

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

In the Matter of: )  
 )  
Encroachment Permit Application ) Case No. PH-2017-PUB-20-001  
No. L-96-S-1335E. )  
 )  
Phyllis Goodwin, ) **FINAL ORDER**  
Applicant. )

**I. NATURE OF PROCEEDINGS**

Encroachments, including riprap, placed on the beds of navigable lakes require a permit issued by the Idaho Department of Lands (IDL) pursuant to the requirements of the Lake Protection Act, Title 58, Chapter 13, Idaho Code, and the corresponding administrative rules promulgated by the State Board of Land Commissioners, IDAPA 20.03.04, Rules for the Regulation of Beds, Waters and Airspace over Navigable Lakes in the State of Idaho.

On October 25, 2017, IDL received a complete application for an encroachment permit from Phyllis Goodwin (Applicant), to place riprap on Lake Pend Oreille. A public hearing was held on January 19, 2018, in Sandpoint, Idaho. Chris Bromley was appointed and served as the Hearing Coordinator. The Hearing Coordinator provided the Preliminary Order to IDL on February 12, 2018.

My responsibility, as Director of IDL, is to render a decision pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.030.07 on behalf of the State Board of Land Commissioners based on the record, which I have reviewed in the context of my personal expertise gained through education, training, and experience. In making this determination I have relied on the whole record for this matter, including the following materials:

- I have read the transcript of the public hearing conducted in Sandpoint, Idaho on January 19, 2018.
- I have reviewed the record including all documents and exhibits.
- I have examined the Hearing Coordinator's Preliminary Order in light of the entire record.

## II. FINDINGS OF FACT

I concur with the Factual and Procedural Background presented by the Hearing Coordinator in the Preliminary Order.

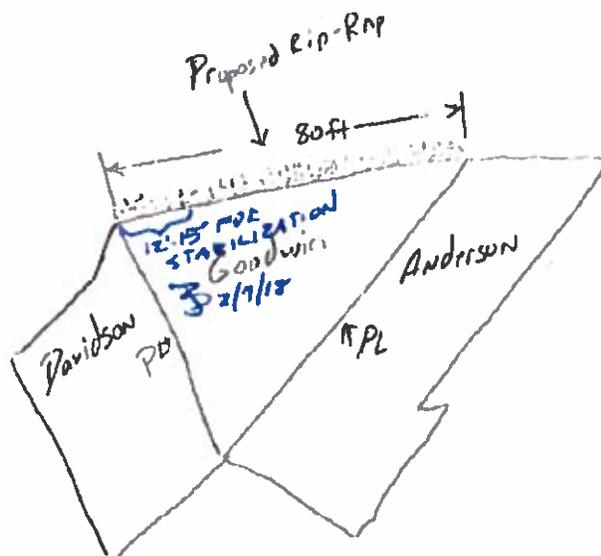
## III. CONCLUSIONS OF LAW

I concur with the Conclusions of Law presented by the Hearing Coordinator in the Preliminary Order.

## IV. FINAL ORDER

I conclude that the Hearing Coordinator's recommendations in the Preliminary Order are based on substantial evidence in the record, and I adopt those recommendations as my decisions in this matter. The Preliminary Order is hereby incorporated, by reference, in its entirety into this Final Order, and is enclosed and served along with this Final Order.

The Applicant is qualified to make application for an encroachment permit for riprap on Lake Pend Oreille, and a portion of the proposed riprap is in conformance with the applicable standards. On the basis of the record, it is my order that Encroachment Permit No. L-96-S-1335E is approved in part by IDL to authorize the Applicant to place only 12 to 15 feet of riprap adjacent to her private property, located below the high water mark of 2062.5 feet, and to the property line with Mr. and Mrs. Davidson. The approved placement of riprap is depicted in the record at Hearing Exhibit 19 and is copied here for clarity – shown as the lower bracket with, "12'-15' for stabilization ..." written underneath:



Hearing Ex. 19 (excerpt).

This is a final order of the agency. Pursuant to Idaho Code § 58-1306(c) and IDAPA 20.30.04.030.09, the Applicant or any aggrieved party who appeared at the hearing shall have the right to have the proceedings and this Final Order reviewed by the district court in the county in which the encroachment is proposed by filing a notice of appeal within thirty (30) days from the date of this Final Order. Because this Final Order is for approval of a permit, any party appealing this Final Order must file a bond with the district court in accordance with Idaho Code § 58-1306(c).

DATED this 15<sup>th</sup> day of February, 2018.



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DAVID GROESCHL

Director, Department of Lands

## CERTIFICATE OF SERVICE

I hereby certify that on this 16<sup>th</sup> day of February, 2018, I caused to be served a true and correct copy of the foregoing by the method indicated below and addressed to the following:

Phyllis Goodwin  
49 Sandy Cove Lane  
Sagle ID 83860

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Email: [pzaklan3@aol.com](mailto:pzaklan3@aol.com)

Larry and Julie Davidson  
46 Sandy Cove Lane  
Sagle ID 83860

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Email: [davidson.larry@outlook.com](mailto:davidson.larry@outlook.com)

Helen Newton  
423 S Huron  
Sandpoint, ID 83864

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Email:

Gary Johnson  
235 Moosewood Ln.  
Sagle, ID 83860

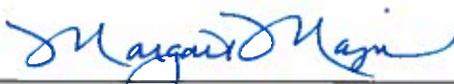
- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Email:

Mike Kempf  
501 Syringa Heights Rd.  
Sandpoint, ID 83864

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
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Angela Schaer Kaufmann  
P.O. Box 83720  
Boise, ID 83720-0010

- Statehouse Mail
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Margaret Major, Administrative Assistant

**BEFORE THE DEPARTMENT OF LANDS  
OF THE STATE OF IDAHO**

In the Matter of:

Encroachment Permit Application  
No. L-96-S-1335E

Phyllis Goodwin,  
Applicant.

Case No. PH-2017-PUB-20-001

**PRELIMINARY ORDER**

**FACTUAL AND PROCEDURAL BACKGROUND**

1. On May 12, 2017, Phyllis A. Goodwin (“Goodwin”) filed a *Joint Application for Permits* (“Application”) with the Idaho Department of Lands (“Department” or “IDL”), the Idaho Department of Water Resources, and the U.S. Army Corps of Engineers, for property at 49 Sandy Cove Lane, Sagle, Idaho, located on the shore of Lake Pend Oreille. *Application* at 1. Included with the Application were a number of other documents, including a *Single and Two-Family Lot Encroachment Application*. The Application sought “Placement of Rip-Rap to minimize erosion of natural shoreline.” *Id.* Twelve cubic yards of material were identified as necessary, *id.* at 2, over 80 linear feet, *id.* at 3. Three adjacent property owners were listed as requiring notice of the Application: Dallas and Kelli Anderson (24990 E. Stonecrest Ct., Liberty Lake, WA) (“Anderson”); Larry and Julie Davidson (46 Sandy Cove, Sagle, ID) (“Davidson”); and the Estate of William W. Wyatt (631 Winslow Way West, Bainbridge Island, WA) (“Wyatt Estate”). *Id.* at 4. Drawings were attached to the Application, showing the location of the riprap relative to Goodwin’s property and the property of the adjacent landowners. What appears to be a close-up of a plat of the Sandy Cove subdivision, an “owners certificate” regarding the Sandy

Cove subdivision, tax lot data from Bonner County, and various deeds were also included, purportedly to show Goodwin had the ability to file the Application.

2. On June 6, 2017, IDL received an *Affidavit of Publication* from an employee of the *Bonner County Daily Bee* stating notice of the Application was published for “two consecutive weeks, commencing on the 19<sup>th</sup> day of May, 2017, and ending on the 26<sup>th</sup> day of May, 2017.” The notice published in the *Bonner County Daily Bee* described the Application as proposing the installation of “80 feet of riprap for erosion control. Location: Sandy Cove, Lot 5, Pend Oreille River, Sagle, Idaho, in Section 25 Township 57 North, Range 2 West; B.M., in Bonner County. . . . Written objections to or requests for hearing in this matter must be received within thirty (30) days after the first appearance of this notice.”

3. On May 17, 2017, the Department sent a *Memorandum* to various state, county, federal, and private entities regarding the Application. The Application was described as seeking approval to “place 80 feet [of] riprap for erosion control on the Pend Oreille River. . . . Please submit your comments, recommendations or objections to IDL by June 20, 2017 . . . .”  
Emphasis removed.

4. On May 26, 2017, the Department received an *Attachment for Encroachment* from Betty Wyatt, offering no objection/consent to the encroachment. The address included by Betty Wyatt matches the address listed by Goodwin in the Application for the Wyatt Estate, an adjacent property owner requiring notice.

5. On June 1, 2017, the Department received comment from the Bonner County Planning Department, regarding the necessity for Goodwin to obtain “all necessary permits prior to construction or alteration within the flood hazard area.”

6. On June 7, 2017, the Department of the Army, Corps of Engineers sent a letter to Goodwin, informing her “that your proposed bank stabilization project is authorized in accordance with Department of Army (DA) Nationwide Permit (NWP) No. 13; Bank Stabilization. . . . Project activities include the discharge of 12 cubic yards of 12-24 inch clean, angular rock associated with stabilizing 80 linear feet of bank along Lake Pend Oreille, a navigable Waters of the United States (U.S.), including wetlands. . . . This verification is valid until March 18, 2022.” Emphasis removed.

7. On June 14, 2017, the Department received an *Attachment for Encroachment* from Anderson, an adjacent property owner, offering no objection/consent to the encroachment.

8. On June 15, 2017, the Department received a letter from the Idaho Department of Water Resources stating “no conflict with other water rights.”

9. On June 19, 2017, the Department received a letter (“Letter”) from Davidson, together with attachments (photographs and prior letters sent to IDL) objecting to the Application:

I am raising this objection . . . for the following reasons:

Applicant has failed to identify her application as being the latest of a string of encroachments she has made with respect to her property, including, but not limited to the following:

1. Installation (without permit) of a concrete retaining wall beyond the high water mark
2. Removal of riprap required by IDOL to be placed on the face of the retaining wall which was intended to mitigate the erosive effects cause by the wall
3. Reinstallation (without permit) of the removed riprap as a “barb” extending from her property out into the lake
4. Installation (without permit) of at least three additional barbs (4 total) at other locations extending into the lake
5. Installation (without permit) of pilings and other materials to extend the length of her dock due to accretion caused by unpermitted barbs
6. Installation of a sewage vault at the shoreline
7. Installation of an enclosed garden structure at the shoreline

I have objected to each and every one of the above violations committed by the Applicant over the years.

....

My objection to the Applicant's current request is essentially the same as indicated previously – every modification performed by Applicant has a detrimental effect to downstream properties, which degradation continues for years afterward. Furthermore, each modification has a compounding effect on each prior modification thereby increasing accretion which lessens the full-pool water depth for downstream properties. More specifically, the accretion on my property has increased up to 4 feet in depth thereby rendering my permitted dock and boatlift virtually useless.

For all the reasons above referenced including those referenced in the enclosed letters, I remain adamantly opposed to any further modification Applicant may want to do to the shoreline. I respectfully request that you deny Applicant's request for encroachment permit and in addition, require that she remove all barbs previously installed. If, however, you are inclined to grant the application, I request that you first set a hearing to discuss the matter and notify me of the time and location for the hearing.

*Letter at 1-2.*

10. On July 3, 2017, the Department sent a letter to Goodwin informing her the Application was incomplete: "After a full and careful review of your application, it has been determined that you may not have littoral rights and therefore not able to apply for any encroachments and making the application incomplete at this time. . . . At this time we are asking that you provide documentation that you do have littoral rights with this property by August 3, 2017. This can be done by checking the deed; it should be mentioned in your properties [sic] description." Emphasis removed. A color copy of Bonner County tax lot data was enclosed, showing a triangular property extending waterward from Goodwin, owned by the Wyatt Estate.

11. On August 1, 2017, the Department received a *Warranty Deed* ("Warranty Deed") as a supplement to the Application. It is unclear from the document if the Warranty

Deed was recorded; although it does bear stamped numbers typical of a recorded document. The Warranty Deed, dated August 1, 1969, was from Mountain Shores, Inc., an Idaho Corporation, to Ronald and Phyllis Goodwin, husband and wife. A legal description was included in the Warranty Deed, describing

Lot 5 of Sandy Cove Addition to Bonner County, Idaho . . . .

. . . .

Subject to Any claims arising from the difference in the mean high water line of Lake Pend Oreille and the meander line as shown by Government Survey.

Subject to A perpetual right of way and easement and overflow, flood and submerge a portion herein described in grant by Alice Thompson to the United States of America, filed September 2, 1952 and recorded in Book 18 of Miscellaneous, Page 615.

*Warranty Deed* at 1.

12. On October 10, 2017, the Department sent a letter to Goodwin informing her the Application remained incomplete: “Because Bonner County shows private submerged lands being owned in front of your property, littoral rights may not be attached to your property. See attached Bonner County Map. Please provide the above information within 30 days of receiving this letter.” The attached map again showed the triangular property owned by the Wyatt Estate.

13. Supplemental photographs were filed by Goodwin with IDL on October 25, 2017, showing erosion, a garden box, a toppled decorative tree, and a footlocker in front of what appears to be a concrete/stucco wall with steps. The garden box and footlocker were set on top of rocks. A kayak rack can be seen in the background of one of the photographs showing the footlocker.

14. On November 6, 2017, the Department sent a *Notice of Hearing* to Goodwin, Davidson, Anderson, and the Wyatt Estate, notifying them of a public hearing, “Another notice

will be issued identifying the hearing officer as well as the date, time, and location of the hearing.”

15. On November 17, 2017, David Groeschl, Deputy Director, appointed Chris M. Bromley as “‘Hearing Coordinator’ to conduct a hearing in the above-captioned matter. The hearing will be conducted pursuant to Idaho Code § 58-1306(c). The Hearing Coordinator has the scope of authority delineated by IDAPA 20.01.01.413.01 and by IDAPA 20.03.04.05.” *Notice of Appointment of Hearing Coordinator and Hearing* at 1. The Deputy Director “delegate[d] initial decision-making authority to the Hearing Coordinator pursuant to Idaho Code § 67-5245.” *Id.* “Notice is hereby given that a public hearing in the above-captioned matter will be conducted in accordance with IDAPA 20.01.01.000 *et seq.* on Friday, January 19, 2018 at 9:00 a.m. Pacific Time at the Idaho Department of Lands located at 2550 Highway 2 West, Sandpoint, ID 83864.” *Id.* at 2. “The Hearing Coordinator shall submit a preliminary order to the Director of the Idaho Department of Lands, who shall issue a Final Order no more than thirty days after the conclusion of the hearing.” *Id.* at 1.

16. Notice of the hearing was published in a newspaper on December 1, 2017 and December 8, 2017.

17. The hearing took place on January 19, 2018, at the Department’s office in Sandpoint, beginning shortly after 9:00 a.m. In attendance at the hearing were Larry and Julie Davidson, Helen Newton, Skip Newton, Jim Corcoran, Goodwin, Michael Kempf, Gary Johnson, Diane Johnson, Bryce Johnson, and Janie Johnson. Jim Brady (“Brady”) and Amidy Funson from IDL were also present, along with Angela Schaer Kaufmann, deputy attorney general. Oral comments were provided by Goodwin, Davidson, Brady,<sup>1</sup> as well as some of the

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<sup>1</sup> Brady has been employed by the Department for twenty-five years and “help[s] administer the Lake Protection Act for north Idaho.” Tr. p. 26.

others in attendance. Goodwin caused Exhibits 1-4 to be admitted into the record, which are photographs. Davidson caused Exhibits A-L to be admitted into the record, which are also photographs. The Department caused IDL Exhibits 1-20<sup>2</sup> to be admitted into the record. Shortly before 12:00 p.m. the hearing concluded, and the record was closed.

## CONCLUSIONS OF LAW

1. The Hearing Coordinator was tasked by the Department to issue a preliminary order. Idaho Code § 67-5245 governs preliminary orders and states as follows:

(1) A preliminary order shall include:

- (a) A statement that the order will become a final order without further notice; and
- (b) The actions necessary to obtain administrative review of the preliminary order.

(2) The agency head, upon his own motion may, or, upon motion by any party shall, review a preliminary order, except to the extent that:

- (a) Another statute precludes or limits agency review of the preliminary order; or
- (b) The agency head has delegated his authority to review preliminary orders to one (1) or more persons.

(3) A petition for review of a preliminary order must be filed with the agency head, or with any person designated for this purpose by rule of the agency, within fourteen (14) days after the service date of the preliminary order unless a different time is required by other provision of law. If the agency head on his own motion decides to review a preliminary order, the agency head shall give written notice within fourteen (14) days after the issuance of the preliminary order unless a different time is required by other provisions of law. The fourteen (14) day period for filing of notice is tolled by the filing of a petition for reconsideration under section 67-5243(3), Idaho Code.

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<sup>2</sup> The original IDL exhibits 19 and 20 were somehow misplaced after the hearing. IDL exhibits 19 and 20 that are now part of the record were recreated by Mr. Brady after reviewing his testimony. *See* Tr. pp. 39-40. From the Hearing Coordinator's perspective, IDL exhibits 19 and 20 look substantially similar to the exhibits that were admitted at the hearing. On February 7, 2018, Goodwin and Davidson were informed the exhibits were missing, and provided drafts of the reproduced IDL exhibits 19 and 20 for their review. Later that day, Davidson stated an objection as to IDL Exhibit 20, "only to the extent [it] depicts the placement of rip rap on my property, which lies immediately south of the impermissibly installed planter box." On February 8, 2017, a deputy attorney general for IDL, who was present at the hearing, responded to Davidson: "By way of clarification, the drawings that Mr. Brady placed on the exhibits were not intended to illustrate or recommend the placing of riprap on Mr. Davidson's property . . . the purpose of Exhibits 19 and 20 was to illustrate what IDL views as the permissible locations for placement of riprap on Ms. Goodwin's property." *Emphasis in original.* On February 8, 2018, the Hearing Coordinator responded by stating Mr. Davidson's "objection is duly noted. I do not interpret the application or IDL exhibits 19 and/or 20 to allow placement of riprap on your property."

- (4) The basis for review must be stated on the petition. If the agency head on his own motion gives notice of his intent to review a preliminary order, the agency head shall identify the issues he intends to review.
- (5) The agency head shall allow all parties to file exceptions to the preliminary order, to present briefs on the issues, and may allow all parties to participate in oral argument.
- (6) The agency head shall:
  - (a) Issue a final order in writing, within fifty-six (56) days of the receipt of the final briefs or oral argument, whichever is later, unless the period is waived or extended with the written consent of all parties, or for good cause shown;
  - (b) Remand the matter for additional hearings; or
  - (c) Hold additional hearings.
- (7) The head of the agency or his designee for the review of preliminary orders shall exercise all of the decision-making power that he would have had if the agency head had presided over the hearing.

Idaho Code § 67-5245.

2. According to the *Notice of Appointment of Hearing Coordinator and Hearing*:

The Hearing Coordinator shall submit a preliminary order to the Director of the Idaho Department of Lands, who shall issue a Final Order no more than thirty (30) days after the conclusion of the hearing. As provided in Idaho Code § 67-5240, the contested case provisions of the Administrative Procedures Act do not apply where the legislature has directed the use of alternative procedures. Because the legislature has enacted specific alternative procedures in Idaho Code § 58-1306 that require a final order to be issued within 30 days of the hearing, and leave insufficient time to consider petitions for review of the preliminary order, the procedures of Idaho Code § 67-5245 addressing petitions for review of preliminary orders are not applicable.

*Notice of Appointment of Hearing Coordinator and Hearing* at 1-2 (emphasis added).

3. The Application proposes the installation of 80 linear feet of riprap parallel with the shoreline, checking the box that it was filed consistent with Idaho Code § 58-1306. *Single and Two-Family Lot Encroachment Application* at 1; *see also Application*. Goodwin stated she owned the property, including the Warranty Deed, survey, an “owners certificate,” tax lot data from Bonner County, and various other deeds as proof.

4. The proposed riprap is a nonnavigational encroachment as defined by IDAPA 20.03.04.010.16.

5. Idaho Code § 58-1306(a) states:

(a) Applications for construction, enlargement or replacement of a nonnavigational encroachment, a commercial navigational encroachment, a community navigational encroachment, or for a navigational encroachment extending beyond the line of navigability shall be submitted upon forms to be furnished by the board and accompanied by plans of the proposed 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. Applications for nonnavigational encroachments must be submitted or approved by the riparian or littoral owner.

Emphasis added.

6. Therefore, Idaho Code § 58-1306(a) requires the presence of two factors to approve this Application for riprap, a nonnavigational encroachment: (1) does Goodwin have littoral rights, and if not, did the owner of the littoral rights approve the proposed work; and (2) were the plans submitted by Goodwin with the Application sufficient?

**A. Does Goodwin Have Littoral Rights?**

7. A question raised prior to hearing was whether Goodwin has littoral rights. Two letters were sent to Goodwin by IDL explaining the Application was incomplete because Goodwin had not documented her littoral rights. This was due to Bonner County tax lot data showing the presence of a triangular-shaped piece of property located waterward of Goodwin. That property, according to the Bonner County tax lot data, is owned by the Wyatt Estate. In the October 10, 2017 letter from IDL to Goodwin, the property owned by the Wyatt Estate was described as “private submerged land being owned in front of” the Goodwin property. Emphasis

added. In photographs that make up the record, the Goodwin property is located on the shore, with what is understood to be the Wyatt Estate appearing submerged. *See* IDL Exs. 1-8.

8. In response to the IDL letters addressing the question of littoral rights, Goodwin filed the Warranty Deed and photographs showing a garden box and toppled trees. These photographs do not address the question of littoral rights. The Warranty Deed provides a meets and bounds description of the Goodwin property, and makes it subject to various requirements, including “claims arising from the difference in the mean high water line of Lake Pend Oreille” and a “perpetual right of way and easement.” The Warranty Deed does not address the property owned by the Wyatt Estate.

9. At the hearing, comment was provided by Brady, stating the question of littoral rights had been cleared up in his mind, with the conclusion that Goodwin has littoral rights:

So—and, I would like to say, in answer to Mr. Davidson’s comment that she does not have littoral rights—Miss Goodwin provided, and this is in the record, a plat that has been recorded, it looks like in ‘86 or so, and Miss Goodwin’s lot number five is the triangular lot here. And over in the owner’s certificate in the dedication, it states, “Lots one through 14 shown hereon shall each contain all the landline between its sidelines extended to the shoreline of Pend Oreille Lake provided that said sidelines do not extend westerly beyond the west line of said section 25.

In front of Miss Goodwin’s property, the west line of section 25 is this line here, which is still not quite out to the meander line, but she does own submerged land in front of her property when you extend the property lines. And they have kind of indicated that on section five with this diagonal because Lake Pend Oreille has an artificial –

Tr. Vol. 1 pp. 36-37.

10. The plat and owners certificate discussed by Brady provide some information, but do not fully address the submerged property owned by the Wyatt Estate. What is known is Bonner County identifies the Wyatt Estate as waterward of Goodwin. Based on this record, which does not include the deed to the Wyatt Estate property, the plat and owners certificate

referenced by Brady cannot be reconciled for or against the Bonner County's tax lot data. Given the timing of when Albeni Falls dam was completed, raising the high water mark from 2151 feet to 2062.5 feet, it is possible the original owner of the Goodwin property sold the waterward property to the Wyatt Estate prior to completion of the dam, with the Wyatt Estate then becoming submerged.

11. While the deed to the Wyatt Estate deed would have been helpful, the lack of the deed is not determinative of Goodwin's littoral rights. Notice of the Application was provided to the Wyatt Estate, with Betty Wyatt filing a document with IDL not objecting/consenting to the Application. With notice given, no one on behalf of the Wyatt Estate appeared at the hearing. Clearly, the Wyatt Estate knew of the Application and any possible infringement upon its real property rights.

12. At the hearing, Brady testified the Department's jurisdiction over encroachments moves with the level of the water: "And that was just confirmed recently that we regulate to where the water flows . . . ." Tr. Vol. 1 p. 33. Brady's comment was based off of a recent Idaho Supreme Court recent decision in *State of Idaho v. Hudson*, 2017 Slip Opinion No. 121 (Dec. 4, 2017, Idaho Sup. Ct.), in which it was stated: "The crux of this appeal is whether the true location of the OWHM on Priest Lake is a material fact. . . . In sum, whether 2437.64 feet was the OWHM or the AHW is not an issue of material fact because the State has the authority to regulate encroachments under both marks." *Id.* at 8-9. That IDL's jurisdiction can move, results in shifting benefits and burdens to land owners.

13. According to the Department's administrative rules, littoral rights are defined as follows:

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.

IDAPA 20.03.04.010.032 (emphasis added).

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.

IDAPA 20.03.04.010.033 (emphasis added).

14. When reviewing a statute, the words are given their plain meaning. *State v. Owens*, 158 Idaho 1, 3, 343 P.3d 30, 32 (2015). The word “adjacent” is defined by Black’s Law Dictionary as, “Lying near or close to; sometimes contiguous; neighboring. *Adjacent* objects are not widely separated, though they may not actually touch.” Black’s Law Dictionary (6<sup>th</sup> ed. 1990) (emphasis in original). Whether Goodwin’s property possessed littoral rights prior to the construction of Albeni Falls dam is not determinative to the question of her littoral rights today. Consistent with photographs submitted with the Application and the exhibits from the hearing, *see* IDL Exs. 1-8, there is no question that Goodwin’s property is next to, or adjoining Lake Pend Oreille. By owning property adjacent to Lake Pend Oreille, Goodwin has littoral rights, allowing her to file the Application, and allowing the Department to approve or deny the proposed encroachment within its jurisdiction.

**B. Are The Plans Sufficient?**

15. Idaho Code § 58-1302(k) defines “Plans” as follows:

“Plans” means maps, sketches, engineering drawings, aerial and other photographs, word descriptions, and specifications sufficient to describe the extent, nature and approximate location of the proposed encroachment and the proposed method of accomplishing the same.

*See also* 20.03.04.010.28.

16. Included with the Application were hand drawn plans, deeds, surveys, and tax lot data from Bonner County. The documents submitted by Goodwin are sufficient for purposes of understanding the proposed work.

**C. Davidson Letter, Comments, and Exhibits from the Hearing**

17. Goodwin provided notice of the Application to the adjoining landowners, including Davidson. On June 19, 2017, Davidson filed the Letter with IDL stating his objection to the Application. Davidson was the only adjacent landowner to object. Notice of the Application, as well as the hearing, was also published in the *Bonner County Daily Bee*. The only person appearing at the hearing in opposition to the Application was Davidson.

18. At the hearing, it quickly became clear there were long-standing problems between Davidson and Goodwin. Many statements were made by both Davidson and Goodwin of problems concerning an easement, parking, and general distrust of one another. While helpful for context, these statements did not address the Application. In the Letter, a primary basis for contesting the Application was the presence of barbs. Many pictures were contained within the Letter documenting and numbering the barbs. At the hearing, Davidson provided comment concerning the barbs, as well as providing additional photographic exhibits documenting the barbs. Exs. E-G. Additional exhibits were provided, together with comment, documenting how Davidson's boatlift has to be dug out due to the deposition of material onto his property. Tr. Vol. 1 pp. 18-19; Exs. J-K. In sum, Davidson's belief is the barbs cause water to act in an unnatural way, resulting in greater deposit of material, thereby impacting his ability to use his property.

19. Comment was provided by Gary Johnson, based on his experience as "a marine deputy for twelve years on the lake," opining that boats accelerating from underneath the railroad

bridge create wakes that contribute to the deposition of material in and around the Davidson and Goodwin properties. Tr. Vol. 1 pp. 22-23.

20. Brady commented that any actions done by Goodwin are not the total cause of problems associated with deposition of material, that the inherent location of the Davidson and Goodwin properties is a factor. Tr. Vol. 1 pp. 38-39. Aerial photographs were submitted into the record documenting what Brady believed to be a “natural spit” in Lake Pend Oreille waterward of the Davidson and Goodwin properties, with the spit changing over time. IDL Exs. 2-8; Tr. Vol. 1 pp. 27-30.

21. Toward the end of the hearing, Davidson commented that the barbs are his primary problem, not the placement of riprap:

The issue that I have is primarily the barbs at this point. The problem with the barbs is that they have caused considerable amount of accretion already. They’ve already buried me. The nature of my property is in a very sensitive area that anything that drops there stays there. Come to the end of my dock. The material farther on into the lake, I don’t care. It ebbs and flows and right now it’s in an acceleration stage, but that’s not the issue that I have. Each one of these barbs that’s been placed on Ms. Goodwin’s property has been in an incremental manner so that she has raised the elevation of the lake basically in front of her property, as you can see in IDL’s pictures. She has increased the shoreline now because of the raising of the lake bed. All of that, has caused accretion to happen out to the end of my dock and beyond. There’s the concern that I have.

Tr. Vol. 2 p. 4 (emphasis added).

22. According to Goodwin, a permit exists for the barb. Tr. Vol. 1 p. 3. Four letters were filed by Davidson with the Department – dated May 21, 2003; April 5, 2003; February 20, 2003; and July 9, 2000 – concerning other applications filed by Goodwin. Other than Davidson’s comments, there was no information presented in the record that Goodwin lacked permitting. Brady, who listened to the comments, and has administered the Lake Protection Act for twenty-five years, did not state there was a lack of permitting, or need for removal of that

material.<sup>3</sup> Moreover, comments were provided that other forces may be at work that lead to the deposition of materials, such as boat wakes and movement of the natural spit. Thus, the evidence is inconclusive as to the barbs. Moreover, even if it were, Goodwin's Application for riprap is the subject of this proceeding, not the barbs.

#### **D. Public Trust Doctrine**

23. Consideration of an application for encroachment requires the balancing of private versus public interests:

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.

24. "Encroachments not in aid of navigation in navigable lakes will normally not be approved by the Department and will be considered only in cases involving major environmental, economic, or social benefits to the general public. Approval under these circumstances is authorized only when consistent with the public trust doctrine and when there is no other feasible alternative with less impact on public trust values." IDAPA 20.03.04.030.02.

25. The public trust doctrine is "a limitation on the power of the state to alienate or encumber title to the beds of navigable waters as defined in this chapter." Idaho Code § 58-1203(1). As explained by the Idaho Supreme Court, the following factors should be considered in evaluating an application for encroachment:

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<sup>3</sup> That Brady did not address the barbs should be contrasted with comments made by Brady concerning a footlocker and garden box. See *infra* fn. 6.

[T]he degree of effect of the project on public trust uses, navigation, fishing, recreation and commerce; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource, i.e. in this instance the proportion of the lake taken up by docks, moorings or other impediments; the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited, i.e. commerce, navigation, fishing or recreation; and the degree to which broad public uses are set aside in favor of more limited or private ones

*Kootenai Env. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 629-30, 671 P.2d 1085, 1092-93 (1983) (hereinafter “KEA”).

26. Lake Pend Oreille is a navigable body of water that is regulated by the Department. “In the early 1950s, the United States Army Corps of Engineers constructed the Albeni Falls dam on Lake Pend Oreille, thereby creating an artificial high water mark (‘AHWM’) approximately eleven and a half feet above the natural high water mark.” *Kaseburg v. State of Idaho*, 154 Idaho 570, 572, 300 P.3d 1058, 1060 (2013). At the hearing, testimony was provided by Brady that the Artificial High Water Mark (“AHWM”) for Lake Pend Oreille is 2062.5 feet. Tr. Vol. 1 p. 29; *see also* IDAPA 20.03.04.010.03 (defining AHWM). Prior to construction of Albeni Falls dam, the Ordinary High Water Mark (“OWHM”) for Lake Pend Oreille was 2151 feet. Tr. Vol. 1 p. 26; *see also* IDAPA 20.03.04.010 (defining OWHM). Whether the water line is measured at the AHWM or the OWHM is immaterial. *Hudson* at 8. What matters is where the high water mark reaches today, which is 2062.5 feet. *See* Tr. Vol. 1 p. 33 (“And that was just confirmed recently that we regulate to where the water flows . . .”).

27. In evaluating the factors set forth in Idaho Code § 58-1301, IDAPA 20.03.04.030.02, and *KEA*, and as will be explained below, approval of the Application, as modified at the hearing by Brady, Tr. Vol. 1 pp. 39-40; IDL Exs. 19 and 20, will not impact the public trust.

28. IDL caused exhibits to become part of in the record showing that all but 12-15 feet of the proposed riprap is above 2062.5 feet. IDL Exs. 1-8, 11, 13, and 18-20.<sup>4</sup> As explained by Brady, and consistent with *Hudson*, the Department's jurisdiction is limited to the approximately 12-15 feet of shoreline nearest to the property line between Davidson and Goodwin, Tr. Vol. 1 pp. 39-40; IDL Exs. 19-20, with placement of the 12-15 feet of riprap limited to Goodwin's private property. "But to this application, our recommendation would be to, if that section over by the flower box is where we have jurisdiction now, would be to authorize bank stabilization in that 12, 15 feet or so of the shoreline, but I'm not seeing an erosion issue for the rest of her property." Tr. Vol. 1 p. 39. Other than the 12-15 feet nearest the garden box, the remainder of Goodwin's property is outside the scope of the Application.

29. Brady's assertion as to the high water mark is correct. Brady was able to correlate the level of Lake Pend Oreille with the timing of the photographs that make up IDL Exhibits 1-8 with IDL Exhibits 11, 13, and 18.<sup>5</sup> As to the 12-15 feet of riprap discussed by Mr. Brady that lies below the high water mark and requires permitting, the evidence in the record shows the riprap, if properly constructed should extend very little below the high water mark. IDL Exs. 1-8, 16-17.

30. As shown in the plans, the riprap will be installed parallel to the shoreline and should extend only very slightly below the high water mark. This placement should not impact the public's ability to navigate or recreate on Lake Pend Oreille. The placement of riprap

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<sup>4</sup> As stated in the Findings of Fact, the original IDL exhibits 19 and 20 were somehow misplaced after the hearing. IDL exhibits 19 and 20 that are now part of the record were recreated by Brady after reviewing his testimony. Tr. pp. 39-40. IDL exhibits 19 and 20 are illustrative, being created so as to visually explain where IDL believes it possess jurisdiction over the Application. IDL exhibits 19 and 20 should not be interpreted to sanction trespass on Davidson's property.

<sup>5</sup> Daily data is kept of the elevation of Lake Pend Oreille. Tr. Vol. 1 p. 27. This allowed Brady to objectively know the elevation of Lake Pend Oreille. Then, based on his experience of administering the Lake Protection Act for twenty-five years in north Idaho, Brady was able to interpret the location of the high water mark in the photographs.

parallel to the shoreline should also allow water to act more naturally than when it strikes the vertical concrete/stucco wall presently in front of Goodwin’s property. If properly constructed, the riprap will further assist in stabilizing the shoreline. The natural materials that will make up the riprap, IDAPA 20.03.04.015.08, together with the gentler slope of the riprap, when compared with the abrupt vertical concrete/stucco wall, should also improve fish and wildlife habitat. The placement of riprap along the 12-15 feet of Goodwin’s private property will not violate the public trust doctrine.<sup>6</sup>

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<sup>6</sup> While not a part of this proceeding and not relevant to approval of this Application, the Hearing Coordinator offers the following observations concerning the footlocker, the garden box, and the kayak rack in relation to the high water mark. Unlike the barbs, there was no discussion of permitting as to these features. The footlocker appears to be located above the high water mark. Tr. Vol. 1 pp. 32-33; IDL Ex. 15. The garden box appears to be located below the high water mark. Tr. Vol. 1 p. 39; Ex. 2; IDL Ex. 17. The kayak rack appears to be below the high water mark. IDL Ex. 14; IDL Ex. 20 (hand drawn plan showing location of the kayak rack in relation to the footlocker); October 25, 2017 supplemental photographs submitted by Goodwin to IDL (showing the kayak rack in the background in relation to the garden box).

## ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that Encroachment Permit Application No. L-96-S-1335E is APPROVED as to the 12-15 feet of riprap on Goodwin's private property, located below the high water mark of 2062.5 feet, and to the property line with Davidson.

IT IS FURTHER ORDERED that the order issued herein is a PRELIMINARY ORDER. Idaho Code § 67-5245. The hearing in this matter was completed on January 19, 2018. Consistent with the *Notice of Appointment of Hearing Coordinator and Hearing*, "The Hearing Coordinator shall submit a preliminary order to the Director of the Idaho Department of Lands, who shall issue a Final Order no more than thirty days after the conclusion of the hearing." This Preliminary Order is submitted fewer than thirty days after conclusion of the hearing.

Dated this 12<sup>th</sup> day of February, 2018.



CHRIS M. BROMLEY  
Hearing Coordinator

## CERTIFICATE OF SERVICE

I certify that on this 16~~th~~ day of February, 2018, I caused to be served a true and correct copy of the foregoing was served upon the following persons by the method(s) indicated:

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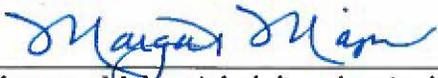
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Margaret Major, Administrative Assistant