

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

In the Matter of: ) Case No. PH-2019-PUB-10-001  
                        )  
Encroachment Permit Application ) **FINAL ORDER**  
No. L-97-S-0891C )  
                        )  
Bonner County, )  
    Applicant. )  
                        )  
\_\_\_\_\_)

**I. NATURE OF PROCEEDINGS/ISSUES**

Encroachments, including breakwaters, placed in, on or above the beds of navigable lake, and channel deepening, 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 20.03.04.000 *et seq.*, Rules for the Regulation of Beds, Waters and Airspace over Navigable Lakes in the State of Idaho.

Bonner County (“Applicant”), applied for Encroachment Permit No. L-97-S-0891C on April 16, 2019 (“Application”), followed by an Addendum on June 19, 2019. According to the Application,

The purpose of this project is to provide navigable access from Priest Lake into the Thorofare during the recreational season. The overall objective of the project is to develop sustainable modifications to improve Thorofare access and navigability with channel deepening and replacement of the derelict breakwater.

Application, p. 1.

On June 17, 2019, I issued a Notice of Appointment of Hearing Coordinator and Hearing, in which I appointed Chris Bromley as Hearing Coordinator. The document also provided notice

of a public hearing to be held on August 13, 2019 at 6:00 p.m. Pacific Daylight Time in Priest River, Idaho.

The Hearing Coordinator issued his Preliminary Order on August 28, 2019. My responsibility is to render a decision pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.030.07 on the behalf of the State Board of Land Commissioners based on the record and applicable law. In making this determination I have relied on the record for this matter. Specifically,

- I have reviewed the record, including the Application and all documents and exhibits thereto; all written comments received prior to the close of the August 13, 2019 hearing; and all documents and exhibits.
- I have examined the Hearing Coordinator's Preliminary Order in light of the record and the applicable law.

## **II. FINDINGS OF FACT**

I adopt Paragraphs 1 – 31 of the Factual and Procedural Background of the Preliminary Order as my Findings of Fact.

## **III. CONCLUSIONS OF LAW**

A. I adopt Paragraphs 1-15 of the Conclusions of Law of the Preliminary Order (“Conclusions of Law”). I specifically conclude that the Application meets the procedural requirements of Idaho Code § 58-1306 and IDAPA 20.03.04.000 *et seq.* and that the Department possesses the authority to regulate encroachments in, on or above the bed of Priest Lake.

B. I adopt Paragraphs 16-21 of the Conclusions of Law.

C. I have chosen not to adopt the first sentence of Paragraph 22 of the Conclusions of Law as written, and instead substitute the following:

22. Idaho Code § 58-1301 requires that the “lake values” of “the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality be given due consideration . . . .” I.C. § 58-1301. *See also KEA* at 629, 671 P.2d at 1092 (“[t]he degree of effect of the project on public trust uses, navigation, fishing, recreation and commerce should be reviewed.”)

I adopt the remainder of Paragraph 22, beginning with “[b]ecause no road exists, . . . .”

D. I have chosen not to adopt the first sentence of Paragraph 23 of the Conclusions of Law as written, and instead substitute the following:

23. Under Idaho Code § 58-1301, the “lake values” must be “given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment.” *See also KEA* at 629, 671 P.2d at 1092 (a proposed encroachment should be “examined cumulatively with existing impediments to the full use of the public trust resource.”)

I adopt the remainder of Paragraph 23, beginning with “Furthermore, ‘the impact of the individual project . . . .’”

E. I have chosen not to adopt the first sentence of Paragraph 24 of the Conclusions of Law as written, and instead substitute the following:

24. The balancing of factors required in Idaho Code § 58-1301 requires consideration of a proposed encroachment’s purpose. *See also KEA* at 630, 671 P.2d at 1093 (a proposed encroachment such as the breakwater should be examined “in light of the primary purpose for which the resource is situated, i.e., commerce, navigation, fishing or recreation . . . .”)

I adopt the remainder of Paragraph 24, beginning with “‘A primary purpose of Priest Lake . . . .’”

F. I have chosen not to adopt the first sentence of Paragraph 25 of the Conclusions of Law as written, and instead substitute the following:

25. Idaho Code § 58-1301 requires a balancing of lake values with the justification for or benefit of a proposed encroachment. *See also KEA* at 630, 671 P.2d at 1093 (consideration should be given to “the degree to which broad public uses are set aside in favor of more limited or private uses.”).

I adopt the remainder of Paragraph 25, beginning with “The breakwater is for private use. . .”

G. I hereby adopt Paragraphs 26 – 46 of the Conclusions of Law.

#### **IV. FINAL ORDER**

Having reviewed the record and Preliminary Order, I adopt the Preliminary Order as my decision in this matter, and it is incorporated by reference herein, except as explicitly set forth above. The Preliminary Order is attached to this Final Order. The Applicant is qualified to make application for the encroachments and activities discussed herein, and the proposed encroachment is in conformance with the applicable standards.

**It is hereby ORDERED that the Application for Encroachment Permit No. L-97-S-0891C is APPROVED subject to the following four conditions:**

- 1. Removal of the existing timber breakwater adjacent to the proposed rock breakwater from approximately STA 3+00 eastward on the Site Plan-Proposed Sheet 4 of 7 Drawing will occur prior to project completion;**
- 2. Bonner County will submit an application for a submerged lands easement to the Idaho Department of Lands to cover the new breakwater in Priest Lake;**
- 3. Bonner County or its contractor(s) will obtain a Land Use Permit or other instrument approved by the Idaho Department of Lands to compensate the State/IDL for sand and other natural lake bed materials dredged or removed from below the ordinary high water mark of Priest Lake and used or disposed of outside the confines of the state-owned lake bed. The expected amount is approximately 1,718 cubic yards; and**
- 4. The species of plants selected for the breakwater must be native and as low growing as reasonably possible in order to anchor the material, yet not infringe on the viewshed.**

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 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 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). The amount of the bond will be set by the district court, in an amount not less than \$500.

DATED 12<sup>th</sup> day of September, 2019



DUSTIN T. MILLER  
Director, Department of Lands

## CERTIFICATE OF MAILING

I hereby certify that on this 12<sup>th</sup> day of September, 2019. I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jason Scott  
GeoEngineers, Inc.  
523 East Second Avenue  
Spokane, WA 99202

- U.S. Mail, postage prepaid  
 Hand Delivery  
 Email:  
[jscott@geoengineers.com](mailto:jscott@geoengineers.com)

Steve Klatt  
Bonner County  
1500 Highway 2, Suite 101  
Sandpoint, ID 83864

- U.S. Mail, postage prepaid  
 Hand Delivery  
 Email:  
[steve.klatt@bonnercountyid.gov](mailto:steve.klatt@bonnercountyid.gov)

Joy Vega  
P.O. Box 83720  
Boise, ID 83720-0010

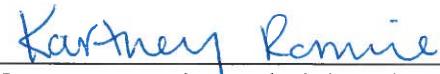
- Statehouse Mail  
 Hand Delivery  
 Email: [joy.vega@ag.idaho.gov](mailto:joy.vega@ag.idaho.gov)

Idaho Department of Lands  
c/o Andrew Smyth, Public Trust Program Manager  
300 N 6<sup>th</sup> Street, Suite 103  
Boise, ID 83702-0050

- U.S. Mail, postage prepaid  
 Hand Delivery  
 Email: [asmith@idl.idaho.gov](mailto:asmith@idl.idaho.gov)

Courtesy copy via email only:

Shane Slate – [shane.p.slate@usace.army.mil](mailto:shane.p.slate@usace.army.mil)  
Jeremy Deforge – [Jeremy@4seasonslandscape.net](mailto:Jeremy@4seasonslandscape.net)  
John & Lydia Hungate – [jell60@hotmail.com](mailto:jell60@hotmail.com)  
Rick Collingwood – [rick.collingwood@idwr.idaho.gov](mailto:rick.collingwood@idwr.idaho.gov)  
Randy Ramey – [randy@predevinc.com](mailto:randy@predevinc.com)  
Eleanor Jones – [ejones3@gmail.com](mailto:ejones3@gmail.com)  
Anne Ashburn – [ashburn@nwrain.com](mailto:ashburn@nwrain.com)  
Jon Miller – [jrmecon@uidaho.edu](mailto:jrmecon@uidaho.edu)  
Neeley Miller – [neeley.miller@idwr.idaho.gov](mailto:neeley.miller@idwr.idaho.gov)  
Ken Hagman – [ken@copperbayconstruction.com](mailto:ken@copperbayconstruction.com)  
Fred Cox – [fredcox@sisna.com](mailto:fredcox@sisna.com)  
Craig Hill – [craighill@hillsresort.com](mailto:craighill@hillsresort.com)

  
\_\_\_\_\_  
Kourtney Romine

Kourtney Romine, Administrative Assistant

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

In the Matter of:

Encroachment Permit Application  
No. L-97-S-0891C

Bonner County,  
Applicant.

Case No. PH-2019-PUB-10-001

**PRELIMINARY ORDER**

**FACTUAL AND PROCEDURAL BACKGROUND**

**A. The Application**

1. On April 16, 2019, Bonner County filed a *Joint Application for Permits* (“Application”) with the Idaho Department of Lands (“Department” or “IDL”) for a breakwater at the north end of Priest Lake to replace an existing timber breakwater. *Application* at 2, line 16. Figures 1 and 3 to the Application show the general location of the proposed breakwater in relation to Priest Lake. Figure 2a to the Application is a closer view of the proposed breakwater in relation to the existing breakwater. Sheet 4 of 7 to the Application is a more detailed site plan of the proposed breakwater itself.

2. On May 2, 2019, the Department emailed Bonner County regarding an incomplete detail in the Application concerning the disposal of sediment. A subsequent email was sent to Bonner County on May 29, 2019, again requesting the additional information. On May 31, 2019, a consultant for Bonner County responded to IDL’s question.

3. On June 5, 2019, the Department, in an email to Bonner County, deemed the Application complete, through the addition of an *Addendum*, discussing “how much of the

breakwater and western excavation (5,725 cubic yards) will be disposed of at an upland site.”

*See also Testimony of Mike Ahmer and Trevor Anderson.* The Addendum states it modifies page 2, box 16 to the Application.

4. According to the Application: “The purpose of this project is to provide navigable access from Priest Lake into the Thorofare during the recreational season. The overall objective of the project is to develop sustainable modifications to improve Thorofare access and navigability with channel deepening and replacement of the derelict breakwater. The project is supported by the Idaho Water Resources Board, Bonner County, Priest Lake businesses and numerous private stakeholders.” *Application* at 1, line 15. In line 15, page 1 of the Application, the box “Public” is checked defining the purpose and need for the navigational encroachment.

5. Attached to the Application are various maps, aerial images, site plans, construction elevations, engineering drawings, and a PowerPoint entitled, *Priest Lake Water Management Report: Thorofare Preliminary Engineering – Progress Report*, dated November 5, 2018, prepared by Mott MacDonald for the Idaho Department of Water Resources and the Idaho Water Resource Board (“IWRB PowerPoint”). The Application shows it was mailed to adjacent property owners.

6. The Application explains:

A solid breakwater will be installed along a slightly rotated alignment, with extension further into the lake. Thorofare dredging to the -2.0 Lake Datum will provide a 5-foot depth for navigation.

The western end of the breakwater would first be breached, to funnel flow into a remnant channel, providing a temporary migratory channel for fish. This would allow dredging, timber breakwater removal, and construction to occur in isolated conditions.

The footprint of the breakwater and western extension will require removal of 5,725 cubic yards (cy) of sediment to meet planned elevations. Approximately 10,374 cy of stone, gravel, and cobble would then be hauled to the project area to build up the

breakwater. The final breakwater will be about 1,300 feet long, and 42 feet wide. A 225-foot western extension of the breakwater will also be constructed to mitigate wave erosion risk and protect this section from bank erosion during high flow. It will consist of 660 cy of geobags and 492 cy of gravel/cobble built around the existing timber piles. About 12,200 cy of sediment will be dredged for the channel. Of this, 11,418 cy of dredge spoils will be re-used and place on the lake side (south) of the breakwater and extension as beach fill. These spoils will be graded at a 10:1 slope from the top of the breakwater to the lake. Native plants (e.g., willow) will be planted in the sandy spoils. The remainder of the dredge spoils (782 cy) would be hauled to an upland disposal site. The final dredged channel will be approximately 50 feet wide, and the dredge prism will cover roughly 3.5 acres.

A temporary haul road may be needed to ford the Thorofare at low water. 444 cy of gravel would be used, which would be removed after construction. Access may also be completed from the Lionhead Boat Launch, requiring 200 cy of temporary fill and 115 cy for Ecology block stabilization in the lake. A temporary erosion and sedimentation control (TESC) plan will be developed and implemented by the contractor. Silt fences will be installed along the perimeter of the work areas to confine sediment and runoff. Straw bales[,] stake straw wattles, or similar measures will be added to the silt fencing. Sediment release from the initial breakwater beach, breakwater removal, breakwater construction, and re-watering may result in temporary, localized increases in suspended sediment and turbidity. However, this impact is expected to be brief and minimal.

*Id.* at 2, line 16. As stated above, page 2, paragraph 16 was modified by the *Addendum*.

7. The Application discusses alternatives:

Several options were originally screened, and ultimately three alternatives were assessed (new bio-engineered, rubble mound, and sheet pile structures) for Thorofare improvements (see attached alternatives analysis[ ]). A bio-engineered structure would require a larger footprint in the lake, and highest maintenance costs, and was thus eliminated from consideration. The sheet pile option provides high constructability, but no opportunity for habitat enhancement, and pile driving can be disruptive to fish. The rubble mound structure can provide additional habitat, can be constructed in isolated conditions, and does not have the high underwater noise levels, [t]hus, is was selected.

*Id.* at 2, line 17.

8. The Application discusses mitigation:

Following development of the new breakwater, the sandy material on the lake (south) side will be planted with native vegetation (e.g., willow). Flow will be returned to the original Thorofare channel. Due to the deeper (5-foot) channel, fish migration should be improved between Priest Lake and the Thorofare. Upon

completion of the project, temporary fill will be removed at the Lionhead boat ramp and the area will be restored. Other project areas will be returned to pre-disturbance conditions. No other mitigation measures are anticipated at this time because all impacts are considered temporary.

*Id.* at 2, line 18.

9. The Application discusses best management practices:

Thorofare flows will be managed to allow the majority of the construction to occur in near dry or isolated groundwater conditions to minimize the work areas exposed directly to open lake surface waters. This will require the installation of temporary berm to isolate work areas and diversion of existing flow channels around the active work areas. Temporary sand berms may be constructed with on-site sand and limited imported materials to divert water through an existing remnant channel upstream of the primary breakwater structure, such that most construction and dredging can be executed in the dry or at the lowest possible water level. The footprint of a berm to divert flow is approximately 225 feet long by 40 feet wide. Work sites will be restored to pre-project conditions after the completion of construction.

*Id.* at 3, line 26b.

**B. Notice of the Application and Comments Received**

10. On June 6, 2019, the Department prepared a *Memorandum* to be sent to various local, state, and federal entities, as well as the Idaho Conservation League and adjacent neighbors, giving notice of the Application to those who received the *Memorandum* and soliciting comments, recommendations, or objections by July 6, 2019.

11. On June 10, 2019, and June 12, 2019, IDL mailed courtesy notification letters to landowners in the area, informing them of the Application and the ability to comment.

12. On June 11, 2019, the United States Army Corps of Engineers (“USACE”) stated it was working on finalizing its public notice for the breakwater.

13. On June 17, 2019, Dustin T. Miller, 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 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 Tuesday, August 13, 2019 at 6:00 p.m. Pacific Daylight Time at the Priest River Auditorium located at 1020 US-2, Priest River, Idaho.” *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.

14. On June 26, 2019, IDL mailed letters to other landowners regarding the Application, the ability to comment, and the time and place for the hearing.

15. On June 27, 2019, an *Affidavit of Publication* was signed by a bookkeeper with the *Bonner County Daily Bee*, a newspaper of general publication in Bonner County, Idaho, stating notice of the Application and notice of the hearing “was published in the regular and entire issue of the Bonner County Daily Bee for a period of 2 consecutive weeks, commencing on the 19 day of June 2019, and ending on the 26 day of June, 2019.”

16. During the months of June, July, and August, 2019, written comments were received by IDL concerning the Application. Some written comments agreed with the Application. Other written comments questioned the process, the greater height of the proposed breakwater relative to the current breakwater, exacerbation of sand build-up, deposition of dredged material, whether current infrastructure could handle construction, construction methods, and the impact to private property values. The written comments did not question the need to take some action as to the current state of the breakwater.

17. On August 5, 2019, IDL received an email from the Idaho Department of Environmental Quality stating: “DEQ will be developing a Water Quality Certificate for the Thoroghfare Project. We will start on it soon.”

18. On August 12, 2019, IDL received a letter from the applicant, Bonner County. The letter discussed the efforts taken by Bonner County since 2016, beginning with “the feasibility study” to keep the project “in the public eye. We accepted dozens of comments throughout that period, which were accommodated in the final design. . . . We have been reviewing comments that have been posted to the Idaho Department of Lands (IDL) website and addressing questions and concerns because it is important for this project to maximize the intended benefits and minimize impacts to the extent possible. . . . As a project intended to provide benefits to the entire Priest Lake community (residential, business, and recreational), we will continue to maintain an open door to address comments and make sure voices are heard throughout the final design and construction phases of the project.”

### C. The August 13, 2019 Hearing

19. On August 13, 2019, a hearing took place at the Priest River Auditorium in Priest River, Idaho, starting at just after 6:00 p.m. The order of testimony was established by the hearing coordinator as follows: (1) testimony from Bonner County; (2) testimony from public agencies other than IDL; (3) testimony from IDL; (4) testimony from the public; and (5) any reply from Bonner County.

20. Testimony on behalf of the applicant was given by Steve Klatt, Bonner County, Department of Parks & Waterways. To aid his testimony, Mr. Klatt presented with a PowerPoint, entitled *Priest Lake Thorofare Improvement Project* (hereinafter “PowerPoint”). Mr. Klatt explained the breakwater has been present since approximately 1917, with aerial

photography supporting its existence since 1935. *Testimony of Steve Klatt; PowerPoint* at 2, 4.

Mr. Klatt discussed the history of the breakwater, showing aerial photographs comparing the historic breakwater with the current breakwater. As part of the PowerPoint, Mr. Klatt superimposed a red outline over an aerial image showing where the 1935 breakwater stood in relation to the 2015 breakwater. *PowerPoint* at 4. Using the PowerPoint, Mr. Klatt explained how deposition of sediment has impacted the north end of Priest Lake and navigation, with different colors showing the depth of sediment. *Id.* at 6. Mr. Klatt also showed a slide with computer modeling that was done to understand waves and current. *Id.* at 7. Mr. Klatt discussed the need for improvements to the breakwater, the number of years the topic has been discussed in public forums, with creation of a steering committee made up of private and public stakeholders, and how the engineering firm, Mott MacDonald, was chosen for the project.

21. Shane Phillips, project manager and engineer with Mott MacDonald, also with aid of the PowerPoint, discussed the creation of a steering committee and public input that led to the consideration of improvement alternatives to the breakwater, ultimately leading to the contents of the Application. *Testimony of Shane Phillips; PowerPoint* at 5, 9. According to Mr. Phillips, the current breakwater was built with porous wood slats that allows currents and sediment to move through the breakwater, resulting in sediment deposition that reduces depth and impacts navigation. *Testimony of Shane Phillips; PowerPoint* at 5, 12. Mr. Phillips explained the proposed breakwater will be built from stone and will be rotated approximately 15 degrees from the existing timber breakwater, *PowerPoint* at 11-14, resulting in a “permanent repair to an existing structure,” *Testimony of Shane Phillips; PowerPoint* at 16.

22. Mike Ahmer, Resource Supervisor – Public Trust, Department of Lands, next testified, reading his written comments into the record (“IDL Comment”). The IDL Comment

was made part of the record at the hearing.<sup>1</sup> The IDL Comment explains the Application proposes a public, navigational encroachment in and above the bed of Priest Lake. *IDL Comment* at 2-3; *see also Application* at 1, line 15. While past permitting was not made part of the record, the IDL Comment states: “IDL has issued encroachment permits for work on the Thorofare in the past.” *Id.* at 2. “The Thorofare is the main access route to Upper Priest Lake because no road access exists. Potential impacts to the fisheries and water quality have been addressed in the proposed design and construction methods. Item 17 on page 2 of the application lists some of the measures proposed to prevent impacts to fisheries.” *Id.* at 3. “The height of the breakwater is needed to withstand the effects of waves and ice.” *Id.* “Protection of public trust resources such as fisheries and habitat helped lead to the selected design.” *Id.* The IDL Comment concludes the Application for a navigational encroachment is approvable, subject to certain modifications and conditions. *Id.* at 4.

23. After Mr. Ahmer’s comments, a representative with USACE explained a separate process exists for federal approval related to the Clean Water Act, with separate notice.

24. Jeff Connolly, Bonner County Commissioner, next testified in support of the project.

25. Eleanor Travis, a Priest Lake property owner, next testified concerning the lack of notice and consultation. Ms. Travis had concerns as to how the proposed breakwater would respond to ice and movement of rock. Ms. Travis read a passage from a 1981 book, entitled *North of the Narrows*, and concluded her testimony with a question as to whether the Thorofare in the future would resemble a canal.

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<sup>1</sup> The IDL Comment received by the hearing coordinator bears a “Draft” watermark on pages 2 and 4. The IDL Comment shows it was electronically signed by Mr. Ahmer, but does not show his actual signature. The IDL Comment was read into the record by Mr. Ahmer and accepted into the record by the hearing coordinator.

26. Randy Ramey, a thirty-year owner from the Sandpiper Shores subdivision, next testified. Mr. Ramey explained he has been involved with the Thorofare discussion since 2004 through various committees, and that his property is located at “ground zero” for the Thorofare project. Mr. Ramey supported the Application, testifying no project will be perfect, but this project will lead to sustainable navigation. After testifying, but before the close of the hearing, Mr. Ramey supplemented his testimony with a document entitled *Last Chance to Save Upper Priest Lake*, which appears to be a transcript of a discussion in the United States Senate involving Senator Frank Church and the efforts to preserve Upper Priest Lake. One passage of that document states: “There is neither road nor trail to the lake but the approach is easy and scenic, via the Thoroughfare, a lazily meandering stream just deep enough for most outboard motorboats and wide enough to permit one boat to pass another.” *Last Chance to Save Upper Priest Lake* at 3-4.

27. Ken Hagman, a member of the Steering Committee, next testified in favor of the Application.

28. John Hungate, property owner just north of the Thorofare, next testified as to his concerns that by rotating the breakwater and increasing the depth of the channel it will increase the velocity of water, moving more sand in front of his property, reducing the use and enjoyment of his property, as well as his property’s value. Mr. Hungate explained it used to be possible to dive from his dock into Priest Lake, but that is no longer possible because of sand deposition.

29. After the public testimony, a reply was given by Bonner County. Mr. Klatt testified as to the impacts boats can have on shorelines. Mr. Klatt explained the area in and around the breakwater and Thorofare has been managed as a no wake zone.

30. Mr. Phillips, in reply for Bonner County, addressed the question of ice and rock. Mr. Phillips explained the subjects have been researched, with breakwaters used extensively in very cold places, such as the Great Lakes and the northern slope of Alaska. Mr. Phillips also addressed the question of sand movement and sedimentation. Using the “Navigation/Bathymetry” slide to the PowerPoint, Mr. Phillips explained the solid breakwater structure will move sand farther out into Priest Lake. Mr. Phillips testified he has personally visited Priest Lake and the Thorofare, in order to aid in the assessment and engineering of the project.

31. The hearing concluded around 7:30 p.m., 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.

- (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).

All such hearings shall be public and held under rules promulgated by the board under the provisions of chapter 52, title 67 of the Idaho Code. The board shall render a decision within thirty (30) days following conclusion of the hearing and a copy of the board's decision shall be mailed to the applicant and to each person or agency appearing at the hearing and giving testimony in support of or in opposition to the proposed encroachment. Any applicant or other aggrieved party so appearing at a hearing shall have the right to have the proceedings and decision of the board reviewed by the district court in the county where the encroachment is proposed by filing notice of appeal within thirty (30) days from the date of the board's decision.

Idaho Code § 58-1306(c).

3. The hearing in this matter concluded at approximately 7:30 p.m. on August 13, 2019, with the matter before the hearing coordinator to issue a preliminary order.

4. All testimony was considered by the hearing coordinator. All written comments and documents received before the hearing was closed were considered by the hearing coordinator.

**A. The Applicant Bears the Burden of Persuasion**

5. As the applicant, Bonner County bears the burden of persuasion. “The customary common law rule that the moving party has the burden of proof – including not only the burden of going forward but also the burden of persuasion – is generally observed in administrative hearings.” *Intermountain Health Care, Inc. v. Bd. of County Comm’rs of Blaine County*, 107 Idaho 248, 251, 688 P.2d 260, 263 (Ct. App. 1984) *rev’d on other grounds* 109 Idaho 299, 707 P.2d 410 (1985).

6. Under Idaho law, “preponderance of the evidence” is generally the applicable standard for administrative proceedings, unless the Idaho Supreme Court or legislature has said otherwise. *N. Frontiers, Inc. v. State ex rel. Cade*, 129 Idaho 437, 439, 926 P.2d 213, 215 (Ct. App. 1996). “Absent an allegation of fraud or a statute or court rule requiring a higher standard, administrative hearings are governed by a preponderance of the evidence standard.” *Id. citing* 2 Am. Jur. 2d *Administrative Law* § 363 (1994). In civil cases, the well-settled principle is that the burden of proof is preponderance of the evidence. *Nield v. Pocatello Health Services, Inc.*, 156 Idaho 802, 848, 332 P.3d 714, 760 (2014). “In most hearings the burden of persuasion is met by the usual civil case standard or preponderance of evidence.” *Intermountain* at 251, 688 P.2d at 263 “A preponderance of the evidence means that when weighing all of the evidence in the

record, the evidence on which the finder of fact relies is more probably true than not.” *Oxley v. Medicine Rock Specialties, Inc.*, 139 Idaho 476, 481, 80 P.3d 1077, 1082 (2003).

**B. The Application Meets the Procedural Requirements of Idaho Code § 58-1306 and IDAPA 20.03.04**

7. Certain requirements, contained in Idaho Code § 58-1306 and IDAPA 20.03.04, must be met for an application to be considered by IDL.

8. First, “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 § 58-1306(a); *see also* IDAPA 20.03.04.020.07. Plans are defined as meaning, “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.” Idaho Code § 58-1302(k); *see also* IDAPA 20.03.04.020.07. Here, the Application was submitted on the *Joint Application for Permits* form, approved for use by the Department. Through maps, aerial images, site plans, engineering drawings, and construction elevations, the County describes the work that will occur. Therefore, the Application meets the requirements of Idaho Code § 58-1306(a), Idaho Code § 58-1302(k), and IDAPA 20.03.04.020.07.

9. Second, “Applications for noncommercial encroachments intended to improve waterways for navigation, wildlife habitat and other recreational uses by members of the public must be filed by a municipality, county, state, or federal agency, or other entity empowered to make such improvements. Application fees are not required for these encroachments.” IDAPA

20.03.04.07.d. Here, the Application is for a public, navigational encroachment. *Application* at 1, line 15; *IDL Comment* at 3. The Application was filed by Bonner County. *Application* at 1. As a governmental entity, and in accordance with IDAPA 20.03.04.07.d, Bonner County was authorized to file this type of application.

10. Third, “Within ten (10) days of receipt of an application . . . the board shall cause to be published . . . once a week for two (2) consecutive weeks, a notice advertising of the application and describing the proposed encroachment and general location thereof.” Idaho Code § 58-1306(b); *see also* IDAPA 20.03.04.030.01. Here, the Application was initially received on April 16, 2019. The Application was deemed complete by the Department on June 5, 2019, following submittal of the *Addendum* discussing “how much of the breakwater and western excavation (5,725 cubic yards) will be disposed of at an upland site.” On June 6, 2019, the Department prepared a *Memorandum* that it sent to various local, state, and federal entities, as well as the Idaho Conservation League and adjacent neighbors. On June 10, 2019 and June 12, 2019, IDL mailed courtesy notification letters to landowners in the area, informing them of the Application and the ability to comment. Notice of the Application was published in the *Bonner County Daily Bee* for a period of two consecutive weeks, commencing on June 19, 2019 and ending June 26, 2019. *Affidavit of Publication*. Therefore, the Application was timely published in accordance with Idaho Code § 58-1306(b) and IDAPA 20.03.04.030.01.

11. Fourth, “Any resident of the state of Idaho, or a nonresident owner or lessee of real property adjacent to the lake, or any state or federal agency may, within thirty (30) days of the first date of publication, file with the board an objection to the proposed encroachment and a request for a hearing on the application.” Idaho Code § 58-1306(c); *see also* IDAPA 20.03.04.030.04. The first notice of the Application was published on June 19, 2019, with the

last notice published on June 26, 2019. The first written comment was received by the Department on June 17, 2019, with the last written comment received on August 11, 2019. While comments must have been received “within thirty (30) days after the first appearance of this notice,” which was June 19, 2019, the Department continued to take written comments up until the close of the hearing on August 13, 2019. All written comments were considered by the hearing coordinator. Therefore, the Department provided more than the statutorily required period of thirty days for receiving comments.

12. Fifth, a hearing may be held if an objection requesting a hearing is made, or upon the Department’s own discretion. Idaho Code § 58-1306(c); *see also* IDAPA 20.03.04.030.05. Here, the Director ordered a hearing be held, noticing the same through publication in the *Bonner County Daily Bee*. Therefore, the hearing requirement of Idaho Code § 58-1306(c) and IDAPA 20.03.04.030.05 is satisfied. All oral comments and associated documents given to the hearing coordinator at the hearing were considered.

### **C. The Department Possess the Authority to Regulate Priest Lake**

13. The Department is vested with the authority, in the interest of “public health, interest, safety and welfare [to regulate] all encroachments upon, in or above the beds of waters of navigable lakes of the state . . . 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.” Idaho Code § 58-1301.

14. The County proposes to work in the bed of Priest Lake in order to construct a navigational encroachment. *Application* at 1, line 15; *IDL Comment* at 3. The work is discussed

in the Application, drawings, and aerial images. Priest Lake is a navigable body of water that is regulated by the Department. *State of Idaho v. Hudson*, 162 Idaho 888, 407 P.3d 202 (2017).

15. “Priest Lake has been a navigable lake since Idaho became a state in 1890. In approximately 1950, the State of Idaho constructed a dam on Priest Lake, which has stabilized the lake elevation at approximately 2437.64 feet from July to September since 1951.” *Id.* at 889, 407 P.3d at 203. “Idaho law provides that ‘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.’ The State of Idaho then owns, ‘in trust for the public title to the bed of the navigable water below the OHWM as it existed at the time the State was admitted into the Union.’ The Idaho legislature enacted the LPA, which is codified as Idaho Code 58, chapter 13, to regulate encroachments and activities that occur in, on, or above navigable lakes in the State of Idaho.” *Id.* at 893, 407 P.3d at 207. The presence of the dam on Priest Lake and the water level the dam creates is not a material fact in determining the ordinary high water mark (“OHWM”). *Id.*

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

16. “The board of land commissioners shall regulate, control and may permit encroachments in aid of navigation or not in aid of navigation on, in or above the beds or waters of navigable lakes . . .” Idaho Code § 58-1303.

17. Consideration of an application for encroachment requires the balancing of 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.

18. 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:

[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”).

19. According to Department rule: “Breakwaters built upon the lake for use in aid of navigation will not be authorized below the normal low water without an extraordinary showing of need, provided, however, that this shall not apply to floating breakwaters secured by piling and used to protect private property from recurring wind, wave, or ice damage, or used to control traffic in busy areas of the lakes. The breakwater shall be designed to counter wave actions of known wave heights and wave lengths.” IDAPA 20.03.04.015.06.

20. In evaluating the factors set forth in Idaho Code § 58-1301 and KEA, and as will be explained below, the Application, is approved, subject to certain conditions set forth in sections E, F, and G in this preliminary order.

21. The Application is for a breakwater in aid of navigation. *Application* at 1, line 15.

By rule, a “breakwater” is defined as an “Encroachment in Aid of Navigation.” IDAPA 20.03.04.010.15. “The term ‘encroachments in aid of navigation’ may be used interchangeably herein with the term ‘navigational encroachments.’” *Id.*

22. According to *KEA*, the “[t]he degree of effect of the project on public trust uses, navigation, fishing, recreation and commerce” should be reviewed. *KEA* at 629, 671 P.2d at 1092. Because no road exists, the Thorofare is the main access route to Upper Priest Lake, *Application* at 3; *see also Last Chance to Save Upper Priest Lake* at 3-4, with the breakwater helping maintain access to the Thorofare. Without a replaced breakwater, navigational access to Upper Priest Lake will be hindered, which will negatively impact recreation and commerce. By deepening the channel to 5 feet, and maintaining the no wake zone to reduce the movement of sediment, the replaced breakwater should improve navigation and recreation opportunities. Reducing deposition of sediment near the breakwater, Thorofare, and shoreline is a project goal, was a public comment, and was testified to at the hearing. While fish, fisheries, and fish migration were discussed in the Application and other written materials, fishing was not.

23. According to *KEA*, the replaced breakwater should be “examined cumulatively with existing impediments to full use of the public trust resource . . . .” *KEA* at 629, 671 P.2d at 1092. Furthermore, “the impact of the individual project on the public trust resource” should be examined. *Id.* It is important that the breakwater is a historic structure, present since approximately 1917, with aerial photography from as early as 1935 showing its presence in much the same area as it exists today and as discussed in the Application. *Testimony of Steve Klatt; PowerPoint.* Comments in the record and testimony at the hearing did not dispute the need for a breakwater, with consensus that something needs to be done. When examined

cumulatively, the breakwater and Thorofare are important features in Priest Lake that have been present for a century and aid in full use of the public trust resource.

24. According to *KEA*, the proposed breakwater should be examined “in light of the primary purpose for which the resource is situated, i.e. commerce, navigation, fishing or recreation . . .” *KEA* at 630, 671 P.2d at 1093. A primary purpose of Priest Lake was not discussed. That said, the record supports a conclusion that the breakwater aids in navigation, recreation, and commerce in and around that area of Priest Lake.

25. According to *KEA*, the proposed breakwater should be examined in light of “the degree to which broad public uses are set aside in favor of more limited or private uses.” *KEA* at 630, 671 P.2d at 1093. The breakwater is for public use, allowing the public to better use the Thorofare, which is the navigational access to Upper Priest Lake. *Application* at 3; *see also Last Chance to Save Upper Priest Lake* at 3-4.

26. Specifically discussed was the height of the proposed breakwater relative to the existing timber breakwater, the materials chosen for the proposed breakwater, the lack of vegetation on the timber breakwater relative to the proposed breakwater, the alignment and porosity of the proposed breakwater, ice, and waves were discussion points in the record.

27. As to height, the existing breakwater varies, with the evidence showing it is approximately “+6.5 feet.” *Application, Sheet 5 of 7 (Sections 1)*; *IWRB PowerPoint* at 9. The proposed breakwater will be “+7.0 feet.” *Application, Sheet 5 of 7 (Sections 1)*. The height of the breakwater is important because a structure that is unreasonably taller than the existing breakwater will impact views from the northern end of Priest Lake and the overall aesthetic. While the proposed breakwater is not identical in height, and will be approximately six inches

higher than the existing breakwater, increasing the height of the breakwater by six inches is reasonable in light of the public benefits the breakwater will provide.

28. As to materials, the existing breakwater is timber driven into the bed of Priest Lake, while the proposed breakwater will consist of sand, gravel, cobble, and stone. *Application*, Sheet 5 of 7 (Sections 1). An alternative considered was construction of a vertical breakwater made from steel sheetpile. *Application* at 2, line 17; *IWRB PowerPoint* at 5, 35-36. “The sheet pile option provides high constructability, but no opportunity for habitat enhancement, and pile driving can be disruptive to fish.” *Application* at 2, line 17. Additional concerns raised with this alternative were: aesthetics (“galvanized or bare steel not a natural material”); wave and wake action; scour at the toe of the wall; and that it would be less compatible with dredged material reuse. *IWRB PowerPoint* at 36. From a cost standpoint, the vertical steel breakwater would cost significantly more than the sloped rock breakwater. *Id.* at 39-40. “A Rock Breakwater is recommended – It is the best material type for project site conditions (ice, access, hydrodynamics), locally available materials, and lower maintenance requirements.” *IWRB PowerPoint* at 42. “The rubblemound structure can provide additional habitat, can be constructed in isolated conditions, and does not have the high underwater noise levels, [t]hus, it was selected.” *Application* at 2, line 17. Local quarries will be used to source the rock for the breakwater. *IWRB PowerPoint* at 16-17. A concern raised at the hearing was whether the proposed breakwater would chip or break, resulting in material other than sand washing ashore. This is possible. That said, and as discussed at the hearing by the project engineer, the stone is local, is good quality, and is predicted to last for 75-100 years. The natural construction materials that will be used in construction of the stone breakwater are reasonable in light of the public benefit the breakwater will provide, and is reasonable in light of the proposed alternatives.

29. As to vegetation, a concern is the existing vertical breakwater has no vegetation growing on it, while the proposed breakwater is designed with vegetation on the Priest Lake side of the structure. *Application, Sheet 5 of 7 (Sections 1)*. Vegetation is likely necessary to help anchor the gravel, cobble, and rock. The Application proposes “native species to be determined” that will be planted above the OHWM and stop one-foot short of the crest of the breakwater. *Id.* Because vegetation grows, it could impact the viewshed. *Comment of Mark Aden* (“No one wants a highly obtrusive structure that obscures the lake or the Thorofare any more than possible.”); *Comment of Brian and RoseAnn Elliott* (“We would expect that no vegetation would be planted where there currently is no vegetation. We purchased this property because of the unobstructed view looking south down the lake. We expect the same view in perpetuity.”). That vegetation should not unreasonably impact the viewshed was contemplated by Bonner County: “Plantings ok; needs to be lower growing shrubs and not large trees that would impact viewshed for property owners at Sand Piper Shores.” *IWRB PowerPoint* at 14. The species of plants to be selected should be native and as low growing as possible to accomplish their purpose, yet not infringe on the viewshed. While not required, Bonner County is encouraged to continue the good public outreach it has done in the past to select vegetation that will accomplish these goals.

30. As to alignment, the proposed breakwater is rotated approximately 15 degrees differently from the existing breakwater. *Application, Figure 2a; PowerPoint* at 11; *IWRB PowerPoint* at 11, 28. As to porosity, the proposed breakwater will be solid, whereas the existing breakwater is not. *Application* at 2. “A rotated alignment is recommended, to further confine the flow, and is consistent with the first breakwater constructed.” *IWRB PowerPoint* at 41. Deposition of sediment along the shore was discussed at the hearing as a concern. The rotated alignment and nonporous nature of the proposed breakwater was supported by computer

modeling and is predicted to improve sediment travel through the Thorofare, allowing sand to move into the deeper portions of Priest Lake. *Testimony of Shane Phillips; PowerPoint* at 12. The rotated alignment and nonporous construction is reasonable in light of the public benefits the breakwater will provide.

31. As to ice, Priest Lake does freeze, *IWRB PowerPoint* at 9, 12, 40, and ice could build up on the breakwater, damaging it. Ice was raised as a concern at the hearing relative to the proposed breakwater. Ice was addressed in the record. *Id.* Ice was addressed at the hearing by Mr. Phillips, who explained the design accounted for it. Mr. Phillips also stated breakwaters are extensively used in very cold environments such as the Great Lakes and the northern slope of Alaska. The proposed breakwater, which is sloped, will better withstand ice than a vertical breakwater. *IWRB PowerPoint* at 40. The proposed breakwater accounts for ice and is reasonable in light of the public benefit it will provide.

32. According to Department rule: “The breakwater shall be designed to counter wave actions of known wave heights and wave lengths.” IDAPA 20.03.04.015.06. Waves and water levels were discussed in the record and accounted for in the design of the proposed breakwater. *IWRB PowerPoint* at 9. Waves were discussed in the record and were accounted for in the proposed breakwater. *Id.* at 10. The Application meets the criteria of IDAPA 20.03.04.015.06.

#### **E. Unused Timber Breakwater**

33. As discussed at the hearing, certain portions of the existing timber breakwater will be used during construction, while other portions will not.

34. According to IDL rule: “Pilings, anchors, old docks, and other structures or waste at the site of the installation or reinstallation and not used as a part of the encroachment shall be

removed from the water and lakebed at the time of the installation or reinstallation to a point above normal flood water levels . . .” IDAPA 20.03.04.060.02.a.

35. As to the existing timber breakwater, the Department commented as follows: “Section 16 on page 2 of the application form briefly mentions removal of the existing timber breakwater on line 4. No further details are given. The existing timber breakwater will be used to support the western end of the proposed breakwater from STA 0+00 to STA 3+00 as shown in Sheet 4 of 7 and Sheet 5 of 7 on pages 13 and 14 of the application. The rest of the existing breakwater from STA 3+00 eastward should be removed during the project.” *IDL Comment* at 3.

36. Consistent with its comment, IDL requests any encroachment permit that issues include the following language: “Removal of the existing timber breakwater adjacent to the proposed rock breakwater from approximately STA 3+00 eastward on the Site Plan-Proposed/Sheet 4 of 7 Drawing will occur prior to project completion.” *IDL Comment* at 4.

37. The Department’s request that Bonner County remove the unused timber breakwater from the bed of Priest Lake is grounded in rule, IDAPA 20.03.04.055, and is approved by the hearing coordinator.

#### **F. Submerged Land Easement**

38. According to IDL rule: “Breakwaters . . . on or over state-owned beds, designed primarily to create additional land surface, will be authorized, if at all, by an encroachment permit and submerged land lease or easement, upon determination by the department to be an appropriate use of submerged lands.” IDAPA 20.03.04.055.02. “As a condition of the encroachment permit, the department may require a submerged land lease or easement for use of any part of the state-owned bed of the lake where such lease or easement is required . . . A lease or easement may be required for uses including, but not limited to, commercial uses.

Construction of an encroachment authorized by permit without first obtaining the required lease or easement shall constitute a trespass upon state-owned public trust lands. This rule is intended to grant the state recompense for the use of the state-owned bed of a navigable lake where reasonable and it is not intended that the department withhold or refuse to grant such lease or easement if in all other respects the proposed encroachment would be permitted.” IDAPA 20.03.04.055.

39. According to the Department, “The proposed breakwater will be a permanent addition to the bed of Priest Lake, and will essentially create a peninsula above the ordinary high water mark (OHWM) of Priest Lake. Permanent features such as this placed on state-owned navigable waters normally require a submerged lands lease or submerged lands easement. Due to the noncommercial use of the breakwater, IDL believes a submerged lands easement would be more appropriate in this instance. An easement will also document the location of the ordinary high water mark and ensure that no claim can be made for upland ownership of the breakwater. Even though the breakwater will extend above the OHWM, it is still impressed with the public trust due to the underlying state-owned lake bed.” *IDL Comment* at 3. As a result, IDL requests any encroachment permit that issues include the following language: “Bonner County will submit an application for a submerged lands easement to cover the new breakwater in Priest Lake.” *IDL Comment* at 4.

40. Bonner County anticipated the possibility that an easement might be needed from the Department. *IWRB PowerPoint* at 13 (“may require an ‘easement’ type permit”).

41. The Department’s request that Bonner County obtain a submerged lands easement is grounded in rule, IDAPA 20.03.04.055, was anticipated by the applicant, and is approved by the hearing coordinator.

## **G. Dredged or Excavated Materials**

42. According to the Department, “Most of the dredged or excavated material removed from the OHWM will be used in the project and left on the state owned bed of Priest Lake. An estimated 1,718 cubic yards of this material is planned to be hauled off site and disposed of in an upland location. A royalty on this material must be paid to IDL. For a project of limited duration and scope such as this proposal, a Land Use Permit is typically used by IDL to recover administrative costs and royalties associated with mineral removal from state lands.”

*IDL Comment at 3-4.*

43. In the *Addendum* to the Application, Bonner County states of the 5,725 cubic yards of excavation, 4,007 cubic yards will be reused at the site, and 1,718 cubic yards will be hauled off site and disposed of in an upland location.

44. Idaho Code § 47-717 states: “It shall be unlawful for any person, association, firm or corporation to remove in commercial quantities any ores, minerals, or deposits from state lands before securing a lease for said lands from the state board of land commissioners. Any person, association, firm or corporation who so removes ores, minerals or deposits shall be liable to the state for treble damages in a civil action.”

45. In accordance with Idaho Code § 47-717, the Department requests any encroachment permit that issues include the following language: “Bonner County or their contractor will obtain a Land Use Permit or other instrument approved by IDL to pay for sand and other natural lake bed materials dredged or removed from below the OHWM of Priest Lake and used or disposed of outside the confines of the state-owned lake bed. The expected amount is approximately 1,718 cubic yards.” *IDL Comment at 4.*

46. The Department's request that Bonner County obtain a Land Use Permit or other instrument to pay for sand and other natural lake bed materials dredged or removed from below the OHWM of Priest Lake and used or disposed of outside the confines of the state-owned lake bed is grounded in statute, Idaho Code § 47-717, and is approved by the hearing coordinator.

## **ORDER**

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that Encroachment Permit Application No. L-97-S-0891C is APPROVED, subject to the following four conditions, as well as any other conditions imposed by the Director of the Idaho Department of Lands:

1. Removal of the existing timber breakwater adjacent to the proposed rock breakwater from approximately STA 3+00 eastward on the Site Plan-Proposed/Sheet 4 of 7 Drawing will occur prior to project completion;
2. Bonner County will submit an application for a submerged lands easement to the Idaho Department of Lands to cover the new breakwater in Priest Lake;
3. Bonner County or their contractor will obtain a Land Use Permit or other instrument approved by the Idaho Department of Lands to pay for sand and other natural lake bed materials dredged or removed from below the ordinary high water mark of Priest Lake and used or disposed of outside the confines of the state-owned lake bed. The expected amount is approximately 1,718 cubic yards; and
4. The species of plants selected for the breakwater must be native and as low growing as reasonably possible in order to anchor the material, yet not infringe on the viewshed.

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 August 13, 2019.

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 28<sup>th</sup> day of August, 2019.



CHRIS M. BROMLEY  
Hearing Coordinator

## CERTIFICATE OF SERVICE

I certify that on this 28<sup>th</sup> day of August, 2019, I caused to be served a true and correct copy of the foregoing was served upon the following persons by the method(s) indicated:

Dustin T. Miller  
Director  
Idaho Dept. of Lands  
P.O. Box 83720  
Boise, ID 83720-0050

- U.S. Mail, postage prepaid
- Hand Delivery
- Facsimile:
- Email: [dmiller@idl.idaho.gov](mailto:dmiller@idl.idaho.gov)

Kourtney Romine  
Administrative Assistant  
Idaho Dept. of Lands  
P.O. Box 83720  
Boise, ID 83720-0050

- Statehouse Mail
- Hand Delivery
- Federal Express
- Email: [kromine@idl.idaho.gov](mailto:kromine@idl.idaho.gov)

Angela Schaer Kaufmann  
P.O. Box 83720  
Boise, ID 83720-0010

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



CHRIS M. BROMLEY