

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

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| In the Matter of Navigational Encroachment |) | |
| Permit No. L-95-S-4610D |) | Case No. L-LP-12-002 |
| _____ |) | |
| |) | |
| JOHN ROCCHIO, Trustee for the Rocchio |) | |
| Family Revocable Trust and BRIDGER REID, |) | FINAL ORDER |
| |) | |
| Applicants, |) | |
| |) | |
| _____ |) | |

This is a final order of the agency. Any party aggrieved by this decision has the right to have this final order reviewed by the district court in the county where the encroachment is proposed by filing a notice of appeal within thirty (30) days from the date of this final order. Idaho Code § 58-1305(c); IDAPA 20.03.04.025.09.

I. BACKGROUND

On March 30, 2011, John Rocchio, Trustee for the Rocchio Family Revocable Trust and Bridger Reid (“Applicants”), submitted a joint application for a navigational encroachment permit to the Idaho Department of Lands (“IDL”) requesting modification of an existing single-family dock located on Lake Coeur d’Alene into a two-family dock. IDL denied the application. Applicants appealed the denial of their joint navigational encroachment permit application to the district court. The Applicants argued that IDL inappropriately applied the statutes and procedural rules when denying the application and that IDL should have conducted a hearing to determine whether most unusual circumstances were present that would warrant denial of the

application. The district court remanded the application back to IDL for purposes of conducting a hearing in accordance with I.C. § 58-1305(a) to determine whether most unusual circumstances are present.¹

On October 29, 2012, Edward Robinson was appointed as the Hearing Officer and directed to make recommendations to the State Board of Land Commissioners (“Land Board”) regarding the application following a hearing. On November 14, 2012, a pre-hearing conference was held at which the parties agreed to a hearing date and a schedule for submitting pre-hearing briefs and identifying exhibits and witnesses. On January 15, 2013, Applicants filed an Affidavit of Nikki Droll in Support of Petitioners’ Response to Prehearing Conference and Scheduling Order (“Affidavit”), which related to Applicants’ previously disclosed exhibit list. IDL filed an Objection And Motion To Strike Portions Of The Affidavit of Nikki Droll in Support of Petitioners’ Response to Prehearing Conference and Scheduling Order on January 16, 2013.

A formal hearing was held in Coeur d’Alene on January 17, 2013. IDL and the Applicants resolved IDL’s objection by stipulating, on the record, to striking paragraph eight of the Affidavit. The parties then offered testimonial and documentary evidence into the record. During the presentation of evidence, IDL objected to the admission of Applicants’ Exhibits 4–15 (“Exhibits 4–15”) which included copies of twelve (12) navigational encroachment permits that had previously been issued on Lake Coeur d’Alene. The Hearing Officer took the objection under advisement. On January 22, 2013, IDL filed The Idaho Department of Lands’ Memorandum In Support Of Objection To Applicants’ Exhibits 4 Through 15. IDL’s Post-

¹ The District Court’s Memorandum Opinion and Order on Petition for Judicial Review, CV 11-5166, September 21, 2012, is quoted in the Hearing Memorandum for the Idaho Department of Lands (“IDL Hearing Memorandum”) filed with the Hearing Officer January 7, 2013, and the Idaho Department of Lands’ Memorandum in Support of Objection to Applicants’ Exhibits 4 through 15 (“Memorandum in Support of Objection”) filed with the Hearing Officer January 22, 2013.

Hearing Memorandum For The Idaho Department Of Lands and Applicants' Post-Hearing Brief Of Petitioner And Reply To Objection were filed on January 28, 2013.

On February 7, 2013, a status conference was held to discuss the timeframe and procedures for issuance of a final order. The Hearing Officer advised the parties of his determination that the procedural requirements set out in I.C. §§ 67-5243-44 and IDAPA 20.01.01.720² should apply in this case. The Hearing Officer asked the parties whether they wished to proceed under I.C. §§ 67-5243-44 and IDAPA 20.01.01.720 or whether they wished to continue under the forty-five day timeframe set forth in I.C. § 58-1305 and IDAPA 20.03.04.025.07.³ IDL took the position that, pursuant to Idaho Code § 67-5240⁴, I.C. § 58-1305(c) controls over the requirements set forth for the issuance of recommended orders in I.C. § 67-5243(3). However, IDL and the Applicants agreed to proceed under the forty-five day time period set forth in I.C. § 58-1305 and IDAPA 20.03.04.07. A February 13, 2013 Order on Status Conference reflected the parties' stipulation and ordered that the final order in this case would be issued within forty-five days of the hearing date. IDL filed a Notice of Errata on February 15, 2013, clarifying that the agency was relying on only I.C. § 67-5240 for its assertion that I.C. § 58-1305(c) governed these proceedings.⁵ Based on the parties' stipulation and the February 13, 2013 Order on Status Conference, these procedural issues need not be addressed further.

II. FINDINGS OF FACT

² Idaho Code Sections 67-5243-5244 and IDAPA 20.01.01.720 provide timeframes for motions for reconsideration and taking of exceptions to an agency's recommended order.

³ Idaho Code Section § 58-1305 and IDAPA 20.03.04.025.07 require that a final order be issued forty-five days after a navigational encroachment permit application hearing.

⁴ Idaho Code Section 67-5240 provides that a contested case proceeding before an agency that may result in the issuance of an order is governed by the provisions of the Idaho Administrative Procedure Act, Idaho Code §§ 67-5201 et. seq., "except as provided by other provisions of law."

⁵ The Order on Status Conference incorrectly referenced I.C. §§ 67-5243(3) and 67-5244(2) when explaining IDL's position.

Prior to February 1, 2011, the Rocchio Family Revocable Trust (“Rocchio Trust”) owned a piece of real property bordering Lake Coeur D’Alene, more specifically described as Lot 12 in the First Addition Driftwood Point subdivision located in Sec. 13, T49N, R4W, BM Kootenai County, Idaho. The physical address of the property is 489 E. Driftwood Lane, Harrison, Idaho. A single family home is located on the property. Navigational encroachment permit number L-95-S-4610 allowed a single family dock to be used in conjunction with Lot 12.

At some point prior to the current application, the Rocchio Trust and a Mr. Bridger Reid (“Mr. Reid”) applied for a navigational encroachment permit for a two-family dock for Lot 12 that was based on a lease between the Rocchio Trust and Mr. Reid. The application was denied. Subsequently, the Rocchio Trust divided Lot 12 into two separate tax lots; Kootenai County tax lots 0-1820-000-12A and 0-1820-000-12B, Sec. 3, T49N, Range 4W. The Rocchio Trust retained ownership of tax lot 0-1820-000-12A. The Rocchio Trust deeded tax lot 0-1820-000-12B to Mr. Reid by a warranty deed dated February 1, 2011. The tax lot line runs through the middle of the original Lot 12, bisecting the property lengthwise. The tax lot line also runs through the middle of the single family home that existed on the Rocchio Trust property prior to the split and existed at the time of the hearing in this matter. Both tax lots 0-1820-000-12A and 0-1820-000-12B are waterfront to Lake Coeur d’Alene.

Mr. Kirk Evans (“Mr. Evans”) owns property located at 547 East Driftwood Lane, Harrison, Idaho; Lot 8 and a part of Lot 7 in the First Addition Driftwood Point subdivision. Mr. Evans’ property is located near the parcels at issue in this case. Prior to Mr. Evans’ acquisition of the property, it was divided into two tax lots by the Kootenai County Assessor’s Office in 1992. One of the tax lots is owned by a family trust and contains a single family residence. The other tax lot is owned by Mr. Evans and does not have a residence or other building on it because

it does not qualify as a buildable lot under the local planning and zoning codes. Mr. Evans entered into an agreement with a Mr. Sean Smith to lease him the tax lot that does not have a residence on it. Mr. Smith leased the property in order to have access to a boat dock. In 2010, based on the tax lot division that occurred in 1992 and the lease to Mr. Smith, Mr. Evans was granted navigational encroachment permit number L-95-S-4287B for a two-family dock for the two tax lots.

Based on the knowledge he acquired by filing his own application, Mr. Evans offered to help the Applicants file an application for a two-family dock for tax lots 0-1820-000-12A and 0-1820-000-12B. The Applicants granted Mr. Evans authority to process their permit application. On or about March 30, 2011, Mr. Evans submitted navigational encroachment permit application number L-95-S-4610D to IDL on behalf of the Applicants. The application was based on the recent tax lot split and requested approval to modify the existing single family dock associated with Lot 12 to create a larger 1,098 square foot two-family dock. The application included adjacent property owner notification and consent, a county plat map, tax records for the properties, lakebed profile, vicinity map, aerial photos, drawings of the proposed project, and the surveyed legal description of each lot.

On April 8, 2011, Mr. James Brady (“Mr. Brady”), IDL Senior Lands Resource Specialist, Minerals and Navigable Waters sent a letter to Mr. Evans. The letter stated that certain information was missing from the application. The letter referred Mr. Evans to Section 25 of IDL’s Navigable Waters Program Procedures Manual⁶ and requested the Applicants provide

⁶ According to IDL, Section 25 of IDL’s Navigable Waters Procedures was adopted in approximately 2004 or 2005. IDL’s Navigable Waters Procedure Section 25 was removed from the IDL website approximately one year prior to the hearing date. See http://www.idl.idaho.gov/bureau/smr/navwaters/nw_procedures.html. A full copy of Section 25 of IDL’s Navigable Waters Procedures was not submitted into evidence. However, a portion of Section 25 is quoted in Mr. Brady’s April 8, 2011 letter.

approval for the lot split from the Kootenai County Planning and Zoning Commission. The letter also requested the Applicants provide proof of ownership by providing copies of the executed recorded deeds for both lots. In response, on April 8, 2011, Mr. Evans had a phone conversation with Mr. Brady regarding the missing documentation that would be needed to complete processing of application number L-95-S-4610D. Following that telephone conversation, Mr. Evans faxed a letter to Mr. Brady stating it was his opinion that both properties in question met the legal requirements necessary to have littoral rights and to qualify for a two-family dock. The letter included a parcel description provided by Kootenai County Title Company describing parcels 1 and 2 of Lot 12, First Addition to Driftwood Point, and a Warranty deed, dated February 1, 2011, transferring property from Mr. and Mrs. John Crowley Rocchio and Lisa Bukar Rocchio, Trustees of the Rocchio Trust to Mr. Reid.

In a letter dated May 31, 2011, IDL denied application L-95-S-4610D because the lot division was not done in conformance with the local planning and zoning authority and was, therefore, not considered a legal subdivision of the littoral right associated with Lot 12. IDL also stated the tax lot division dividing a residence in half was a most unusual circumstance that warranted denial of the permit and that approving an application under the circumstances of this case would be in violation of IDL's obligations under the public trust doctrine.

III. ANALYSIS

A. Approval of Application due to Failure to Act

Applicants argue that their application was automatically approved because IDL failed to act upon the application within the time period required by IDAPA 20.03.04.025.08 which states that "the department shall act upon a complete application . . . as expeditiously as possible but no later than sixty (60) days from the acceptance of the application. Failure to act within this sixty

(60) day timeframe shall constitute approval of the application.” The application that was received by IDL on March 30, 2011 did not contain information necessary to document littoral ownership as required by IDAPA 20.03.04.07.a.iii. The application was fully complete on April 8, 2011, when Mr. Evans submitted the Warranty Deed transferring property from the Rocchio Trust to Mr. Reid. Thus, it was not until April 8, 2011, that IDL was able to begin processing the application. The application was denied on May 31, 2011, which was within 60 days from the date the application was fully submitted and capable of being processed. Therefore, IDL acted on the application within the 60-day timeframe and the application was not automatically approved.

B. IDL’S Objection to Applicants’ Exhibits 4–15

IDL asserts that Exhibits 4–15 should be excluded from the record because they are not relevant to the question of whether IDL acted arbitrarily in denying the permit. Exhibits 4–15 include twelve (12) lake encroachment permits issued by IDL from 2006 to 2012. IDL asserts the exhibits are not relevant because they are all factually distinguishable from the case at hand. In support of its objection, IDL relies upon *Whorle v. Kootenai County*, 147 Idaho 267, 207 P.3d 998 (2009). *Whorle* involved an appeal to the district court of a county zoning decision denying a variance. Pursuant to I.C. § 67-5276⁷, the appellant sought to augment the record before the district court with evidence of other variances that, in the appellant’s view, had been granted under similar circumstances. *Whorle*, 147 Idaho at 272, 207 P.3d at 1003. In analyzing the requirements for augmenting the record pursuant to I.C. § 67-5276, the Idaho Supreme Court determined that evidence of other variance permits was not material due to the unique characteristics of the appellant’s property. *Id.* However, the standard of review applied in

⁷ Idaho Code Section 67-5276 deals with augmentation of an agency record on appeal.

Whorle, I.C. § 67-5276, governs augmentation of an appellate record during judicial review of a final agency action and is therefore not applicable here.

Rather, I.C. § 67-5251 governs the admission of relevant evidence during a contested case hearing before the agency. Idaho Code Section 67-5251 provides that a presiding officer in a contested case “may exclude evidence that is irrelevant, unduly repetitious, or excludable on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of this state.” However, the Rules of Practice and Procedure Before the State Board of Land Commissioners, IDAPA 20.01.01, encourage full development of a contested case record:

Evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order. . . . All . . . evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs.

IDAPA 20.01.01.600.

Pursuant to IDAPA 20.01.01.600, Exhibits 4–15 are not so irrelevant, unduly repetitious, or excludable on other grounds as to warrant their exclusion and they should be accepted to assist in the development of the record in this case. Therefore, IDL’s objection to Exhibits 4–15 and request they be excluded from the record is denied.

C. Littoral rights

Both Applicants and IDL argue that this case requires a determination of whether Applicants’ split of Lot 12 into two separate tax lots legally divided the littoral rights of Lot 12 into two separate littoral rights so as to qualify them for a two-family dock. Idaho Code Section

58-1302(f) defines riparian or littoral rights as “the rights of owners or lessees of land adjacent to navigable waters to maintain their adjacency to the lake and to make use of their rights as riparian or littoral owners or lessees in building or using aid to navigation.” The Rules for the Regulation of Beds, Waters, and Air-space Over Navigable Lakes in the State of Idaho, IDAPA 20.03.04 (“Lake Protection Act Rules”), define riparian or littoral owner to be “[t]he 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 20.03.04.010.33. IDL’s Navigable Waters Procedures Manual, Section 25, states that a legally established littoral lot is “a separate tax lot or parcel, which has been approved by the local planning and zoning commission or other appropriate governmental unit.”⁸

Based on this statutory, regulatory, and policy framework, IDL argues that the only way for Applicants to create a split of the original littoral right was to subdivide the property in compliance with the requirements of Kootenai County Subdivision Ordinance 26-B which was enacted on November 17, 1995.⁹ IDL argues that, because the local land use code governs the division of land into two or more lots, parcels, tracts, or sites for the purpose of sale or lease, the only way to divide littoral rights after the date Ordinance 26-B was enacted (i.e., post-1995) is to get approval for the subdivision from the Kootenai County Planning and Zoning Commission. IDL asserts that prior to 1995, the creation of separate tax lots through the Kootenai County Assessor’s Office was the only way land could be legally subdivided. Thus, IDL argues, tax lots created before 1995 legally created littoral rights, but after 1995, only subdivisions approved by the Kootenai County Planning and Zoning Commission create a legal division of littoral rights.

⁸ *Supra* note 6.

⁹ Kootenai County Subdivision Ordinance 26-B governs the division of land into two or more lots, parcels, tracts, or sites for the purpose of sale or lease.

According to IDL, because Applicants' tax lot division occurred after 1995 it did not legally create a division of littoral rights.

Applicants argue that applying for and gaining approval from the Kootenai County Assessor's Office to divide the property into two tax lots was sufficient to create a division of the littoral rights so as to qualify them for a two-family dock. Applicants focus on the language of IDL's Navigable Waters Procedures Manual Section 25 which states that a legally established lot can be approved by "the local planning and zoning commission or *other appropriate governmental unit.*" (emphasis added).¹⁰ Applicants contend that the Kootenai County Assessor's Office is just such an "appropriate governmental unit" and, therefore, they are in possession of two separate littoral rights that qualify for a two-family dock. In response, IDL asserts that the phrase "appropriate governmental unit" refers to the local authority with jurisdiction to regulate property subdivisions and the creation of legal lots, even if it is not titled planning and zoning commission, and that post-1995, only the Kootenai County Planning and Zoning Commission has that authority, not the County Assessor's Office.

Even assuming, for argument's sake, that the Applicants are correct, and that their tax lot division legally created two separate littoral rights, the application for navigational encroachment permit number L-95-S-4610D should still be denied because it involves the most unusual circumstances and violates IDL's public trust responsibilities. Therefore, it is not necessary to address the issue of the legal creation of littoral rights for subdivided real property. *See e.g., Dupont v. Idaho State Bd. of Land Comm'rs*, 134 Idaho 618, 625, 7 P.3d 1095, 1102 (2000) (Affirming the Land Board's decision based on the existence of unusual circumstances and concluding it was unnecessary to address other legal arguments.)

¹⁰ *Supra* note 6.

D. Most unusual circumstances

The State of Idaho owns, in trust for the public, title to the beds and banks of navigable waters below the ordinary high water mark as it existed when Idaho became a state. *In re Sanders Beach*, 143 Idaho 443, 446, 147 P.3d 75, 78 (2006). The Lake Protection Act (“LPA”) expressly authorizes the Land Board¹¹ to regulate, control and permit encroachments on, in or above the beds of navigable waters in the State of Idaho. I.C. §§ 58-104(9), 58-1301 to 1312. Lake Coeur d’Alene is a navigable lake as defined by Idaho Code § 58-1302(a). The express purpose of the LPA is regulate the use of the beds or waters of navigable lakes in order that:

[T]he 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.

I.C. § 58-1301.

Pursuant to the Lake Protection Act Rules, encroachments of any kind on, in, or above the beds of Lake Coeur d’Alene require a permit prior to encroaching on the lake. IDAPA 20.03.04.012.02.

IDL has discretion to deny an application for a navigational encroachment permit where IDL finds “most unusual circumstances” exist that would warrant a denial. I.C. § 58-1305(a), IDAPA 20.03.04.025.01. The “most unusual circumstances” language reflects IDL’s responsibility to weigh various public and private interests associated with a given encroachment. *See* I.C. § 58-1301. The Idaho Supreme Court has determined that the phrase

¹¹ IDL is the administrative agency of the Land Board. I.C. § 58-119.

“the most unusual of circumstances,” although not defined by statute or rule, can be reasonably interpreted:

Obviously, “unusual” means *out of the ordinary, different* [T]he statute gives the Board the right to deny the permit if, in its discretion, the Board determines the circumstances surrounding a particular encroachment are so out of the ordinary as to make it inadvisable to issue the permit. Such a determination is *necessarily fact specific and may vary from case to case.*

Dupont v. Idaho State Bd. of Land Comm'rs, 134 Idaho 618, 623, 7 P.3d 1095, 1100 (2000)

(emphasis added). In *Dupont*, the Idaho Supreme Court affirmed the Land Board’s revocation of a dock permit because the proximity of a designated swimming area presented most unusual circumstances. The encroachment was located in an area where the operation of motor vehicles on the lake was prohibited by local ordinance. In reaching its decision, the Court took note of the fact that, out of hundreds of applications received each year, it was the only encroachment permit that had been requested or issued for placement of a dock in a designated swimming area. *Id.* at 627, 623 P.3d at 1103.

As in *Dupont*, most unusual circumstances exist in this case that warrant the denial of Applicants’ navigational encroachment permit application. It is significant that Applicants first filed an application for permit based on a lease between the Rocchio Trust and Mr. Reid. After this permit was denied, Applicants effected the tax lot division and, within a month, filed a second application for permit. While tax parcel splits may not be unusual in and of themselves, a parcel split that places a lot line directly through the middle of a single family home is unusual. The single family residence was in place prior to the property split. As a result of the split, a portion of the residence now sits on the land owned by the Rocchio Trust and the other portion sits on the land owned by Mr. Reid. Mr. Evans, who was Applicants’ agent in filing the

application for permit, acknowledged that he was not aware what the “legal ramifications” of deeding the property in this way would be on ownership of the residence. Such an arrangement, which places a property ownership line directly underneath an existing residence, is certainly out of the ordinary. No evidence was admitted showing the intent of the split was anything other than to secure a larger dock than would otherwise have been allowed for Lot 12. The timing of the two applications, coupled with the tax lot line running through the residence created most unusual circumstances that, in and of themselves, was sufficient for IDL to deny the permit application.

E. The Public Trust Doctrine

However, IDL was also correct to deny the permit based on its responsibilities under the public trust doctrine. The public trust doctrine is an ancient common law doctrine that governs the state’s management of state-owned beds and banks of navigable waters. *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc. (Panhandle Yacht Club)*, 105 Idaho 622, 671 P.2d 1085 (1983). In processing applications for navigational encroachments under the LPA, IDL, on behalf of the Land Board, is obligated to regulate, control, and utilize the public trust lands for the protection of public trust uses, including navigation, commerce, fisheries, aesthetics, and recreational uses such as fishing and swimming. *Id.* In reviewing an application for permit, IDL must consider factors relating to its public trust obligations such as:

[T]he 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, . . . and the degree to which broad public uses are set aside in favor of more limited or private ones.

Id. at 629-630, 671 P.2d at 1092. (emphasis added.) “The public trust doctrine at all times forms the outer boundaries of permissible government actions with respect to public trust resources.”

Id. at 632, 671 P.2d at 1095. Accordingly, IDL's analysis of a lake encroachment permit application under the LPA must necessarily include consideration of the public trust doctrine.

As noted in *Panhandle Yacht Club*, even if the statutory and regulatory requirements of the LPA are met, an encroachment permit may still be denied if it violates the public trust doctrine.

Panhandle Yacht Club, 105 Idaho at 632, 671 P.2d at 1095 (“However, it must again be emphasized that mere compliance by these bodies with their legislative authority is not sufficient to determine if their actions comport with the requirements of the public trust doctrine.”)

With each application, IDL is required to give due consideration to “the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality” and weigh these values against “the navigational or economic necessity or justification for, or the benefit to be derived from the proposed encroachment.” I.C. § 58-1301. The consideration of these factors amounts to a balancing test that requires the weighing of competing public and private interests on a case-by-case basis. Generally, IDL seeks to minimize the impacts on navigation, fisheries, and other values by limiting the number and size of docks allowed around the lake while still allowing littoral owners to exercise littoral rights and build aids to navigation. A primary concern of IDL is the protection of the near-shore zone because of its importance to cold water biota. Docks create shade which provides hiding places for predatory fish and limits food production. Thus, the more square footage of docks allowed around the lake the greater the impact on cold water biota.

Thus, seven hundred (700) square feet is allowed for a single family dock and a two-family dock is allowed eleven hundred (1,100) square feet. IDAPA 20.03.04.015.01.b. The two-

family dock application was developed to accommodate applicants interested in reducing costs by sharing a dock and in recognition that two-family docks, while slightly larger, would be shared between two littoral owners and, thus, would reduce the impact on fisheries, navigation, and other natural resources near the shore zone by reducing the over-all square footage of docks on the lake. This application, however, stands the ordinary case on its head because it would allow a lot that would normally qualify for a single-family dock to qualify for a larger two-family dock.

Increasing demand for use of lake resources is of concern to IDL. While the additional square footage involved in this application is only three hundred (300) square feet, the Applicants' approach to justifying a larger dock would be inconsistent with the purpose of the two-family dock provision. And, importantly, the cumulative adverse effects on public trust resources of allowing two-family dock permits to be issued in circumstances such as these could be substantial. The cumulative effect of issuing permits under these types of circumstances will result in a significant increase in the proportion of the lake taken up by docks, moorings, or other impediments, a consequence the Idaho Supreme Court has directed the Land Board to consider in its review of encroachment applications. *Panhandle Yacht Club* at 629-630, 671 P.2d at 1092. Approving this permit would set aside broad public uses in favor of more limited private ones, an outcome inconsistent with the public interest. Therefore, IDL's denial of the permit strikes a reasonable balance between the rights of lake front owners to navigable encroachments and the rights of the public to protection of the lake value factors defined in I.C. § 58-1301, consistent with the public trust doctrine.

F. Agency Action as Arbitrary, Capricious, or an Abuse of Discretion

Applicants contend that the permit denial was arbitrary, capricious, and an abuse of discretion in violation of Idaho Code § 67-5279(3)(e).¹² In support of their argument, Applicants submitted twelve (12) encroachment permits into evidence that were issued between 2006 to 2012 by IDL for parcels that had been split into tax lots by the Kootenai County Assessor's Office. Applicants contend that because IDL has in the past granted one and two-family dock permits for split tax lots, IDL is singling them out for different treatment.

It is the burden of the party contesting an agency's decision to show how the agency's action was arbitrary, capricious, or an abuse of discretion. *Wheeler v. Idaho Dep't. of Health and Welfare*, 147 Idaho 257, 260, 207 P.3d 988, 991 (2009). So long as an agency "perceived the issue as discretionary, acted within the outer limits of its discretion and consistently with the legal standards applicable to its available choices, and reached its own decision through an exercise of reason" the agency has not abused its discretion. *Haw v. Idaho State Bd. Of Med.*, 143 Idaho 51, 54, 137 P.3d 438, 441 (2006).

The Applicants' argument rests on the incorrect assumption that the facts surrounding the permits identified in Exhibits 4–15 are identical to the facts surrounding this application. None of the referenced permits involved a tax parcel line running directly through a single family home that existed prior to the tax parcel split. As the district court observed on remand to IDL for a determination of unusual circumstances: "I.C. § 58-1301 requires the IDL weigh factors which are specific to the littoral property where a dock would be located Due to the unique characteristics of the littoral property and the requirements of I.C. § 58-1301, each permit is

¹² Idaho Code Section 67-5279(3)(e) provides that a "court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decision are: . . . arbitrary, capricious, or an abuse of discretion."

granted on a case by case basis” Memorandum in Support of Objection at 2. The district court also pointed out that “[f]or the purposes of determining whether most unusual circumstances exist, deference should be given to the agency for interpretation of its internal policies or rules.” IDL Hearing Memorandum at 8. In sum, IDL has considerable discretion to reach a determination on the unique facts and circumstances relevant to each permit application, including this one.

IDL has never before been faced with a property division that goes through the middle of a preexisting residence and was done for the sole purpose of acquiring a larger two-family dock. No past decision has set a precedent or practice for this situation. Even assuming Exhibits 4–15 did create some sort of precedence for IDL’s actions in this case, it is well established that administrative agencies must be free to take such steps as may be proper in specific circumstances, irrespective of past decisions. This is because administrative understanding or conditions may change, and the agency must be free to exercise its discretion in carrying out its statutory responsibilities. *Rosebud Enterprises v. Idaho Public Util. Comm’n*, 128 Idaho 609, 618, 917 P.2d 766, 775 (1996); *Washington Water Power v. Idaho Public Utility Comm’n.*, 101 Idaho 567, 579, 617 P.2d 1242, 1254 (1980).

Here, IDL has articulated the policy, facts, and circumstances underlying its decision to deny the permit. Most unusual circumstances exist in this case that warrant denial of the permit. In addition, there is increased pressure on Idaho’s lakes for access and use. IDL has determined that issuing a permit under the circumstances of this case would have negative cumulative effects to the public resource if similar applications were approved in the future.

IV. CONCLUSIONS OF LAW

For the foregoing reasons, I conclude that:

1. The application was not automatically approved because IDL acted on the application within the timeframe required by IDAPA 20.03.04.025.08.
2. IDL'S Objection to Exhibits 4-15 is denied because they are not so irrelevant, unduly repetitious, or excludable on other grounds as to warrant their exclusion and they should be accepted to assist in the development of the record in this case.
3. Determination of the mechanism that must be utilized for the legal division of littoral rights is not necessary to the disposition of this case.
4. Most unusual circumstances exist that warrant the denial of navigational encroachment permit application L-95-S-4610D.
5. IDL's responsibilities under the public trust doctrine warrant the denial of navigational encroachment permit application L-95-S-4610D.
6. Denial of application for permit number L-95-S-4610D was not arbitrary, capricious, or an abuse of discretion.

THEREFORE, the joint application for navigational encroachment permit number L-95-S-4610D is DENIED.

Dated this 4th day of March, 2013



THOMAS M. SCHULTZ, JR.
Director of the Idaho Department of Lands and
Secretary to the Land Board

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of March 2013, I caused a true and correct copy of the foregoing FINAL ORDER to be served on the following parties by the indicated methods:

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