preliminary Order"), as follows:

In the Petition For Review Of Preliminary Order, the Applicants Kaseburgs set forth, as the issues sought for review, the conclusions by the Hearing Officer that:

1. The boating access to the cove would be restricted by more than one-half.
2. The restriction is a most unusual of circumstances.
3. The Kaseburgs' requested encroachment may infringe upon Congleton's littoral rights.

4. That any purported navigational hazard exists and could not be addressed with markers.

5. That the Kaseburgs' application must be denied.

The Record in this matter consists of the several Record parts compiled by the Department, the Exhibits, and a Transcript of the August 19, 2015 proceeding (which was provided by an e-mail on October 14, 2015). The Transcript provided contains numerous missing words, erroneously transcribed words, and several misidentifications of the person speaking. There is no effort made in this brief to correct those.

I. The History Leading Up To Application No. 219E

The present application 219E is the latest revised dock proposal by the Kaseburgs to address the prior concerns of the Department and the Objector Congleton regarding the several prior applications. The Kaseburg dock sought by application 219E was proposed in such a manner that it does not extend beyond the Department's prior asserted line of navigability and so that it was well within upon the Department's and Congleton's prior asserted littoral rights of the Kaseburgs as owners of waterfront property on Lake Pend Oreille.

The initial permit for this property was issued to McLean in the mid-1970s for the pre-existing encroachments after the adoption by the State of Idaho legislature of the Lake Protection Act. Mr. McLean's permit was given number ERL-96-S-219 and is Applicants' Exhibit 3 admitted herein.

After the Kaseburgs purchased the property from the McLean Living Trust in 2008, the permit was transferred to the Kaseburgs

and given the number ERL-96-S-219A. Permit No. 219A is Applicant's Exhibit 2 admitted herein. Thereafter, the Kaseburgs submitted two different applications to the Department. The first in 2008 was to replace certain of the piling, assigned application No. 219B. The second in 2009 was to install a mobile dock and mooring buoy, assigned application No. 219C. These applications were the subject of proceedings by the Department of Lands and judicial review by both the District Court and the Idaho Supreme Court.

The Idaho Supreme Court decision is set forth in Kaseburg v. State, Bd. of Land Comm'rs, 154 Idaho 570, 300 P.3d 1058 (2013). The Idaho Supreme Court commented that the Department appeared to have not made any determination of the littoral rights lines and set forth the general standards for doing so. Kaseburg 154 Idaho 570. The Idaho Supreme Court then held that in respect to Application No. 219C: "The IDL assumed, without any basis in fact or law, that the line of navigability in the area of the proposed encroachment was fifty-five feet waterward of the AHWM. It cannot be determined whether the IDL applied the correct standard when processing Application 219-C until a proper line of navigability is established." Kaseburg, 154 Idaho at 578. The Idaho Supreme Court then set forth its analysis and holdings regarding the line of navigability and held that the line of navigability must be waterward of the low water mark. Kaseburg, 154 Idaho at 579. The matter was then remanded to the Department of Lands to conduct a proper line of navigability analysis.

The Department then conducted a line of navigability proceeding, in which the Department did a littoral right lines

analysis as well as a line of navigability analysis. The Department produced what was then labelled as Exhibit U as the applicable littoral right lines for the Kaseburgs' moveable dock application. That diagram by the Department is Applicant's Exhibit 13 admitted herein. That diagram of the Littoral Right Lines was made by the Department on the Kaseburg's application No. 219C which was for a moveable dock that would be moved waterward as the lake level dropped. The Department also used and relied upon that diagram in regards to the decision on Application No. 219D described below.

The Department denied application No. 219C basically as extending beyond the line of navigability. The Kaseburgs then made their application 219D which reduced the length of the moveable dock system to be to within the Department's determination as to the line of navigability.

The Objector Congleton objected as to movability of the dock and as to the location as infringing upon the Congleton's littoral rights. An objection hearing was held. In the objection proceedings, Mr. Congleton submitted his what was then labelled as Exhibit Q as to the shoreline condition and indicated in regards to the area he labelled as "D" as a "good location" for the Kaseburgs' dock. That diagram by Mr. Congleton is Applicant's Exhibit 16 admitted herein. Mr. Congleton also submitted what was then labelled as Exhibit T as to his assertion as to the littoral rights line to be applied (at low water), which was generally perpendicular to the generally straight shoreline. That diagram by Mr. Congleton is Applicant's Exhibit 17 admitted herein.

The Department denied the Kaseburg's Application No. 219D because of the location compared to Mr. Congleton's submerged property and as to the uncertainty of the design of the moveable dock system.

With the denial of Application 219D, the Kaseburgs understood the Department to be concerned with both the dock location compared to the submerged lands of Mr. Congleton and the dock being a moveable system. The Kaseburgs understood the Department's asserted line of navigability location and the Department's asserted littoral rights line location. The Kaseburgs also understood Mr. Congleton to object to the location, and understood Mr. Congleton to have identified what he considered a good location on the east side of the tree and understood Mr. Congleton to have identified his asserted littoral right line from which to have a setback. Therefore, the Kaseburgs submitted application No. 219E for a fixed floating dock (not moveable) in a location which Mr. Congleton asserted was a good location, with a setback that met both the Department's prior littoral rights line identified and Mr. Congleton's littoral rights line identified.

The Kaseburg's 219E application is in the Department's Record Part 1 and the diagram submitted in the application is also Applicant's Exhibit 14 admitted herein. The application by the Kaseburgs met the location and design concerns previously asserted by the Department and the Objector Congleton.

## II. The Applicable Standard For Consideration

It is important to reiterate set forth here, that the

applicable procedure for the processing and the decision upon Application No. 219E is set forth in Idaho Code § 58-1305, as follows:

58-1305. Noncommercial navigational encroachments -- Procedures -- Repairs -- Forms. (a) Applications for construction or enlargement of navigational encroachments not extending beyond the line of navigability nor intended primarily for commercial or community use shall be processed by the board with a minimum of procedural requirements and shall not be denied nor appearance required except in the most unusual of circumstances or if the proposed encroachment infringes upon or it appears it may infringe upon the riparian or littoral rights of an adjacent property owner.

(b) If the plans of the proposed encroachment indicate such infringement will or may occur, the board shall require that the applicant secure the consent of such adjacent owner or that he be given notice of the application by personal service or by certified or registered mail, return receipt requested, directed to him at his usual place of address, which, if not otherwise known, shall be the address shown on the records of the county treasurer or assessor, and such adjacent owner shall have ten (10) days from the date of personal service or receipt of certified or registered mail to file objection with the board. The application itself shall be deemed sufficient notice if the adjacent owner is the state of Idaho.

(c) In the event objection to the application is filed by an adjacent owner or if the board deems it advisable because of the existence of unusual circumstances, the board shall fix a time, no later than sixty (60) days from the date of filing application, and a place, for affording the applicant and the adjacent owner filing objection to appear and present evidence in support of or in opposition to the application and within forty-five (45) days thereafter shall render a decision and give notice thereof to the parties concerned who may thereafter resort to appellate procedures prescribed in section 58-1306, Idaho Code.

(d) A permit shall not be required for repair of an existing navigational encroachment.

(e) A permit shall not be required for replacement of an existing navigational encroachment if all the following conditions are met:

(1) The existing encroachment is covered by a valid permit in good standing.

(2) The existing encroachment meets the current requirements for new encroachments.

(3) The location and orientation of the replacement do not change from the existing encroachment.

(4) The replacement will be the exact same size or smaller and the same shape as the existing encroachment.

(5) The replacement will not be located closer to adjacent littoral right lines than the existing encroachment.

(f) Applications submitted under this section shall be upon forms to be furnished by the board and shall be accompanied by plans of the proposed navigational encroachment containing information required by section 58-1302(k), Idaho Code, and such other information as the board may by rule require in conformance with the intent and purpose of this chapter.

(g) If notice to an adjacent owner is not required or if the adjacent owner has consented to the proposed encroachment or has failed to file objection to the proposed encroachment within the time allowed following service of notice, the board shall act upon the application as expeditiously as possible but no later than sixty (60) days from receipt of the application and failure to act within such time shall constitute approval of the application.

(h) All permits issued for noncommercial navigational encroachments shall be recorded in the records of the county in which the encroachment is located and shall be a condition of issuance of a permit. Proof of recordation shall be furnished to the department by the permittee before a permit becomes valid. Such recordation shall be at the expense of the permittee. Recordation of an issued permit serves only to provide constructive notice of the permit to the public and subsequent purchasers and mortgagees, but conveys no other right, title or interest on the permittee other than validation of said permit.

The Kaseburg's dock is a navigation encroachment not extending beyond the line of navigability nor intended primarily for commercial or community use. Therefore, the only permissible possible statutory grounds for denial are a most unusual of circumstances or infringement upon the littoral rights of an adjacent property owner.

### III. The Preliminary Order

For the purposes of this review, the Applicants Kaseburgs only set forth matters directly related to the exceptions for review and do not set forth every possibly issue with the Hearing Officer's Preliminary Order.

A. Typographical Corrections

The Preliminary Order contains at least 2 undisputed typographical errors, which are identified with corrections as follows:

1. Page 9, Part III. Findings of Fact, Paragraph 6. The reference to "16 inches" of water level fluctuation should be "6 inches.
2. Page 1, Part VI Conclusions of Law, Paragraph 1. The reference to "Holman's" should be "Kaseburg's".

B. The Conclusions Of Law Regarding Restricting Boating Access to the Cove Are Not Supported by the Record

In the Preliminary Order, the Hearing Officer made Conclusion of Law No. 4 (page 21) that "restriction of more than one-half of the boating access to the Cove by the combination of an existing encroachment and Kaseburg's proposed encroachment presents the most unusual of circumstances to require denial of the application."

The diagram admitted in the record as Exhibit 7 sets forth the dimensions of the existing encroachments in the Cove. The outer docks of the Marina on the southerly shore project approximately 234' in length. The existing permitted Kaseburg 219A piling on the northerly shore project approximately 221' feet from the shore. There is approximately 257' between them. As set forth in the record in the Kaseburg Application documents, the Kaseburg proposed 219E dock would project 140' from the northerly shore, which is 81' less than the existing 221' piling line (221' - 140' = 81' less). The total distance across the Cove is



234'+257'+221' = 712'. The 140' dock is less than the 221' piling line. If there were no piling line, the opening to the Cove between the Marina Dock and the Kaseburg Dock would be 712'-234'-140' = 338' wide, which is wider than the opening with the existing piling line. In addition, the 338' wide opening is fairly centered in the Cove and in the deepest water, so as the lake level was lowered the opening compared to the Marina Dock and the Kaseburg Dock would remain unchanged. The aerial photo in the record as Exhibit 9 also illustrates the encroachments at lower water. The Kaseburg Dock would be barely into the far right area in that photo. The U.S. Coast Guard navigation chart in the record as Exhibit 11 identifies the navigation hazard line. This line has been imposed on an aerial photo in the record as the last page of Exhibit 11. The Kaseburg dock would be well within the identified charted navigation hazard line. Also, please refer to testimony set forth in the Transcript of August 19, 2015, pages 18-20 regarding Exhibit 7. A 338' wide opening is more than sufficient for navigation in and around the Cove.

The testimony and evidence does not support a determination that the most unusual of circumstances exist. There is nothing unusual (let alone "most unusual") about the Kaseburgs as owners of waterfront property on Lake Pend Oreille, applying to have a dock which is within the line of navigability for personal use, in a location which is within the footprint of their existing permitted encroachments or immediately adjacent thereto (piling, waterline, dock, swimming area, and moorage area). The location is in an area relatively protected from the prevailing weather with a relatively smooth submerged ground surface, and is located

adjacent to the residence on the property. The dock meets the square footage and side line setback policies of the Department.

C. The Conclusions Of Law Regarding Possible Infringement on Littoral Rights Is Not Supported by the Record

In the Preliminary Order, the Hearing Officer made a Conclusion of Law No. 5 (page 21) that "Kaseburg's requested encroachment must be denied on the basis that it appears that it may infringe upon Congleton's littoral rights." The Hearing Officers did not make an actual determination of a littoral rights line or a suggested determination and merely relies upon a conclusory statement by Jim Brady in IDL Exhibit 1 that there "may" be infringement based upon an equitable allocation.

The Department previously made an unchallenged finding and conclusion of the Littoral Right Lines in this Cove on Glengary Bay on Lake Pend Oreille as applicable to the Kaseburg property and the adjoining properties. This determination is illustrated on Exhibit 13 with a Dark Blue "Littoral Rights Line" drawn pursuant to the Chord Method. This determination is supported by the applicable court decisions, statutes, and rule provisions which apply. The location also meets the Objector Congleton's prior asserted Littoral Right Lines illustrated on Exhibit 17 (and Exhibit 14) and in a "good location" as identified by Mr. Congleton on Exhibit 16.

In Brett v. Eleventh St. Dockowner's Ass'n, Inc., 141 Idaho 517, 521-23, (2005) (which is cited in footnote No. 4 by the Idaho Supreme Court in the Kaseburg decision) the Idaho Supreme Court held as follows:

Littoral rights, for the purposes of issuing lake encroachment permits, refer to the right of owners or lessees of land adjacent to navigable waters "to maintain their adjacency to the lake and to make use of their rights" as littoral owners by building or using "aids to navigation". See I.C. § 58-1302(f). Issuance of a lake encroachment permit, i.e. permission to place a dock on the lake, necessarily contemplates a determination of littoral rights as defined by the Idaho Lake Protection Act. *Lovitt v. Robideaux*, 139 Idaho 322, 326, 78 P.3d 389, 393 (2003). "A holder of a valid permit cannot locate a dock in a manner that infringes upon an adjacent landowner's littoral right". *Id.* Thus, IDL must determine the littoral rights of adjoining riparian landowners when there is a dispute regarding placement of an encroachment pursuant to a permit and possible infringement of those rights. *Id.*

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In *Driesbach v. Lynch*, 71 Idaho 501, 234 P.2d 446 (1951), this Court set forth the general rules which govern establishing littoral zones applicable to adjacent property owners:

It is realized that due to the numerous variations of the shore line formations, such as a convex or a concave, or otherwise irregular shore line of a lake or other large body of water, no one rule or formula could be invoked to determine the littoral boundaries which would apply in all cases; in instances where the shore line is substantially a straight shore line these boundaries are more readily and easily ascertained and determined because in such instances it is practical and equitable to draw a straight line according to the general course of the shore at high water mark and extend the lateral lines of all the properties upon such body of water at right angles with the shore line towards the low water mark; however, the irregularity in the formation of the shore line as above mentioned would make the application of this rule inequitable in many instances.... It seems quite firmly established that there are a few general and fundamental rules which in most instances may be applied with reference to the apportionment of littoral rights: If the shore line is straight or substantially so, the littoral lines are to be extended from the divisional lines on shore into the water perpendicular to the shore line; in the event the shore line is concave, converging lines shall be run from the divisional shore lines to the line of navigability; again, if the shore lines are convex, the lines will be divergent to the line of navigability (citation omitted).

It is evident in examining the cases that there seems to be no hard and fast rule or rules which are without

modification to meet peculiar facts and circumstances; the controlling thought in every case is to treat each case in an equitable manner so that, so far as it is possible, all property owners on such a body of water have access to the water; the courts in all cases have striven to see that each shore line owner shall have his proportionate share of the deep water frontage and all of the rules which have been adopted and applied throughout the years by the courts in relation to this problem have had that end in view; the courts have not hesitated to point out that these rules often require modification under the peculiar circumstances of the case in order to secure equal justice, and that where such is the case the courts do not hesitate to invoke a modification to attain such objective.

*Driesbach*, 71 Idaho at 508-509, 234 P.2d at 450-451.

To emphasize, when the shore line is substantially a straight line, the analysis is to draw a straight line according to the general course of the shore at the high water mark and extend the lateral lines of all the properties upon such body of water at right angles with the shore line towards the low water mark. Only when there is an irregularity in the formation of the shore line itself is there an inequity which requires modification of the analysis. Here the shore line between Congleton and Kaseburg (both at AHWM and OHWM) is substantially a straight line. There is no irregularity in the shoreline. The irregularity here is the non-perpendicular common property boundaries coming in at an angle to the shoreline. That is not a basis to modify the general rule.

Also, Idaho Code 58-1302(f) Definitions provides as follows:

(f) "Riparian or littoral rights" means only the rights of owners or lessees of land adjacent to navigable waters of the lake to maintain their adjacency to the lake and to make use of their rights as riparian or littoral owners or lessees in building or using aids to navigation but does not include any right to make any consumptive use of the waters of the lake.

IDAPA 20.03.04.010 Definitions provides as follows:

32. Riparian or Littoral Rights. The rights of owners or lessees of land adjacent to navigable waters of the lake to maintain their adjacency to the lake and to make use of their rights as riparian or littoral owners or lessees in building or using aids to navigation but does not include any right to make any consumptive use of the waters of the lake. (4-2-08)

33. Riparian or Littoral Owner. The fee owner of land immediately adjacent to a navigable lake, or his lessee, or the owner of riparian or littoral rights that have been segregated from the fee specifically by deed, lease, or other grant. (3-29-10)

34. Riparian or Littoral Right Lines. Lines that extend waterward of the intersection between the artificial or ordinary high water mark and an upland ownership boundary to the line of navigation. Riparian or littoral right lines will generally be at right angles to the shoreline. (4-2-08)

IDAPA 20.03.04.015.13 General Encroachment Standards provides as follows:

c. Angle from Shoreline. (4-2-08)

i. Where feasible, all docks, piers, or similar structures shall be constructed so as to protrude as nearly as possible at right angles to the general shoreline, lessening the potential for infringement on adjacent littoral rights. (4-2-08)

ii. Where it is not feasible to place docks at right angles to the general shoreline, the department shall work with the applicant to review and approve the applicant's proposed configuration and location of the dock and the dock's angle from shore. (4-2-08)

In addition, the Department's Navigable Waters Procedure Manual Section 25. Encroachment Standards And Requirements. Section B. Littoral Right Lines sets forth the Departments application of the "Chord Method" from the artificial high water mark. In addition, all the Department's sample drawings in the encroachment permit application packet show examples of that method applied at the Artificial High Water Mark.

The Department's prior determination of the Littoral Right Lines in this portion of Glengary Bay on Lake Pend Oreille as set

forth on Exhibit 13 takes into account any peculiar factual circumstances with the "controlling thought in every case [] to treat each case in an equitable manner so that, so far as it is possible, all property owners on such a body of water have access to the water, [ and] to see that each shore line owner shall have his proportionate share of the deep water frontage[.]"

*Driesbach*, 71 Idaho at 508-509, 234 P.2d at 450-451

The applicable law for determining the littoral rights takes into account that equity must be applied to balance the property rights of each adjoining owner so each is able "'to maintain their adjacency to the lake and to make use of their rights' as littoral owners by building or using 'aids to navigation'". This equitable requirement is a balancing of competing rights and interests, and the flexibility of the application of the methods to determine the littoral rights is made to secure equal justice.

The evidence that the proposed dock meets the standards for determining littoral right lines is depicted in the Kaseburg's application documents, the Department's original determination of the Littoral Right Lines, the Objector Congleton's asserted Littoral Right Lines at low water, and is supported by the testimony and exhibits at the hearing.

Mr. Congleton concedes that although he has several separate deeds for the real property under his control, he has not obtained Bonner County planning and zoning compliance for the purposes of having separate parcels. He also concedes that Doug McLean kept all right, title, claim, and interest to the permitted encroachments which were subsequently sold to the Kaseburgs and for which the Kaseburgs hold permit No. 219A. There is no

evidence that McLean, by conveying additional waterfront (with an extreme upland angle to the common boundary line), intended to or actually did give up any rights to have a dock perpendicular to the shore pointing out to his piling and waterline.

The Department, although it had already provided a Littoral Right Lines analysis and diagram, submitted a Memorandum with competing locations for determining the lines (AHWM or OHWM) and with competing methods (Chord or "Equitable Allocation"). It is not clear the Department's motive for this new diagram and for simply not applying the Chord method. The Department's Memorandum concludes that the Chord method shows that no infringement would occur and that the Equitable Allocation method as they calculate it "may" result in infringement in the 10' setback (not an actual infringement). The Kaseburgs have submitted alternative calculations and considerations for the Equitable Allocation method which show various lines can be allocated.

With all of that said, the location applied for by the Kaseburgs does not improperly infringe upon Mr. Congleton's littoral rights, as he is able to equitably enjoy the waters of Lake Pend Oreille from his property with the Kaseburg dock situated as applied for in 219E. Applying the Chord method at the OHWM allows both Mr. Congleton and the Kaseburgs the right to maintain adjacency to the lake and to build aids in navigation. The rules of equity in determining littoral rights lines requires docks to be perpendicular to the artificial high water mark. This prohibits Mr. Congleton from placing a dock at an extreme angle along his submerged property line. In addition, such an angle would infringe upon the Kaseburg's rights when measured from the

AHWM. The Department's machinations regarding where and how to apply the littoral right lines are really irrelevant to this matter and do not support a denial of the application.

The "may" infringe comment by Jim Brady (accepted without actual analysis by the Hearing Officer) is not supported by the facts on the simple basis that the upland and submerged property line is at an extreme angle to the straight shoreline. There is no basis to "equitable allocated" on the straight shoreline between these properties and there is no basis to apply an angled littoral rights line to the straight shoreline at low water, because any dock for Congleton must be at a right angle to the straight shore and would be over 200 feet away from the Kaseburg dock. The location applied for by Kaseburg in 219E is 15' off the asserted submerged corner of the property. The "may" infringe comment is not support by the facts.

D. The Conclusions Of Law Regarding A Navigational Hazzard Is Not Supported by the Record

In the Preliminary Order, the Hearing Officer made a Conclusion of Law No. 6 (page 21) that "Kaseburg's requested encroachment must be denied on the basis that it could create a navigational hazard to the general boating public particularly during low-light, low-water conditions characteristic of the winter months."

There is no basis for the conclusion that the Kaseburg dock would create any more navigational hazard than any other dock on the Lake or than the existing breakwater and docks at the Marina in the Cove, or the existing Kaseburg piling (which have a



navigational light installed). In addition, at low water conditions, the water depth at the end of the dock would be at or under 2 feet, which would negate any perceived hazard to navigation. In addition, lights and/or flagging could be installed to address any perceived hazard. The Dock is located wholly within the Coast Guard charted hazard area for the Cove. Pursuant to the statute under which the Kaseburg's applied, the dock would not extend beyond the line of navigation. If not beyond the line of navigation, there is no hazard to navigation. There is no basis in the applicable statute to have the non-existent perceived navigational hazard be a basis for denial.

#### IV. The Dock Must Be Approved


As set forth in Idaho Code § 58-1305(a), Application No. 219E "shall be processed by the board with a minimum of procedural requirements and shall not be denied nor appearance required except in the most unusual of circumstances or if the proposed encroachment infringes upon or it appears it may infringe upon the riparian or littoral rights of an adjacent property owner." (emphasis added).

In the present circumstance, Application No. 219E does not involve unusual circumstances, let alone the most unusual of circumstances. In addition, the plans for the proposed dock pursuant to Application No. 219E do not indicate any infringement upon the littoral rights of an adjacent property owner and do not give the appearance that it may infringe upon the littoral rights of an adjacent property owner. This matter should not have had to go to an objection hearing, given the prior objection hearing and

given the applications provisions. The Department previously identified Littoral Right Lines. Mr. Congleton previously identified Littoral Right Lines and a "good location" for the dock. The standards for determining littoral right lines are depicted in Applicants' application documents. The littoral rights lines have been met with an appropriate setback or not only 10 feet, but actually 15 feet.

The proposed encroachment in Application No. 219E meets the provisions of Idaho Code § 58-1305 and the applicable case law, statutes, rules, and procedure, and must be approved.

DATED this 16<sup>th</sup> day of October, 2015.

  
JOHN A. FINNEY  
Attorney for Applicants  
Kaseburgs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via e-mail, unless otherwise indicated, this 16 day of October, 2015, and was addressed as follows:

Kourtney Romine  
Idaho Department of Lands  
Via e-mail: kromine@idl.idaho.gov

Steven J. Schuster  
Idaho Department of Lands  
Deputy Attorney General  
Attorney for Department  
Via e-mail: steve.schuster@ag.idaho.gov

Janet Robnett  
Lake City Law Group PLLC  
Attorney for George Congleton  
Via e-mail: jrobbett@lclattorneys.com

A handwritten signature in black ink, appearing to read "Ephraim Ferry", is written over a horizontal line.

BEFORE THE STATE BOARD OF LAND COMMISSIONERS

STATE OF IDAHO

In the matter of:	)	Case No. CC-2015-PUB-20-001
	)	
Encroachment Permit	)	<b>ORDER GRANTING PETITION FOR</b>
Application No. ERL-96-S-219E	)	<b>REVIEW AND SCHEDULING ORDER</b>
	)	
Peter Kaseburg, Applicant	)	
	)	
_____	)	

On October 5, 2015, Peter Kaseburg, Shelagh Kaseburg, Kaseburg Family Trust (collectively “Kaseburg”) petitioned the Director of the Idaho Department of Lands to review the Findings of Fact, Conclusions of Law and Preliminary Order dated September 22, 2015 in the above-captioned matter.

The Director hereby accepts the matter for review, to be decided by the Director or his designee.

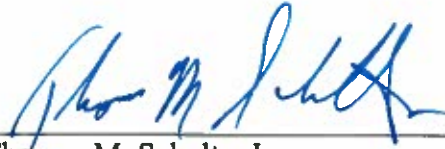
The parties and the Idaho Department of Lands shall have until October 16, 2015 to file exceptions to the preliminary order, if any, and to present briefs on the issues raised by such exceptions and in the petition for review. Such exceptions and briefs shall include citations to the record before the hearing officer in this matter. The parties and the Idaho Department of Lands shall each have five (5) days from the date of the briefs, to file reply briefs, if any.

There shall be no oral argument.

Documents shall be sent to the following address:

Kourtney Romine  
 Idaho Department of Lands  
[kromine@idl.idaho.gov](mailto:kromine@idl.idaho.gov)

DATED this 6<sup>th</sup> day of October, 2015.

A handwritten signature in blue ink, appearing to read "Thomas M. Schultz, Jr.", written over a horizontal line.

Thomas M. Schultz, Jr.  
Director, Idaho Department of Lands

**CERTIFICATE OF MAILING**

I hereby certify that on this 6<sup>th</sup> day of October, 2015, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

John A. Finney  
Attorney at Law  
Finney, Finney & Finney, P.A.  
120 E. Lake Street, Suite 317  
Sandpoint, Idaho 83864-1366

- U.S. Mail, postage prepaid
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- Federal Express
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Janet Robnett  
Lake City Law  
701 E. Front Ave  
Coeur d'Alene, ID 83814

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Steven J. Schuster  
Deputy Attorney General  
P.O. Box 83720  
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- Statehouse Mail
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- Facsimile:
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\_\_\_\_\_  
Kourtney Romine

JOHN A. FINNEY  
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 ISB No. 5413

DEPT. OF LANDS  
 2015 OCT -5 AM 11:27  
 BOISE, IDAHO

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
 STATE OF IDAHO

In the matter of:	)	Case No. CC-2015-PUB-20-001
	)	
Encroachment Permit	)	PETITION FOR REVIEW OF
Application No. ERL-96-S-219E	)	PRELIMINARY ORDER
	)	
Peter Kaseburg, Applicant	)	
	)	
	)	

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COME NOW the Applicants, PETER KASEBURG and SHELAGH KASEBURG, KASEBURG FAMILY TRUST, by and through counsel JOHN A. FINNEY, and petition for review of Hearing Officer Edward C. Lockwood's Findings Of Fact, Conclusions Of Law, And Preliminary Order, dated September 22, 2015 (herein "Preliminary Order"), as follows:

The Notice Of Appointment Of Hearing Officer was entered June 30, 2015 (herein "Notice of Appointment"), and provided that the Director of the Idaho Department of Lands appointed a Hearing Office with certain authority to conduct an objection hearing and issue a preliminary order pursuant to I.C. § 67-5245, subject to review by the Director. The Notice Of Appointment is ambiguous as to whether the Director would automatically review the Preliminary Order and make a final order or if after 15 days the Preliminary Order would become a final order. In addition, the Hearing Officer's Preliminary Order does not state if the order

will become a final order without further notice as required by I.C. § 67-5245.

In addition, IDAPA 20.01.01.413.03 provides that all final decisions will be made by the Board in a contested case.

I.C. § 67-5245 provides for review of a preliminary order upon motion or petition by a party within 14 days. The Applicants Kaseburgs hereby petition for review of the Preliminary Order by the Director, in the event the Director was not going to automatically review the Preliminary Order and issue a final order.

The basis for review is set forth above and the issues sought for review by the Applicants are the conclusions by the Hearing Officer that:

1. The boating access to the cove would be restricted by more than one-half.
2. The restriction is a most unusual of circumstances.
3. The Kaseburgs' requested encroachment may infringe upon Congleton's littoral rights.
4. That any purported navigational hazard exists and could not be addressed with markers.
5. That the Kaseburgs' application must be denied.

DATED this 5 day of October, 2015.

  
JOHN A. FINNEY  
Attorney for Applicants  
Kaseburgs



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via e-mail, unless otherwise indicated, this 5 day of October, 2015, and was addressed as follows:

Edward C. Lockwood  
Hearing Officer  
Via e-mail: ed@lockwood-lawoffice.com

Kourtney Romine  
Idaho Department of Lands  
Via e-mail: kromine@idl.idaho.gov

Steven J. Schuster  
Idaho Department of Lands  
Deputy Attorney General  
Attorney for Department  
Via e-mail: steve.schuster@ag.idaho.gov

Janet Robnett  
Lake City Law Group PLLC  
Attorney for George Congleton  
Via e-mail: jrobnett@lclattorneys.com

A handwritten signature in black ink, appearing to read "Adina T. Murray", is written over a horizontal line.

**Edward C. Lockwood**  
 Attorney at Law, P.A.  
 P.O. Box 1807  
 Coeur d'Alene, ID 83816-1807  
 (208) 765-8101  
 Idaho State Bar No. 3595

**BEFORE THE STATE OF IDAHO BOARD OF LAND COMMISSIONERS**

In the Matter of:	)	Case No. CC-2015-PUB-20-001
	)	
Encroachment Permit Application No.	)	<b>FINDINGS OF FACT,</b>
ERL-96-S-219E	)	<b>CONCLUSIONS OF LAW</b>
	)	<b>AND</b>
Peter Kaseburg, Applicant.	)	<b>PRELIMINARY ORDER</b>
_____	)	

An evidentiary hearing was conducted in this matter on August 19, 2015, by Edward C. Lockwood, appointed hearing officer for the Idaho Department of Lands (IDL). The IDL was represented by Deputy Attorney General Steven J. Schuster, who was present with IDL Lands Resource Supervisor James Brady (Brady). The applicant, Peter Kaseburg (Kaseburg), was present with his spouse, Shelagh Kaseburg, and represented by Attorney John A. Finney. Objector, George Congleton (Congleton), was present and represented by Attorney Janet Robnett.

The parties submitted post-hearing briefs on September 11, 2015, and this matter was deemed “fully submitted” on that date.

**I. Course of Proceedings**

Kaseburg is a littoral property owner on Glengary Cove (Cove), which an indentation on the larger Glengary Bay (Bay), on Lake Pend Oreille in Bonner County, Idaho. There are some seven other property owners on the Cove. Pertinent to this application, Sequoia Glen South Partners (SGS Partners) own a parcel adjacent to, and south

**1. FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER**

of, Kaseburg's property on the Cove. SGS Partners' property is followed sequentially by Sequoia Glenn Community Partners, Congleton, and three other landowners who have not appeared in this immediate proceeding.

A Douglas McLean (McLean) was issued an encroachment permit by the IDL in 1975 for a series of decaying wooden pilings that had been driven into the lakebed in the 1930s. This permit was assigned and referenced as ERL-96-S-219. McLean subsequently sold a portion of the property to Congleton. The McLean Living Trust later sold the parcel adjacent to Congleton to Kaseburg in 2008. Apparently at Kaseburg's request, the IDL transferred McLean's encroachment permit to Kaseburg on or about September 11, 2008. The transfer document was designated as ERL-96-S-219A, and allowed Kaseburg to ". . . maintain existing 30' x 7' dock, waterline suspended on 15 pilings and 2 dolphins-280' waterward of AHWM per attached approved design plan. . . ."

Kaseburg applied with the IDL in 2009 for a permit to replace ten of the pilings with steel pilings (Application 219-B). The IDL deemed the application to be for a non-navigational purpose and, after considering numerous objections, denied the application. Kaseburg submitted a second application with the IDL (Application 219-C) requesting an encroachment permit to install a mobile dock system anchored to one of the pilings and, separately, a mooring buoy. The IDL denied this second application on the basis that the requested encroachment extended beyond the "line of navigability (LON)."

IDL's denial of Application 219-B was upheld following a hearing before an IDL administrative hearing coordinator, and the IDL Director's subsequent affirmation of the hearing coordinator's decision. Kaseburg appealed these denials to the First District Court

## **2. FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER**

for Bonner County. The District Court reversed the IDL decisions in Applications 219-B and 219-C, and the IDL appealed to the Idaho Supreme Court.

In *Kaseburg v. State of Idaho, Board of Land Commissioners*, 154 Idaho 570, 300 P. 3d 1058 (2013), the Supreme Court reversed the District Court's decision on Application 219-B, reasoning that the District Court erred in its conclusion that all pilings are necessarily navigational encroachments as a matter of law. The Supreme Court upheld the District Court's decision regarding Application 219-C, but on different grounds. The Supreme Court concluded that the IDL had improperly denied the Application 219-C because it had not properly established the LON. The Supreme Court remanded Application 219-C to the IDL to create an adequate record that would establish the LON, and to then further consider that application based on the LON determination.

The IDL initiated an administrative proceeding before IDL Hearing Coordinator Mike Murphy to determine the LON. The Hearing Coordinator found and concluded that a LON had not previously been established for the Bay, and received extensive evidence to determine the LON in the Bay in the first instance. The Hearing Coordinator issued a Recommended Decision on April 7, 2014, establishing the "low water mark" in the Bay at 2,052.6 feet mean sea level (msl) based on the average low water years from 1952 to 2005, and establishing the LON at 2,049.6 msl to permit three (3) feet of navigable water at the low water mark. The IDL Director issued a Decision on April 14, 2014, adopting the Hearing Coordinator's recommendations on the establishment of the LON. The IDL subsequently processed Kaseburg's Application 219-C and denied the application on or about July 24, 2014.

### **3. FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER**

Kaseburg submitted Application 219-D with the IDL on September 30, 2014, requesting a noncommercial, navigational encroachment. Kaseburg stated in the application that he sought a ninety-five (95) foot encroachment composed of a fifteen (15) foot stationary ramp that is attached to an eighty (80) foot floating dock. The requested encroachment terminated at the LON that had been established in the prior administrative proceeding. IDL issued notice of the application to adjacent littoral owners, and conducted a contested case proceeding when Congleton filed an objection.

IDL Hearing Officer Brandon Lamb issued a Preliminary Order on March 27, 2015, denying Kaseburg's application due to the presence of the "most unusual of circumstances" as contained in Idaho Code § 58-1305. Foremost among these circumstances was the hearing officer's conclusion that Kaseburg had presented insufficient evidence to establish that he owned the area below which the proposed dock would sit or may travel. The hearing officer noted that Kaseburg's and Congleton's deeds established the boundary line between their properties at the ordinary high water mark (OHWM), rather than at an ambiguous "meander line" as Kaseburg had asserted. Further, the hearing officer reasoned that Kaseburg's dock would trespass on Congleton's property even if Kaseburg's meander line theory was correct.

The hearing officer additionally concluded that Kaseburg presented insufficient information through his application and testimony regarding how the dock would actually be constructed to survive normal weather conditions, or secured and controlled during severe weather. Further, the hearing officer concluded that Kaseburg presented insufficient evidence to establish that the proposed anchoring system at the waterward end of the dock would not intrude beyond the LON. Finally, the hearing officer apparently accepted

#### **4. FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER**

Brady's testimony that Kaseburg's proposal was unusual because it would protrude approximately 165 feet waterward of the artificial high water mark (AHWM), or "summer pool," when the lake level was lowest at 2051 ft msl.

Apparently, no appeal was taken of this denial and Kaseburg filed Application 219-E that is the subject of this present proceeding.

## **II. Issue**

Should Kaseburg's application for an encroachment permit be granted?

## **III. Findings of Fact**

1. The IDL manages and regulates Lake Pend Oreille jointly with the United States Department of Army Corp of Engineers (Corp) and the State of Idaho Department of Water Resources pursuant to separate state and federal statutory authorities. The Corp has established policies regarding piers and floating docks that, *inter alia*, generally limit single-family docks from extending no further into the waterway than the Line of Navigation (LON) and, in no case, may the encroachment extend more than 100 feet waterward of the ordinary high water mark (OHWM) regardless of water depth. The Corp has established the OHWM upstream from the Corp-managed Albeni Falls Dam at 2,062.5 msl.

2. Kaseburg submitted an encroachment permit with the IDL on April 27, 2015, requesting authorization to:

install a new 4 feet wide by 108 feet long floating walkway fabricated by Ferguson Industrial using 12 inch diameter filled HDPE Pipe. Relocate existing 8 feet wide by 32 feet long floating dock to the waterward end of the walkway, with hinged T connections. Location is east of existing location, to avoid neighboring submerged property. Install a maximum of four pilings to secure dock and walkway using pile hoops. Hinged T connections and pile hoops to be supplied by Ferguson Industrial.

3. Kaseburg stated in the application that his desire and intention in requesting the permit was to allow year-round access to the navigable waters of the lake to the greatest

## **5. FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER**

extent possible given the fluctuation of lake levels through the Corp's operation of the Albeni Falls damn. The diagrams Kaseburg submitted with the application indicated that the walkway-dock would extend to, but not beyond, the IDL-established LON. The walkway would be secured to the lakebed by two (2) pilings on the east side of the structure, as would the dock by two additional pilings. Kaseburg calculated that the combination of walkway, dock and "transitional" component would total 700 square feet.

4. The IDL issued correspondences to Congleton and a Reg Galusha<sup>1</sup> on April 29, 2015, informing them of Kaseburg's application, providing them with copies of the application and supporting documentation and informing them of the IDL's policy to allow a ten day comment period.

5. Congleton submitted correspondence with the IDL on May 7, 2015, objecting to Kaseburg's application. Through that, and subsequent, correspondence to the IDL Congleton requested that the objections that he had previously lodged in applications 219-B, 219-C and 219-D again be considered. Congleton's objections, through his correspondences and testimony during this hearing, may be encapsulated:

a. Kaseburg's application is internally inconsistent regarding the exact placement of the proposed dock. Congleton asserts that Kaseburg's depiction of the walkway-dock on the True North survey indicates the proposed walkway and dock runs close to perpendicular to the shoreline in a general north-south orientation and comes no closer than fifteen (15) feet from Congleton's eastern property boundary. Yet, Congleton states that Kaseburg's depiction of the proposal on an aerial photograph of the Cove indicates the walkway and dock skews toward Congleton's property in a more north-

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<sup>1</sup> Galusa appears to be the owner of record of property to the north of Kaseburg. The Galusa property is not within the Cove.

## **6. FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER**

northeast/south-southwest vector. Congleton emphasized the import of these apparent discrepancies in Kaseburg's diagrams based on his assertions of Kaseburg's disingenuousness in previous proceedings and interactions.

b. Kaseburg's contractor, Ferguson Industrial, is a supplier of pipes, valves and fittings, and does not possess the necessary expertise to design and construct docks. Congleton asserts that Kaseburg has provided insufficient information in the application to confidently conclude that the proposed structures would be safe, and will withstand the rigors of wind, water and ice that are common on the lake.

c. Kaseburg's application is internally inconsistent and/or inaccurate regarding the configuration of the proposed dock. Congleton asserts that Kaseburg states that he seeks a walkway measuring 4' by 108' and a dock measuring 8' by 32 for an encroachment that should total 688 square feet. Congleton notes that one diagram submitted with the application depicts only the walkway and dock. In a different diagram submitted with the application, however, Kaseburg indicates that there is a "transition" component adding 12 more square feet to the proposal for a total encroachment of 700 square feet. Congleton asserts that Kaseburg has failed to clearly and consistently describe the proposal and, if this transition is actually a ramp from the shoreline to the walkway, the dock would then extend beyond the LON.<sup>2</sup>

d. The walkway and dock extending 140 feet into the Cove is a navigational hazard at many times of the year. Congleton asserts that boaters would have difficulty seeing the dock when entering the Cove in the afternoon because they would be traveling directly into the sun, and again when entering or leaving the Cove at night.

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<sup>2</sup> The diagram that Congleton references depicts the walkway flaring as it meets the dock, but does not otherwise indicate that the transition is a component separate from the walkway or dock.

## **7. FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER**



Kayackers and shell-rowers (such as Congleton) would experience similar difficulty, especially when the water is rough, because these crafts ride so low in the water. Further, Congleton asserts that the dock may be partially or completely submerged during some portion of the winter months if the walkway freezes to lake bottom and there is insufficient water depth in the Cove to allow the dock to float.

e. IDL policies disfavor approval of docks of the length Kaseburg proposes, and limit docks to no more than 100 feet in length irrespective of water depth.

f. Kaseburg's proposal detracts from Congleton's enjoyment of views from his home and generally detracts from the aesthetic qualities of the area.

g. Kaseburg owns approximately 975 feet of shoreline according to his application. Congleton asserts that there is adequate space to place a dock north of "the point" that allows Kaseburg to fully enjoy his littoral rights while simultaneously eliminating all of Congleton's concerns. Congleton further asserts that placement of the dock further north on Kaseburg's property would allow for a shorter dock because the steeper bottom gradient provides deeper water closer to shore.

6. Tom Trulock (Trulock) has been the owner of Heitman Docks, a commercial marina on the south end of the Cove, for some 21 years.<sup>3</sup> He is well acquainted with the range of weather and lake conditions that commonly occur on the lake, especially in the Cove, and he is versed in the design and construction of breakwaters and docks. He expressed concern that a 4-foot floating walkway, as proposed by Kaseburg, would not possess the structural integrity to withstand the twisting action exerted on it by high winds, especially when high winds combine with high water. Trulock stated that fixed docks are far

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<sup>3</sup> As explained in the *Kaseburg* decision, the Heitman Docks were originally established and managed by Trulock's in-laws in the mid-1940s.

## **8. FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER**

more common on the lake than floating docks because fixed docks are more stable and durable in these conditions. He stated that the water level in the Cove can fluctuate up to 16 inches per day, and that the Cove often freezes during the winter months. He agreed with Congleton that Kaseburg's proposed walkway could be periodically frozen to the lake bottom and Trulock questioned Kaseburg's assertion that the dock would become buoyant in only 18 inches of water. Trulock acknowledged that a dock constructed on Kaseburg's property north of the point would have "a little more" exposure to the elements, but that a fixed dock is better able to endure those conditions and could be significantly shorter than 140 feet to reach the LON. Finally, Trulock offered his observation that, should Kaseburg build a floating dock at the proposed location, the pilings should be placed on the opposite side of the walkway and dock so the structures are pushed against, rather than pulled from, the pilings in windy conditions.

7. Kaseburg is a civil engineer, and he testified that he applied his education, training and experience when preparing this immediate application. He stated that he considered Congleton's concerns when locating the proposed encroachment by selecting a site that he believed that Congleton had suggested as an acceptable site in a prior proceeding. Kaseburg additionally stated that he selected the location of the proposed dock because he can observe it, and whatever craft may be moored to it, from his home. He testified that an alternative site to the north of the point would not allow him to see the dock and his watercraft, and the basalt rock structure in that portion of his property is not conducive to constructing it there. Moreover, he testified that it would be more difficult and expensive to build in the suggested location. He stated that he could affix some type of structure below the dock if it becomes evident that the dock is not floating in low water

**9. FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER**

conditions and is a hazard to other recreationalists. Kaseburg offered his calculations during the hearing regarding the stresses the proposed dock would experience from a 40 mph wind and, separately, from 3.5 foot waves hitting the structure at a right angle. He concluded that these anticipated forces are “insignificant” when compared to the design strength of the dock.<sup>4</sup>

8. Congleton partially disagreed with Kaseburg’s description of the geological features of Kaseburg’s shoreline. Congleton agreed that exposed basalt is evident immediately north of Kaseburg’s proposed dock site, but that the soil conditions further around the point are comparable to the conditions where their properties meet.

9. Brady has been employed with the IDL for some 23 years and, during that tenure, has processed in excess of 1,000 encroachment permit applications. He stated that the IDL does not routinely request disclosure or explanation of the particular types of construction materials that are intended to be used, nor request wind or water stress data on single family dock applications. Indeed, the IDL does not engage in a comprehensive engineering analysis of each encroachment application and places the responsibility on the individual applicants to determine that their proposed docks are suitably designed and

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<sup>4</sup> Kaseburg testified regarding his calculations during the hearing, and offered those calculations in written form as Applicant’s Exhibits “18” and “19.” The IDL and Congleton objected to admission of these exhibits because they had not been disclosed prior to the hearing as required by the hearing officer’s Order Following Pre-Hearing Conference dated July 16, 2015, and they were therefore unfairly prejudiced in their abilities to analyze these calculations in advance of the hearing. The hearing officer is cognizant that IDAPA 20.01.01.600 states that the Idaho Rules of Evidence are not strictly applied in a proceeding such as this, and that evidence should generally be included to assist the parties’ development of the record rather than excluded to frustrate that purpose. Nevertheless, the hearing officer sustained the parties’ objections on the basis of unfair prejudice, and additionally on the basis that Kaseburg had provided insufficient foundation to admit the exhibits.

**10. FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER**

constructed.<sup>5</sup> Brady found Kaseburg's application suitably complete to process without supplemental information.

10. Brady does, however, evaluate whether encroachment proposals conform to littoral rights requirements, and he performed such an evaluation of the littoral rights lines for this application. Brady noted in his report dated July 17, 2015, that the lake level can vary from the Artificial High Water Mark (AHWM) of 2,062.5 msl to the Ordinary High Water Mark (OHWM) of 2,051 msl, a drop of 11.5 feet. Depending on the lakebed gradient in different points on the lake, the shoreline at the AHWM and OHWM levels could be separated by as much as 1,800 feet. In the Cove, that difference is approximately 100 feet.

11. Determining littoral right lines between upland property owners is comparatively simple when the shoreline is straight and property lines intersect the shoreline at right angles. Where, as in the Cove, the shoreline is concave further evaluation is required. Brady analyzed Kaseburg's proposal applying the "chord" and "equitable allocation" methods to the AHWM and OHWM since Kaseburg is requesting an encroachment for year-round access to navigable water. Brady concluded that Kaseburg's proposal did not infringe on his neighbors' littoral rights using the chord method, but "may" infringe on littoral setbacks under the equitable allocation method.<sup>6</sup>

12. Kaseburg performed a littoral rights line analysis working from Brady's evaluation and his additional research. Kaseburg took issue with Brady's calculations using the chord method but, even with that disagreement, concurred with Brady's ultimate conclusion that the proposal would not intrude into Congleton's littoral rights when this

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<sup>5</sup> Brady testified that he doesn't assist applicants in the design of their proposed docks but, if he observes some glaring deficiency in the proposed design, he may offer some friendly advice to the applicant.

<sup>6</sup> Brady's explanation of these methods, and illustrations of littoral right lines applying these methods, are contained in IDL Exhibit 1.

## **11. FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER**

method was applied. Kaseburg concluded that the equitable allocation method should only be applied when the distance between the shoreline and LON is fairly uniform which, in the Cove, is not. Kaseburg proposed an alternative method to determine littoral rights lines, the “thread of lake” method. He concluded that the results through this method were similar to the chord calculations and that his proposal did not intrude on Congleton’s littoral rights.

13. The existing Heitmans Docks extend 340 feet into the Cove, leaving approximately 478 feet between the end of the commercial docks and Kaseburg’s property.<sup>7</sup> A 140 foot walkway and dock envisioned in Kaseburg’s application would leave approximately 338 feet of open water between the two docks.

14. In response to questions, Brady stated that he found Kaseburg’s proposal unusual because most docks in the area are 55 feet in length, most permittees do not seek to use their docks year-round in low water conditions and Kaseburg has alternative locations on his property that would allow year-round navigable access with a significantly shorter dock. Brady agreed that Kaseburg’s dock would be a navigational hazard if it became partially submerged, although there are methods to warn boaters of the danger such as flagging it.

#### **IV. Relevant Authorities**

1. The Board of Land Commissioners (Board) is authorized to regulate and control encroachments on, in or above the beds or waters of navigable lakes within the State of Idaho pursuant to Idaho Code § 58-1303 *et seq.* The Board’s delegation of authority to the IDL to process encroachment permits has been upheld in *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 671 P.2d 1085 (1983). Further,

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<sup>7</sup> The hearing officer accepts Brady’s general measurements in that regard, but the record is not entirely clear whether that distance was calculated during AHWM or OHWM levels.

#### **12. FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER**

the Board is authorized to promulgate rules to effectuate policies and procedures associated with this authority pursuant to Idaho Code § 58-1304.

2. The guiding principles for evaluating encroachments on navigable lakes are found in Idaho Code § 58-1301. That statute provides:

The legislature of the state of Idaho hereby declares 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. No encroachment on, in or above the beds or waters of any navigable lake in the state shall hereafter be made unless approval therefor has been given as provided in this act.

*See also. Brett v. Eleventh Street Dockowner's Association, Inc.*, 141 Idaho 517, 112 P. 3d 805 (2005).

3. The IDL processed Kaseburg's application as a noncommercial navigational encroachment permit pursuant to Idaho Code § 58-1305 and related agency rules. Pertinent portions of that statute state:

**Idaho Code § 58-1305. Noncommercial navigational encroachments. . . .**

(a) Applications for construction or enlargement of navigational encroachments not extending beyond the line of navigability nor intended primarily for commercial or community use shall be processed by the board with a minimum of procedural requirements and shall not be denied nor appearance required except in the most unusual of circumstances or if the proposed encroachment infringes upon or it appears it may infringe upon the riparian or littoral rights of an adjacent property owner.

(b) If the plans of the proposed encroachment indicate such infringement will or may occur, the board shall require that the applicant secure the consent of such adjacent owner or that he be given notice of the application . . .and such adjacent owner shall have ten (10) days from the date of personal service or receipt of certified or registered mail to file objection with the board. . . .

(c) In the event objection to the application is filed by an adjacent owner . . .the board shall fix a time, no later than sixty (60) days from the date of filing

**13. FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER**

application, and a place, for affording the applicant and the adjacent owner filing objection to appear and present evidence in support of or in opposition to the application and within forty-five (45) days thereafter shall render a decision and give notice thereof to the parties concerned who may thereafter resort to appellate procedures prescribed in section 58-1306, Idaho Code.

. . .

(f) Applications submitted under this section shall be upon forms to be furnished by the board and shall be accompanied by plans of the proposed navigational encroachment containing information required by section 58-1302(k), Idaho Code, and such other information as the board may by rule require in conformance with the intent and purpose of this chapter.

. . .

4. A pertinent IDL rule regarding encroachments states:

**IDAPA 20.03.04.015. ENCROACHMENT STANDARDS.**

**.01 Single-Family and Two-Family Docks.**

. . .

c. No portion of the docking facility shall extend beyond the line of navigability. Shorter docks are encouraged whenever practical. . . .

**.13 General Encroachment Standards.**

. . .

e. Presumed Adverse Effect. It will be presumed, subject to rebuttal, that single-family and two-family navigational encroachments will have an adverse effect upon adjacent littoral rights if located closer than ten (10) feet from adjacent littoral right lines. . . .

f. Weather conditions. Encroachments and their building materials shall be designed and installed to withstand normally anticipated weather conditions in the area. Docks, piers, and similar structures shall be adequately secured to pilings or anchors to prevent displacement due to ice, wind and waves. . . .

5. If the proposed encroachment does not extend beyond the line of navigability, there is a presumption in favor of approval of the application. *Kaseburg v. State of Idaho, Board of Land Commissioners*, 154 Idaho 570, 575, 300 P. 3d 1058, 1063

**14. FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER**

(2013). In accordance with Idaho Code § 58-1305 (a), however, the presumption is overcome where the proposed encroachment involves “. . . the most unusual of circumstances or if the proposed encroachment infringes upon or it appears it may infringe upon the riparian or littoral rights of an adjacent property owner.”

6. “The most unusual of circumstances” is not defined in either statute or rule. Consequently, these words must be accorded their plain and ordinary meaning. *See generally*. Idaho Code § 73-113. Circumstances are “unusual” when they are uncommon or rare. The Merriam Webster Dictionary 570 (7<sup>th</sup> ed. 1995). Circumstances are “most” unusual when they are of the greatest or highest degree. The Merriam Webster Dictionary 339 (7<sup>th</sup> ed. 1995).

7. “Riparian or littoral rights” is defined at Idaho Code § 58-1302 (f) as: “. . . the rights of owners or lessees of land adjacent to navigable waters of the lake to maintain their adjacency to the land and to make use of their rights as riparian or littoral owners or lessees in building or using aids to navigation but does not include any right to make any consumptive use of the waters of the lake.”

8. The rights of littoral property owners has been further defined as “. . . the enjoyment of their respective littoral rights within the limits of their littoral boundaries.” *Driesbach v. Lynch*, 71 Idaho 501, 507, 234 P.2d 446, 449 (1951). More recently, the rights of littoral property owners has been defined as the right to unobstructed access to the navigable waters along the entire length of their waterfront. *Ritter v. Standall*, 98 Idaho 446, 566 P.2d 769 (1977). *See also*, *West v. Smith*, 95 Idaho 550, 511 P.2d 1326 (1973) [right to unobstructed access “free from unreasonable interference”].

## 15. FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER



9. Issuance of a lake encroachment permit necessarily contemplates a determination of littoral rights as defined by the Idaho Lake Protection Act. *Lovitt v. Robideaux*, 139 Idaho 322, 326, 78 P.3d 389, 393 (2003). ‘A holder of a valid permit cannot locate a dock in a manner that infringes upon an adjacent landowner's littoral rights. . . . Thus, IDL must determine the littoral rights of adjoining riparian landowners when there is a dispute regarding placement of an encroachment pursuant to a permit and possible infringement of those rights.’ *Brett v. Eleventh Street Dockowner’s Association, Inc.*, 141 Idaho 517, 521, 112 P. 3d 805, 809 (2005).

10. The general rules governing establishment of littoral zones applicable to adjacent property owners was outline in *Driesbach v. Lynch*, 71 Idaho 501, 234 P.2d 446 (1951), wherein the Court stated:

. . . It is realized that due to the numerous variations of the shore line formations, such as a convex or a concave, or otherwise irregular shore line of a lake or other large body of water, no one rule or formula could be invoked to determine the littoral boundaries which would apply in all cases; in instances where the shore line is substantially a straight shore line these boundaries are more readily and easily ascertained and determined because in such instances it is practical and equitable to draw a straight line according to the general course of the shore at high water mark and extend the lateral lines of all the properties upon such body of water at right angles with the shore line towards the low water mark; however, the irregularity in the formation of the shore line as above mentioned would make the application of this rule inequitable in many instances.

It seems quite firmly established that there are a few general and fundamental rules which in most instances may be applied with reference to the apportionment of littoral rights: If the shore line is straight or substantially so, the littoral lines are to be extended from the divisional lines on shore into the water perpendicular to the shore line; in the event the shore line is concave, converging lines shall be run from the divisional shore lines to the line of navigability; again, if the shore lines are convex, the lines will be divergent to the line of navigability (citation omitted).

It is evident in examining the cases that there seems to be no hard and fast rule or rules which are without modification to meet peculiar facts and circumstances; the controlling thought in every case is to treat each case in an equitable manner so that, so far as it is possible, all property owners on such a body of water have access to

**16. FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER**

the water; the courts in all cases have striven to see that each shore line owner shall have his proportionate share of the deep water frontage and all of the rules which have been adopted and applied throughout the years by the courts in relation to this problem have had that end in view; the courts have not hesitated to point out that these rules often require modification under the peculiar circumstances of the case in

## V. Discussion

Kaseburg's proposed encroachment does not extend beyond the LON, as established by the IDL. He should therefore be accorded the presumption of approval, unless the most unusual of circumstances are present or if it appears that the proposal may infringe upon the riparian or littoral rights of an adjacent property owner.

In the case of *Dupont v. Idaho State Board of Land Commissioners*, 134 Idaho 618, 7 P.3d 1095 (2000), the Idaho Supreme Court had the opportunity to consider the meaning of "most unusual circumstances" in an appeal of the Board's decision to revoke an encroachment permit. Seemingly applying a dictionary meaning, the Court found that ". . . 'unusual' means out of the ordinary, different, etc. . . ." *Dupont* at 623. The Court concluded that the Board correctly found the existence of most unusual circumstances where a city ordinance prohibited operation of a motor boat in a designated swimming area, such as the one surrounding Dupont's permitted dock, and a state statute separately prohibited operation of a motorized vessel in a designated swimming area. Significantly, the Court also stated: ". . . the fact that the Board does not have the authority to regulate the use of the dock does not prevent the Board from considering the proposed use in its decision. . . . Thus, we hold the Board did not exceed its statutory authority when it considered the intended use of the proposed encroachment in making its determination to revoke the permit based on the existence of unusual circumstances. . . ." *Dupont* at 625.

In the present matter, Kaseburg requests approval of the 140 foot walkway-dock structure so that he can have boating access to the lake year-round even when the water

level is low. The *Dupont* court also allowed for consideration of how the surrounding waters are used and what existing restrictions may be present in the use of the waters.

The Cove is a comparatively small, concave indentation in the lake currently providing littoral rights to eight property owners (including Kaseburg), and recreational access to the general public. The mouth of the Cove is some 950 feet across. Heitman Docks' pre-existing encroachment, at 340 feet, consumes more than a third of the unfettered recreational access into the Cove. Kaseburg's proposal would consume nearly a quarter of what remains. Stated somewhat differently, if Kaseburg's application is approved, more than one-half of the access to the Cove would be restricted by these two encroachments during the summer pool.

Additionally, there is substantial evidence in the record that the water level in the Cove can fluctuate up to 16 inches per day, and that the Cove occasionally freezes, during the winter. A reasonable inference can be drawn that Kaseburg's proposed walkway (and possibly even the dock) could be periodically frozen to the lakebed at times when the water level is rising. These conditions could result in the dock being partially or completely submerged. A submerged dock is undoubtedly a navigational hazard, particularly in low-light conditions and when the water is rough.

The combination of restricted access to the Cove during prime boating season, and presentation of a hidden navigational hazard in the dark days of winter presents the most unusual of circumstances.

There is also the question of possible littoral infringement associated with Kaseburg's proposed encroachment. There is no disagreement that determination of littoral rights through the right angle method is inappropriate in this circumstance because the

## **18. FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER**

shoreline is concave rather than straight. Similarly, there is no disagreement that Kaseburg's proposal would not interfere with his neighbor's littoral rights applying the chord method.

Applying the reasoning of the *Driesbach* decision, “. . . the controlling thought in every case is to treat each case in an equitable manner so that, so far as it is possible, all property owners on such a body of water have access to the water. . . .” This decision suggests that consideration of the equitable allocation method is appropriate in the Cove. Kaseburg took some issue with Brady's calculations, but the hearing officer can find insufficient grounds to reject Brady's analysis or conclusion that Kaseburg's proposal “may” infringe on Congleton's littoral rights. The hearing officer takes note that Idaho Code § 58-1305 does not require mathematical certainty. The statute merely states that a proposed encroachment should be denied when it appears the proposal “may” infringe upon the littoral rights of an adjacent property owner.

The record is insufficiently developed to consider Kaseburg's proposed fourth method, the thread lake method, of evaluating littoral intrusions.

The issue was raised whether Kaseburg's proposed walkway and dock is sufficiently durable to withstand normally anticipated weather conditions in the area, as required by IDAPA 20.03.04.015.13 f. Congleton opined that Kaseburg's contractor, Ferguson Industries, is not qualified to design floating docks. Congleton's opinion, alone, is insufficient for the hearing officer to render findings and conclusions regarding Ferguson's qualifications.

The hearing officer places significant weight on Trulock's testimony. He has managed a marina and observed the lake for decades. He knows about docks, and he knows

## **19. FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER**

what conditions can be expected in the Cove. The hearing officer accepts his testimony that docks are subjected to significant stresses from rapidly rising and falling lake levels, wind, waves and/or freezing conditions. While accepting his opinion that narrow, floating walkways are more unstable than wider, fixed docks, are subjected to twisting forces, and that he wouldn't build what Kaseburg is proposing, the hearing officer is nevertheless unable to conclude that Ferguson's design falls short of the regulatory requirement for durability.

Aesthetics, it is said, is judged from the eye of the beholder. Kaseburg's sense of aesthetics is presumably enhanced by his ability to look out on his dock and watercraft from his living room, while Congleton's is concurrently diminished by that same view.

Restricted access and hazards aside, there is nothing so unusual about Kaseburg's proposal that would lead to an objective finding that it would palpably detract from the beauty of the area any more than any other dock.

There was insufficient evidence presented in the hearing to render findings regarding the possible affect of this proposal on fish and wildlife habitat, aquatic life or water quality.

## **VI. Conclusions of Law**

1. The IDL has jurisdiction to process Holman's application for the encroachment permit.
2. The IDL was required to issue notice to neighboring property owners regarding Kaseburg's application, and Congleton timely filed an objection.
3. Idaho Code §58-1305(a) and associated case law requires approval of Kaseburg's application in the absence of "most unusual circumstances," or if the permit "may" infringe upon the littoral rights of an adjacent property owner.

## **20. FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER**

4. Restriction of more than one-half of boating access to the Cove by the combination of an existing encroachment and Kaseburg's proposed encroachment presents the most unusual of circumstances to require denial of the application.

5. Kaseburg's requested encroachment must be denied on the basis that it appears that it may infringe upon Congleton's littoral rights.

6. Kaseburg's requested encroachment must be denied on the basis that it could create a navigational hazard to the general boating public particularly during low-light, low-water conditions characteristic of the winter months.

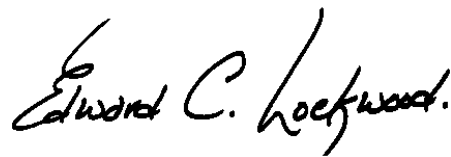
#### **VII. Preliminary Order**

Based on the foregoing Findings of Fact and Conclusions of Law, Kaseburg's application for the requested encroachment permit is hereby **DENIED**.

#### **VIII. Notification**

This Preliminary Order is issued subject to the IDL Director's delegation of authority as stated in the Notice of Appointment of Hearing Officer dated June 29, 2015. Please refer to that Notice, Idaho Code §58-1305 and IDAPA 20.03.04.025 regarding appeal rights and procedures.

DATED: September 22, 2015.



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Edward C. Lockwood  
Hearing Officer

## CERTIFICATE OF MAILING

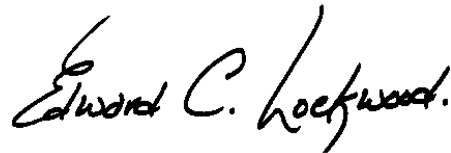
I HEREBY CERTIFY that a true and correct copy of the foregoing Findings of Fact, Conclusions of Law and Preliminary Order was forwarded to the following parties by the method stated below on September 22, 2015.

Via ELECTRONIC MAIL:

Steven J. Schuster: [steve.schuster@ag.idaho.gov](mailto:steve.schuster@ag.idaho.gov)

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Edward C. Lockwood  
Hearing Officer