

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

In the Matter of:	)	Case No. CC-2016-PUB-22-002
	)	
REVOCATION OF ENCROACHMENT	)	<b>FINAL ORDER</b>
PERMIT L-95-S-4938	)	
	)	
SHIRLEY FREEMAN, PERMITEE.	)	
_____	)	

**I. INTRODUCTION AND ADOPTION OF RECOMMENDED ORDER AND  
ORDER ON PETITION FOR RECONSIDERATION**

This is a final order issued by the Director of the Idaho Department of Lands (“IDL”). The Hearing Officer issued the Recommended Order after the contested case hearing in this matter on March 31, 2017, recommending the revocation of Encroachment Permit L-95-S-4938, no assessment of a civil penalty, and no award attorney fees. Shirley Freeman (“Permittee”) filed a petition for reconsideration with the Hearing Officer on April 11, 2017, which the Hearing Officer denied on April 28, 2017.

Permittee filed a written answer taking exception to the Recommended Order with the Director on May 16, 2017.<sup>1</sup> IDL filed a response on June 6, 2017. The arguments raised in Permittee’s exceptions filed with the Director largely mirror the arguments raised in Permittee’s petition for reconsideration before the Hearing Officer. The Director finds that a hearing on Permittee’s exceptions is unnecessary in this matter. *See* IDAPA 20.01.01.720.02.c.

The Director has freely reviewed the record for this contested case and the written submissions of Permittee and IDL. Based on this review, the Director fully agrees with and hereby affirms and adopts the Recommended Order and the Order on Petition for

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<sup>1</sup> Permittee faxed an “answer” to the Director, the Hearing Officer, the Deputy Director, and IDL. The content of these filing were largely duplicative.

Reconsideration of Recommended Order in their entirety. All of the factual findings and legal conclusions in the Recommended Order and the Order on Petition for Reconsideration, which are attached hereto, are hereby fulling incorporated by reference into this Final Order.

## **II. ORDER**

1. Encroachment Permit L-95-S-4938 is hereby revoked.
  - a. Permittee has ninety (90) days from the date this order is served to remove all encroachments, including the float home, docks, and debris from Coeur d'Alene Lake, adjacent to: Parcel Number 021600010060, Lot Number 6, Block Number 1, Emerald Shores Tracts Addition; Section 3, Township 49 North, Range 3 West; Boise Meridian: Kootenai County.
  - b. Permittee shall restore the affected area of Coeur d'Alene Lake to as near its condition immediately prior to the encroachment as possible.
  - c. Failure to remove such encroachments and restore the affected lake area within the specified time will result in the Department of Lands initiating legal action for the removal of unauthorized encroachments and the restoration of Lake Coeur d'Alene as provided in Idaho Code sections 58-1308 and 58-1309 and for attorney fees and costs associated with such legal action.
2. No civil penalty is assessed against Permittee.
3. The request for attorney fees and costs is denied.

## **III. PROCEDURES FOR FINAL ORDERS**

1. 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* I.C. § 67-5246(4); IDAPA 20.01.01.740.02.a.

2. Pursuant to Idaho Code sections 67-5270 and 67-5272, 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: (1) a hearing was held; (ii) the final agency action was taken; (iii) the party seeking review resides; or (iv) the real property or personal property that was the subject of the agency action is attached. IDAPA 20.01.01.740.02.b.
3. An appeal must be filed within twenty-eight (28) 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* I.C. § 67-527. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal. IDAPA 20.01.01.740.02.c.

DATED this 7<sup>th</sup> day of July, 2017.

  
THOMAS M. SCHULTZ, JR.  
Director, Idaho Department of Lands

**CERTIFICATE OF SERVICE**

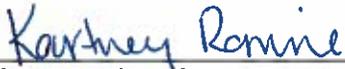
I HEREBY CERTIFY that on this 7<sup>th</sup> day of July, 2017, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

Shirley K. Freeman  
1513 N. 3rd Street  
Cœur d'Alene, ID 83814

- U.S. Mail, Postage Prepaid
- Certified Mail
- Hand Delivery
- Email:

Angela Schaer Kaufmann  
Deputy Attorney General  
P.O. Box 83720  
Boise, ID 83720

- Statehouse Mail
- Certified Mail
- Hand Delivery
- Email:  
[angela.kaufmann@ag.idaho.gov](mailto:angela.kaufmann@ag.idaho.gov)

  
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Kourtney Romine  
Administrative Assistant

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

In the Matter of:	)	Case No. CC-2016-PUB-22-002
	)	
REVOCATION OF ENCROACHMENT	)	<b>RECOMMENDED ORDER</b>
PERMIT L-95-S-4938	)	
	)	
SHIRLEY FREEMAN, PERMITTEE.	)	
_____	)	

**I. INTRODUCTION AND BACKGROUND**

Hearing Officer Scott Corkill prepared this Recommended Order following the contested case hearing in this matter. The Recommended Order is submitted to the Director of the Idaho Department of Lands (“IDL”) for review pursuant to Idaho Code § 67-5243(1)(a). The final decision in this matter, and the decision to adopt or reject the Recommended Order, in whole or in part, shall be made by the Director.

On December 19, 2016, IDL filed a Verified Complaint for Revocation of Encroachment Permit and Civil Penalties against Shirley Freeman (“Permittee”). In the Verified Complaint, IDL alleged that Permittee was in violation of the terms of encroachment permit L-95-S-4938, the Lake Protection Act Title 58, Chapter 13 Idaho Code (“LPA”), and IDL’s Rules for the Regulation of Beds, Waters, and Airspace over Navigable Waters in the State of Idaho, IDAPA 20.03.04.000, *et seq.* (“IDL’s Encroachment Rules”). The Verified Complaint sought the revocation of the encroachment permit, the assessment of civil penalties against Permittee and an award of costs and attorney fees to IDL. This complaint initiated a contested case proceeding under IDAPA 20.03.04.07.

In accordance with IDL’s Rules for Practice and Procedure, IDAPA 20.01.01 (“IDL’s Procedural Rules”) and the Idaho Administrative Procedures Act, Idaho Code § 67-5201 *et seq.*

("APA"), a contested case hearing was held at IDL's Mica Supervisory Area Office in Coeur d'Alene, Idaho, on January 19, 2017. Both Permittee and a representative for IDL were present at the hearing and each had opportunity to offer testimony and present evidence to be included in the Record for Decision. *See* IDL's Exhibit List (Jan. 11, 2017) (including Exs. A–R); Hr'g Tr. 78:5–90:19 (Jan. 19, 2017) (admitting Permittee's Exs. 1–5). At the hearing, testimony was presented from Jim Brady (IDL's Resource Supervisor for North Idaho), Permittee, Roy Davidson (interested third party), and John Condon (interested third party). *See generally* Hr'g Tr. At the request of IDL, a Post Hearing Brief was allowed to be submitted by both parties. Hr'g Tr. 114:12–119:10; Order Setting Schedule for Post-Hearing Briefing (Jan 27, 2017). On February 13, 2017, a Post Hearing Brief was received from Angela Kaufmann, Deputy Attorney General, on behalf of IDL. Permittee submitted a faxed statement post-hearing on February 9, 2017.

## II. FINDINGS OF FACT

1. Lake Coeur d' Alene in Kootenai County, Idaho is a navigable lake as defined by Idaho Code § 58-1302(a) and IDAPA 20.03.04.010.24.
2. On September 29, 2004, an encroachment permit (L-95-S-4938A) ("Permit") was issued to David Ray Clark to relocate, install and maintain an existing 50'X18' combination float home and boat garage, one each 50'X5' and 5'X24' floating docks with 2 piling on Lake Coeur d'Alene, adjacent to Parcel No. 021600010060, Lot No. 6, Block No. 1, Emerald Shores Tracts Addition; Section 3, Township 49 N., Range 3 W.; Boise Meridian: Kootenai County. Ex. A at 2.
3. On June 7, 2007, IDL assigned Permit to Permittee, with all previous provisions in effect. Ex. A at 2.
4. Permit included the following provisions relevant to this proceeding:

- a. Section 1: “All applicable provisions of [IDL’s Encroachment Rules] are incorporated herein by reference and a part hereof.” Ex. A at 3.
  - b. Section 10: “White bead foam flotation shall be completely encased in a manner that will maintain the structural integrity of the foam. The encasement shall be resistant to the entry of rodents.” Ex. A at 4.
  - c. Section 16: “The Permittee shall maintain the structure or work authorized herein in a good and safe condition and in accordance with the plans and drawings attached hereto.” Ex. A at 4.
  - d. Section 18: “This permit is issued contingent upon the Permittee’s agreement to enter into a sovereign land lease when notified by the director that a lease is necessary to occupy state-owned lake or riverbeds. The lease will be consistent with other sovereign land leases and policy adopted by the State Board of Land Commissioners.” Ex. A at 4.
5. On July 10, 2007, Permittee was assigned Submerged Land Lease No. B-2204 (“Lease”) originally issued to David Ray Clark, for the use of the lands described in the Permit. Ex. R at 1–3.
6. On August 24, 2011, IDL sent permittee a Notice of Violation (“NoV”), noting Permittee’s float home was “severely deteriorating” and it was “adding material to the lake as it is falling apart,” which may be hazardous to navigation. Ex. F. Jim Brady testified that the NoV was based on his personal observations of the condition of the float home and related encroachments. Hr’g Tr. 11:19–21.

7. In the Official Record, in Exhibit F, there is a hand written note on the above mentioned NoV dated August 26, 2011, that states that Permittee is “working to correct problems on float home,” initialed “BB.” Ex. F.

8. In April, 2012, IDL received pictures of Permittee’s float home from an adjacent land owner showing the float home partially collapsed in the lake with debris in the lake. Hr’g Tr. 12:4–10; Ex G; Ex. H.

9. On June 4, 2012, IDL sent Permittee a NoV and Cancellation of her Submerged Land Lease, stating IDL was cancelling the Lease and beginning the permit revocation process due to the “non-maintenance and blight you have allowed to occur with your float home on Lake Coeur d’ Alene”. Ex. I. IDL also instructed Permittee to immediately remove trash and debris from Lake Coeur d’ Alene and that failure to remove the debris by June 22, 2012, would result in this case being forwarded to the Attorney General’s office to seek injunctive relief and civil penalties. Ex. I. Jim Brady testified that the trash and debris from Lake Coeur d’Alene was not removed by the June 22, 2012. Hr’g Tr. 13:15–22. IDL did not seek to cancel the Lease or revoke the Permit at that time.

10. Permittee’s Lease was set to expire on December 31, 2013. Ex. R at 3.

11. On September 18, 2013, Jim Brady documented that he and Roger Johnson (another IDL employee) “went to the Freeman float home to verify it was all cleaned up from collapse prior to offering to renew lease.” Ex. J at 1. Brady noted that the float home was “straightened up a bit but still a disaster” and recommended that IDL cancel the Lease that is expiring on December 31, 2013, and order removal from the lake. Ex. J at 1.

12. Jim Brady testified that he took pictures of Permittee’s float home during the September 2013 inspection. Hr’g Tr. 14:16–15:6. Those pictures are included in the record at page 2 of

Exhibit J. As testified by Jim Brady, those photos show several issues with Permittee's float home and related encroachments, including: debris and open white bead foam in the lake, numerous unauthorized docks, the collapse and removal of the boat garage, and the deteriorated condition of the remaining float home. Hr'g Tr. 15:8–17:8, 19:10–21; Ex. J at 2.

13. Jim Brady testified that the open white bead foam was particularly an issue because once it is out of its casing it will break up into small beads that are not biodegradable. Hr'g Tr. 15:20–25.

14. IDL did not renew Permittee's Lease. Ex. B at 3.

15. On April 1, 2016, IDL sent a Notice of Noncompliance with Permit No. L-95-S-4938 ("NoN") to Permittee. Within this notice, Jim Brady stated that during an inspection on March 23, 2016, he noted numerous violations the Permit's terms and set out steps Permittee needed to take to bring her encroachment into compliance. Ex. B. Specifically, the NoN informed Permittee that she was out of compliance with IDL's Encroachment Rules and the terms of the Permit, including:

- a. Section 10 of the Permit and IDAPA 20.03.04.015.13.i because there was unencased white bead foam on and under docks and floating in the lake around the encroachments. Ex. B at 2.
- b. Section 16 of the Permit because a portion of the float home/boat garage has collapsed into the lake and deposited large amounts of debris in the lake. Additionally, the float home had detached from the pilings and drifted into the adjacent land owner's littoral area. Ex. B at 2.
- c. Section 18 of the Permit because IDL had not renewed Permittee's land lease because of the dilapidated condition of the float home and encroachments, and

such a lease is required for the float home encroachment permit. Ex. B. at 2; *see also* IDAPA 20.03.04.055 (IDL may require a submerged land lease as a condition of the encroachment permit).

16. The April 2016 NoN also informed Permittee that she had 30 days from the receipt of the notice to complete a list of steps to bring the encroachments into compliance including: (1) completely encase any white bead foam used to support the structures, (2) remove all other white bead foam from the encroachments and surroundings waters, (3) move the float home and secure it to the pilings, and (4) remove all docks and debris not authorized by the encroachment permit. Ex. B. at 3.

17. On April 19, 2016, IDL received a letter of complaint from an adjacent land owner, who stated that the Permittee's float home and docks had broken free from their moorings and were resting against his dock and shoreline. Ex. L.

18. On April 29, 2016, Permittee submitted correspondence to IDL, stating that she had taken measures to remedy the violations cited in the April 1 NoN, including securing the structures to the pilings, completely removing white bead foam, repairing the structure of the float house, and removing debris from the encroachments. Ex. K. Permittee provided no evidence to support these statements.

19. On September 23, 2016, IDL sent Permittee a Notice of Cancellation for Lease B-2204/Notice of Proposed Permit Revocation, Encroachment Permit L-95-S-4938. Ex. C. This notice informed Permittee that the Lease would be cancelled based on continued violations of the terms of the Lease, Permit, the LPA, IDL's Encroachment Rules, and IDL's Rules Governing Leases on State Owned Submerged Lands and Formerly Submerged Lands (IDAPA 20.03.17.000 *et seq.*). Ex. C at 1. Particularly, the Notice of Cancellation stated that Permittee

was in violation of Sections 6 and 7 of the Lease, which required that Permittee not use the leased site in any manner that would cause waste and to keep the leased site clean and free of trash, garbage, and litter. Ex. C. at 2. The notice also stated that Permittee was in violation of Section 12 of the Lease because she had not provided proof of adequate insurance. Ex. C at 3. The notice cited the history of violations, beginning in 2011, and stated that those violations have either only partially or not at all been rectified. Ex. C at 1–3.

20. The Notice of Proposed Permit Revocation stated that Permittee was still not in compliance with Sections 10, 16, and 18 of the Permit because white bead foam was still not fully encased, the float home was in a decrepit condition, there was debris at the bottom of the lake, Permittee’s lease had not been renewed, and Permittee had at least one unpermitted dock. Ex. C at 4–5. The Notice provided that Permittee had 30 days from receipt of the notice to meet the following requirements to bring the float home into compliance in order to avoid revocation of the Permit: (1) Remove the decrepit float home and any related structure or debris or fully replace or reconstruct the float home and any and all related structures; (2) remove all unauthorized docks and related structures; (3) remove any and all debris including white bead foam, trash and pieces of the float home from the lake; (4) provide proof that all white bead foam used to support the structures has been completely encased in a manner that will maintain the structural integrity of the foam and be resistant to the entry of rodents; and (5) take all steps necessary to obtain and maintain a submerged land lease.<sup>1</sup> Ex. C. at 5.

21. On or about October 9, 2016, Permittee responded to the September 23 Notice. Ex. D. Permittee stated that she had complied with previous demands from IDL by removing the white bead foam and resealing the float home and gave reasons why some requirements had not been

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<sup>1</sup> The Notice also provided that Permittee could avoid cancellation of the submerged land lease by meeting the same requirements as set forth above and providing proof of adequate insurance. Ex. C at 3–4.

met. Ex. D at 2. In the document, she stated that “every time I have been notified, only twice that I remember, I did exactly what was asked or had workers follow your requested guidelines” Ex. D at 2. Later Permittee states, “I work every summer to make things right. It is difficult when a person cannot stand upright because of very large boats making waves bigger and bigger”. Ex. D at 2. At the hearing, Permittee also testified that she had removed the white bead foam and resecured the float home. Hr’g Tr. 54:21–58:18.

22. In response to Permittee’s October 9 response, Jim Brady and IDL Resource Specialist Mike Ahmer conducted an inspection of Permittee’s encroachment on October 13, 2016. Ex. O. In the inspection report, they noted that the following issues had not been rectified or had since been created: (1) “decrepit float home is still present;” (2) “[a new] portable gazebo is on dock with multiple recliner chairs under it” (3) “90 percent of usable deck space is covered with stuff” (4) “Loose white beaded foam;” (5) “Docks and float homes are secured with multiple ¼” poly ropes, 1/8” cables and coax or electrical cables;” (6) “[n]ew unauthorized docks are present along with a tire/log breakwater as well as the previously identified unauthorized slip dock and other docks”; and (7) “numerous recliners, ladders, bed frames, plates and other unidentifiable debris on the bed of the lake”. Ex. O. at 1. Accompanying the inspection report were several photos evidencing the above issues. Ex. O at 2.

23. On October 21, 2016, IDL replied to permittee’s October 9, 2016 correspondence and cited the results of the October 13, 2016 inspection. Ex. E. IDL’s reply attempted to clarify points that were questioned in the October 9, 2016 response, and also cited, in detail, Permittee’s violations of Idaho Code § 58-1301 (unauthorized docks), IDAPA 20.03.04.015.13.f (structures shall be adequately secured to pilings), and Sections 16 (structures shall be maintained in a good condition) and 18 (submerged land lease required) of the Permit. Ex. E at 3–4. IDL then cited

the necessary requirements to bring Permittee's encroachment into compliance; the same requirements set forth in the September 23 Notice. IDL also extended the time Permittee had to remedy the violations to November 10, 2016. Ex. E at 4.

24. On November 8, 2016, Permittee submitted a hand written letter to IDL stating that she was in the process of trying to get workers out to the site to "remedy the situation" and stating that "we did not know the boat garage collapsing got us out of compliance" and also requesting a 10 day extension. Ex. P.

25. On November 16, 2016, IDL employees Mike Ahmer and Amidy Fuson performed an inspection of Permittee's encroachment. The report stated that while most of the refuse had been cleaned up from the decks of the docks, the decrepit float home still remained, loose white beaded foam was still present underneath the float home as well as within its sidewalls, and the unauthorized docks were still present, along with a tire/log breakwater. Ex. Q. at 1. They also observed numerous recliners, ladders, bed frames, plates and other unidentifiable debris still on the bed of the lake. Ex. Q. at 1. Included in the report was a hand drawn inventory of the various docks at the encroachment site and several photographs evidencing the above issues. Ex. Q at 2-3.

26. Concluding that Permittee had failed to take the appropriate corrective action, IDL cancelled Permittee's submerged land lease and filed the Verified Complaint seeking revocation of the Permit.

27. At the hearing, Permittee testified that she had hired workers to clean the debris from the bottom of the lake and to remove the unpermitted docks sometime on or about January 13, 2017.<sup>2</sup> Hr'g Tr. 59:17-62:24. Permittee presented a photo to enter into the record, reportedly

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<sup>2</sup> Permittee did not testify as to the date of the cleanup but had presented into evidence a police report dated January 13, 2017, which based on her testimony corresponded with the date of the alleged cleanup. Ex. 4; Hr'g Tr. 62:11-24.

showing additional cleanup work and the state of the encroachment site as of January 16, 2017. Ex. 5. The photo shows Permittee's encroachment covered in snow. Ex. 5. From the photo it is not possible to determine whether un-encased white bead foam or debris in the lake is still present. Jim Brady testified at the hearing that he believed the encroachment depicted in Ex. 5 was still in noncompliance as it appeared to include unpermitted docks, and he could not see if the debris had been removed from the bottom of the lake. Hr'g Tr. 96:13-20.

### III. ANALYSIS AND CONCLUSIONS OF LAW

#### A. Legal Authority

1. The LPA "requires that all encroachments upon, in or above the beds or waters of navigable lakes of the state be regulated" and that no encroachment be made on any navigable lake in the state unless approval has been given as provided in the Act. I.C. § 58-1301. This is to ensure "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." *Id.*

2. The Idaho Board of Land Commissioners ("the Board") is granted authority to regulate, control, and permit encroachments in or above the beds or waters of navigable lakes within the State. I.C. § 58-1303. The Board exercises its authority through the instrumentality of IDL. *See* I.C. § 58-101, I.C. § 58-119. "Therefore, the duty of administering the Lake Protection Act falls upon the IDL." *Kaseburg v. State, Bd. of Land Comm'rs*, 154 Idaho 570, 578, 300 P.3d 1058, 1066 (2013).

3. IDL's authority under the LPA includes the authority to adopt such rules and regulations necessary to effectuate the purposes and policies of the LPA. I.C. § 58-1304. Under this

authority, and pursuant to Chapter 52, Title 67 of the Idaho Code, IDL promulgated IDL's Encroachment Rules. IDAPA 20.03.04.000.

4. IDL's decision in this matter must be supported by substantial evidence on the record. I.C. § 67-5279(3). Substantial evidence is "relevant evidence that a reasonable mind might accept to support a conclusion." *Chisholm v. Idaho Dep't of Water Res.*, 142 Idaho 159, 164, 125 P.3d 515, 520 (2005). Such evidence is "less than a preponderance of evidence, but more than a mere scintilla." *Id.* "Substantial evidence need not be uncontradicted, nor does it need to necessarily lead to a certain conclusion; it need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusion as the fact finder." *Id.*

5. Additionally, IDL's decision must not be an abuse of discretion. I.C. § 67-5279(3). An agency's discretionary decision is within the bounds of its discretion if the agency (1) perceived the issue in question as discretionary, (2) acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and (3) reached its own decision through an exercise of reason." *Rangen, Inc. v. Idaho Dep't of Water Res.*, 160 Idaho 251, 255, 371 P.3d 305, 309 (2016).

#### **B. Revocation of Encroachment Permit**

6. IDL "may institute an administrative action to revoke a lake encroachment permit for violation of the conditions of a permit, or for any other reason authorized by law." IDAPA 20.03.04.080.07(a). In construing a statute, words will be given their common and ordinary meaning. *Rife v. Long*, 127 Idaho 841, 848, 908 P.2d 143, 150 (1995). The word "may" appearing in legislation has been interpreted by the Idaho Supreme Court "as having the meaning or expressing the right to exercise discretion." *Id.* "Administrative rules are interpreted the same way as statutes." *Kimbrough v. Idaho Bd. of Tax Appeals*, 150 Idaho 417, 420, 247 P.3d 644, 647

(2011). Therefore, if Permittee is found to be in violation of the conditions of the Permit, it is within the discretion of IDL to revoke the Permit.

7. An encroachment permit may not be revoked unless the permittee has been given notice and opportunity for an appropriate contested case conducted in compliance with the Idaho chapter 52, Title 67 of the Idaho Code and IDL's Procedural Rules. IDAPA 20.03.04.080.07(b); I.C. § 67-5254(1). The contested case proceeding held on this matter meets those requirements.

8. The Verified Complaint cites four (4) violations justifying revocation of Permit L-95-S-4938;

a. failing to completely encase the white bead foam flotation structures in a manner that maintained the structural integrity of the foam, in violation of Section 10 of the Permit and IDAPA 20.03.04.015.i; (Complt. ¶ 36)

b. failing to maintain the float home in a good and safe condition and in accordance with the plans attached to the permit, in violation of Section 16 of the Permit; (Complt. ¶ 37)

c. failing to take the necessary steps to avoid the cancellation of the Lease, in violation of Section 18 of the Permit and IDAPA 20.03.04.55.01; (Complt. ¶ 38) and

d. placing an unpermitted dock and breakwater in Lake Coeur d'Alene near her float home in violation of IDAPA 20.03.04.012.02 and Idaho Code section 58-1301. (Complt. ¶ 39).

9. The record supports IDL's allegations that Permittee is in violation of the above Permit terms and Encroachment Rules.

10. Section 10 of the Permit requires that “[w]hite bead foam flotation shall be completely encased in a manner that will maintain the structural integrity of the foam. The encasement shall be resistant to the entry of rodents.” Ex. A at 4. The requirement in IDAPA 20.03.04.15.i is identical to that stated in Section 10. Section 16 provides that “[t]he Permittee shall maintain the structure or work authorized herein in a good and safe condition.” Ex. A at 4.

11. Since 2011, IDL has received complaints and informed Permittee that the float home is in a decrepit state and that debris, including un-encased white bead foam, was falling off the structure and polluting Lake Coeur d’Alene. *See* Ex. B; Ex. C; Ex. E; Ex. F; Ex. I; Ex. J. The record includes ample documentary evidence of the continued decrepit state of the float home and failure to keep the structure in a safe condition: Exs. G and H (evidencing trash on docks and collapse of the boat garage in 2012); Ex. J (showing trash and debris on the encroachments and in the lake in 2013); Ex. B (stating that a portion of the float home/boat garage collapsed and has left debris in the lake in April 2016); Ex. O (showing decrepit float home still present, docks and structures covered in debris, and submerged debris on the bed of the lake in October 2016). The record also provides significant evidence of Permittee’s failure to remove and/or encase the white bead foam supporting the structure, even though Permittee told IDL that she had removed the white bead foam on several occasions. *See* Ex. B; Ex. D; Ex. J at 2; Ex. K; and Ex. O at 2.

12. These issues were still present when IDL performed its inspection on November 16, 2016. The IDL Inspection Report dated November 16, 2016 states that while most of the refuse had been cleaned up from the decks of the docks, the decrepit float home still remained, and loose white beaded foam was still present underneath the float home as well as within its sidewalls. Ex. Q at 1. The report also stated that numerous recliners, ladders, bed frames, plates

and other unidentifiable debris still on the bed of the lake. Ex. Q. at 1. The photographs attached the report evidence these findings. Ex. Q at 3.

13. As stated in notices IDL sent Permittee, the submerged debris in Lake Coeur d'Alene is a significant navigational hazard. Ex. B; Ex. C at 4. Additionally such debris, including the uncased white bead foam, pollutes the lake, negatively impacting water quality, aquatic life, and the aesthetic beauty of the lake. These are the exact types of hazards that the LPA was enacted to protect against. *See* I.C. § 58-1301. Therefore, Permittee is in violation of Sections 10 and 16 of the Permit and IDAPA 20.03.04.15.i.

14. Section 1 of the Permit incorporates IDL's Encroachment Rules into the terms of the Permit. Ex. A at 3. IDAPA 20.03.04.012.02 provides that "[n]o encroachment on, in or above the beds or water of any navigable lake in the state shall hereafter be made unless approval therefore has been given as provided in these rules." *See also* I.C. § 58-1301 ("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.").

15. The Permit gave permission to Permittee to maintain the 50'x18' combination float home/boat garage and one each 50'x5' and 5'x24' floating dock with two pilings. Ex. A at 2. From 2013 to 2016, IDL documented unpermitted docks at Permittee's encroachment site. Ex. B; Ex. C; Ex. J; Ex. O; Ex. Q. The November 16, 2016 Inspection report includes an inventory of docks at the encroachment site, depicting six (6) separate docks (not including the float home) all with different parameters than the docks allowed under the terms of the Permit. Ex. Q at 2. Therefore, the Permittee is in violation of IDAPA 20.03.04.012.02, which is incorporated into the terms of the Permit under Section 1.

16. Section 18 of the Permit provides that “[t]his permit is issued contingent upon the Permittee’s agreement to enter into a sovereign land lease.” Permittee’s submerged land lease expired on December 31, 2013 and was never renewed by IDL. Ex. B at 3. After the November 16, 2016 inspection, Permittee was found to have failed to take the required action to avoid cancellation of the lease (which included rectifying the above violations) and IDL sent Permittee notice that lease was cancelled, effective January 18, 2017. Compl. ¶ 32. The Permittee does not have a valid submerged land lease and is therefore in violation of Section 18 of the Permit.

17. Permittee testified at the hearing and introduced a photo of the encroachment site taken in January 2017 (Ex. 5), alleging that work had been done to comply with IDL’s demands in the Verified Complaint. Hr’g Tr. 59:17–62:24. The photo does little to corroborate Permittee’s testimony as it shows the encroachment site covered in snow and was taken too far away to see whether debris had been removed from the lake. Ex. 5. Additionally, as Jim Brady testified, Exhibit 5 appears to show that Permittee is still in noncompliance as the decrepit float home and unpermitted docks are still present. Hr’g Tr. 96:13-20. In summary, no reliable evidence has been presented or submitted to the Official Record that the Permittee has corrected the above issues, which have persisted at Permittee’s encroachment site for well over three years.

18. Based on the foregoing, I recommend that the Permit be revoked because Permittee is in violation of Sections 10, 16, and 18 of the Permit and IDAPA 20.03.04.012.02 and 20.03.04.015.i.

### **C. Civil Penalties**

19. Any person who violates any provision of the LPA or “any valid and authorized regulation, rule, permit or order of the board,. . . shall be subject to a civil penalty of not less than

one hundred fifty dollars (\$150) nor more than two thousand five hundred dollars (\$2500).” I.C. § 58-1308(1); *see also* IDAPA 20.03.04.080.04.

20. “Such civil penalty *may* be assessed by the board in conjunction with any other administrative action; provided, that no civil penalty shall be assessed unless the person was given notice and opportunity or a hearing pursuant to the administrative procedure act [APA].” I.C. § 58-1308(1) (emphasis added).

21. A person is subject to a civil penalty if found in violation of any provision of the LPA, its implementing regulations, or an encroachment permit after a contested case proceeding held in compliance with the APA. However, if a violation is found, the decision to assess a fine and to what amount (as long it falls within the statutorily prescribed range) falls within the discretion of IDL. *See Rife*, 127 Idaho at 848.

22. Permittee is in violation of the terms of the Permit and IDL’s Encroachment Rules. However, where the Permit will be revoked and the encroachment removed from the lake, a civil penalty would do little to deter future violations. Additionally, no argument has been presented in this case addressing why a civil penalty would be appropriate or for what amount would be appropriate.

23. Therefore, I recommend that IDL assess no civil penalty against Permittee.

#### **D. Attorney Fees**

24. “The awarding of attorney fees in Idaho is dependent upon a statute or rule of the court permitting the awarding of such fees.” *Valentine v. Perry*, 118 Idaho 653, 655, 798 P.2d 935, 937 (1990). “The Idaho Legislature has authorized the award of attorney fees in only a few clearly defined circumstances.” *Idaho Power Co. v. Idaho Pub. Utilities Comm’n*, 102 Idaho 744, 751, 639 P.2d 442, 449 (1981).

25. IDL requested that it be awarded its costs and attorney fees incurred in this proceeding under Idaho Code § 58-1308(3). Compl., Prayer for Relief ¶ 3.

26. Idaho Code section 58-1308(3) provides in part:

any person who has been determined to have violated the provisions of [the LPA] or any valid and authorized regulation, rule, permit or order of the board, shall be liable for *any expense* incurred by the state in enforcing [the LPA], or in enforcing or terminating any nuisance, source of environmental degradation, cause of sickness or health hazard.

(emphasis added). This provision was added to section 58-1308 in 2008. 2008 Idaho Sess. Laws 919.

27. The Idaho Supreme Court has previously held that the use of the phrase “costs and expenses” was not specific enough to provide for an award of attorney fees. *Valentine*, 118 Idaho at 655, 798 P.2d at 937 (“Idaho Rule of Civil Procedure 54(d)(3) additionally provides only for ‘costs and expenses.’ There is no provision contained in that rule for the awarding of attorney fees.”).

28. The Supreme Court’s holding in *Valentine* had been established for 18 years when the legislature amended section 58-1308 to add subsection (3). “In enacting legislation, the Legislature is deemed to have full knowledge of existing judicial decisions.” *Callies v. O’Neal*, 147 Idaho 841, 847, 216 P.3d 130, 136 (2009).

29. Idaho Code section 58-1308(3) only provides for “expenses.” There is no express provision providing for attorney fees or costs. If the legislature had intended to include an award of attorney fees or costs under section 58-1308(3) it knew how to do so. *See e.g.* I.C. §§ 6-324, 6-2107, 12-120, 12-121, 45-513.

30. As stated by the Idaho Supreme Court in *Idaho Power Co.*, “[i]t is clear that the Idaho legislature has provided for the award of attorney fees specifically when it so intends, and only when it so intends. The same is true for costs.” 102 Idaho at 751, 639 P.2d at 449. The express

terms of Idaho Code section 58-1308(3) do not provide for an award of attorney fees or costs incurred in an administrative proceeding.

31. Therefore, I recommend that the request for costs and attorney fees under Idaho Code section 58-1308 be denied.

#### **IV. RECOMMENDATION**

For the foregoing reasons and based on the evidence in the record, I recommend that the Director of IDL issue a final order (1) revoking Lake Encroachment Permit No. ERL-95-S-4938, (2) denying the request to impose a civil penalty against Permittee, and (3) denying the request for attorney fees and costs.

#### **V. PROCEDURES FOR RECOMMENDED ORDERS**

This is a Recommended Order of the hearing officer. It will not become final without action of the Director. Any party may file a petition for reconsideration of this Recommended Order with the hearing officer issuing the order within fourteen (14) days of the service date of this order. The hearing officer issuing this Recommended Order will dispose of any 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 § 67-5243(3); IDAPA 20.01.01.720.02(a).

Within twenty-one (21) days after (a) the service date of this Recommended Order, (b) the service date of a denial of a petition for reconsideration from this Recommended Order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this Recommended Order, any party may in writing support or take exceptions to any part of this Recommended Order and file briefs in support of the party's position on any issue in the proceeding. IDAPA 20.01.01.720.02(b).

Written briefs in support of or taking exceptions to the Recommended Order shall be filed with the Director. Opposing parties shall have twenty-one (21) days to respond. The Director may schedule oral argument in the matter before issuing a final order. The Director will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. IDAPA 20.01.01.720.02(c).

DATED this 31<sup>st</sup> day of March, 2017.



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SCOTT CORKILL  
Hearing Officer

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this \_\_\_ day of March, 2017, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

Kourtney Romine  
300 N. 6th Street, Suite 103  
Boise, ID 83702

- U.S. Mail, Postage Prepaid
- Hand Delivery
- Facsimile:
- Email: [kromine@idl.idaho.gov](mailto:kromine@idl.idaho.gov)

Shirley K. Freeman  
1513 N. 3rd Street  
Cœur d'Alene, ID 83814

- U.S. Mail, Postage Prepaid
- Hand Delivery
- Facsimile:
- Email:

Angela Schaer Kaufmann  
Deputy Attorney General  
Natural Resources Division  
700 W. State Street, 2nd Floor  
P.O. Box 83720  
Boise, ID 83720

- U.S. Mail, Postage Prepaid
- Hand Delivery
- Facsimile:
- Email: [angela.kaufmann@ag.idaho.gov](mailto:angela.kaufmann@ag.idaho.gov)



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Scott Corkill  
Hearing Officer

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

In the Matter of:	)	Case No. CC-2016-PUB-22-002
	)	
REVOCATION OF ENCROACHMENT	)	<b>ORDER ON PETITION FOR</b>
PERMIT ERL-95-S-4938	)	<b>RECONSIDERATION OF</b>
	)	<b>RECOMMENDED ORDER</b>
SHIRLEY FREEMAN, PERMITEE.	)	
.....	)	

**I. INTRODUCTION AND BACKGROUND**

On March 31, 2017, Hearing Officer Scott Corkill issued a Recommended Order following the contested case hearing in this matter. The Recommended Order recommended that the Director of the Idaho Department of Lands (“IDL”) issue a final order revoking Encroachment Permit L-95-S-4938 (“Permit”). *Recommended Order* at 18 (March 31, 2017).

As provided in Idaho Code section 67-5243(3) and IDAPA 20.01.01.720.02(a), and included in the Recommended Order, the parties had fourteen (14) days to file a petition for reconsideration of the Recommended Order with the Hearing Officer. *See Recommended Order* at 18.

On April 11, 2017, IDL received a fax from Shirley Freeman (“Permittee”).<sup>1</sup> *April 11, 2017 Answer* [hereinafter “*Petition*”]. As this fax appears to be responding to the Recommended Order, it will be treated as a petition for reconsideration.

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<sup>1</sup> The fax included a typed response on a form civil case answer; a copy of the hand drawn inventory of docks at Permittee’s encroachment site prepared by IDL employees during the November 16, 2016, inspection of the site (Ex. Q at 2); a copy of what appears to be drawn plans for the Permit prepared by the original permit owner in 2004, a copy of a letter to Permittee from IDL dated December 19, 2016 informing Permittee that the Submerged Land Lease No-B-2204 is cancelled effective January 18, 2017; and a copy of a letter to Permittee from IDL dated March 17, 2017; and a copy of an assessment notice for Permittee’s property, similar to that submitted by Permittee as Ex. 3 at the hearing in this matter. *Petition* at 5-14. IDL received additional faxes from Permittee on April 12, 2017 and April 13, 2017. Those faxes included the same response filed on April 11, 2017, with additional attachments including the photo of Permittee’s encroachment site submitted during at the hearing as Exhibit 5 and a tax statement from Kootenai County. *April 12, 2017 Answer; April 13, 2017 Answer.*

## II. ANALYSIS

Permittee states in the *Petition* that her current dock configuration is "under the allowed square footage of docks allowed." *Petition* at 3. The Permit allows one each, 50' X 5' and 5' X 24' floating docks. Ex. A at 2. According to the drawing submitted in Permittee's *Petition*, presumably an accurate depiction of the drawing attached to the Permit, it allows the above mentioned floating docks, as well as a 5' X 10' ramp, totaling 420 square feet for the docks and ramp only. *Petition* at 6. The documented docks in the November 16, 2016 Inspection Report (Ex. Q at 2) showed a total of 1646 square feet of docks present at the encroachment site. In neither case was the float home measured. The Permit allows for a 900 square foot float home and boat garage. Ex. A at 2. With the docks and float home, a total of 1320 allowable square feet of encroachment is permitted. *Id.* Without even counting the float home, Permittee is well over the square footage limit.

Additionally, even if Permittee was under the allowed square footage, the six docks documented in the November 16, 2016 inspection are still unpermitted. The Permit allows for 1320 allowable square feet of encroachment maintained in accordance with the plan attached to the Permit. Ex. A at 4. The Permit allowed only two docks with specific parameters and the float home. The six docks documented in the November 2016 inspection do not meet the approved configuration in the permit. This is a violation of IDAPA 20.03.04.012.02, because there are unpermitted docks at the encroachment site.

Permittee also states in the *Petition* that she has had the docks cleared, and cleaned the lake bottom. *Petition* at 3. However, there is no evidence on the record showing that any of this has been done. This statement by Permittee does not contravene the numerous exhibits in the

record showing that there has been debris on the bed of the lake for an extended period of time. See Exs. G, H, J, B, O, and Q.

Permittee also appears to be confused about the violations set forth in the April 26 Notice of Violation (Ex B) and September 2016 Notice of Cancellation and Proposed Permit Revocation (Ex. C). Permittee states "if I had already lost the land lease why were these items in the testimony for the hearing held" on the permit revocation. Petition at 2. The April 26 and September 2016 Notice were relevant to this proceeding because they gave Permittee notice of the terms of the permit that Permittee was in violation of and gave Permittee instructions for curing those violations. Exs. B and C. The failure to cure said violations was the basis for IDL filing the Certified Complaint and initiating a contested case proceeding to revoke the Permit.

### **III. CONCLUSION**

Permittee's petition for reconsideration is denied.

### **IV. PROCEDURE ON RECOMMENDED ORDER**

Within twenty-one (21) days after the service date of this Order denying Permittee's petition for reconsideration of the Recommended Order any party may in writing support or take exceptions to any part of the Recommended Order and file briefs in support of the party's position on any issue in the proceeding. IDAPA 20.01.01.720.02(b).

Written briefs in support of or taking exceptions to the Recommended Order shall be filed with the Director. Opposing parties shall have twenty-one (21) days to respond. The Director may schedule oral argument in the matter before issuing a final order. The Director will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The Director may

remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. IDAPA 20.01.01.720.02(c).

DATED this 27<sup>th</sup> day of April, 2017.

  
\_\_\_\_\_  
SCOTT CORKILL  
Hearing Officer

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 28th day of April, 2017, I caused the foregoing document to be filed with the Court and true and correct copies served on the following parties by the methods indicated:

Kourtney Romine  
300 N. 6th Street, Suite 103  
Boise, ID 83702

- U.S. Mail, Postage Prepaid
- Hand Delivery
- Facsimile:
- Email: [kromine@idl.idaho.gov](mailto:kromine@idl.idaho.gov)

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\_\_\_\_\_  
Kristen Kludt  
Administrative Assistant