

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

IN THE MATTER OF THE LINE OF )  
NAVIGABILITY IN AND IN THE VICINITY ) **DIRECTOR'S FINDING ON**  
OF GLENGARY BAY OF LAKE PEND ) **LINE OF NAVIGABILITY**  
OREILLE. )  
\_\_\_\_\_ )

**I. NATURE OF THE PROCEEDING**

The purpose of this proceeding is to determine a line of navigability pursuant to the State Board of Land Commissioners' authority in the Lake Protection Act ("LPA"), Idaho Code § 58-1301 *et seq.*, that will be used by the Idaho Department of Lands ("IDL") to process Peter and Shelagh Kaseburg's application for Encroachment Permit No. L-96-S-219-C.

IDL held a public hearing in this matter on August 15, 2013, at the Sandpoint Community Hall. Mike Murphy served as the hearing coordinator. Mr. Murphy issued his *Recommended Finding on Line of Navigability* ("Recommended Finding") on April 7, 2014.

**II. DIRECTOR'S FINDING**

My responsibility is to render a finding on the line of navigability on behalf of the State Board of Land Commissioners based on the record reviewed in the context of my personal expertise gained through education, training, and experience. I have reviewed the documents submitted in this matter, the hearing transcript, and the hearing coordinator's Recommended Finding. I conclude the Recommended Finding is based on substantial evidence in the record. I adopt the Recommended Finding as my finding on the line of navigability in this matter. The

Recommended Finding is attached and incorporated herein by reference. IDL shall process the Kaseburgs' application in accordance with this finding on the line of navigability.

DATED this 14<sup>th</sup> day of April, 2014.



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

## CERTIFICATE OF MAILING

I hereby certify that on this 14<sup>th</sup> day of April, 2014, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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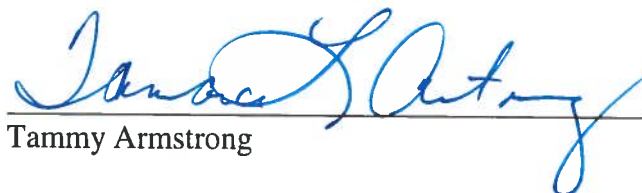
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Tammy Armstrong

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

IN THE MATTER OF THE LINE OF	)	
NAVIGABILITY IN AND IN THE VICINITY	)	<b>HEARING COORDINATOR'S</b>
OF GLENGARY BAY OF LAKE PEND	)	<b>RECOMMENDED FINDING ON</b>
OREILLE.	)	<b>LINE OF NAVIGABILITY</b>
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**I. INTRODUCTION**

The purpose of this proceeding is to determine a line of navigability pursuant to the State Board of Land Commissioners' authority in the Lake Protection Act ("LPA"), Idaho Code §58-1301 *et seq.* The Idaho Department of Lands ("IDL") will apply the line of navigability finding from this proceeding to Peter and Shelagh Kaseburg's application for Encroachment Permit No. L-96-S-219-C. The instant proceeding is limited to determining a line of navigability and does not address the merits of the Kaseburgs' encroachment permit application. The Hearing Coordinator submits this recommended finding for consideration by the IDL Director.

**II. PROCEDURAL BACKGROUND**

This proceeding is related to administrative and judicial actions involving applications by the Kaseburgs for encroachment permits on Glengary Bay of Lake Pend Oreille. The procedural history of the Kaseburgs' encroachment permit applications, and IDL's decisions on the applications, is set forth in detail in *Kaseburg v. State*, 154 Idaho 570, 572-576, 300 P.3d 1058, 1060-1064 (2013).

The Kaseburgs filed applications for Encroachment Permit Nos. L-96-S-219-B and L-96-S-219-C with IDL in 2009. IDL denied both applications in January 2010. The Kaseburgs sought judicial review of IDL's decisions with the First District Court for Bonner County in February 2010. The district court set aside IDL's denials of the Kaseburgs' applications and remanded the matter to IDL. IDL appealed the district court's decision to the Idaho Supreme Court. In *Kaseburg*, the Supreme Court affirmed the district court's decision in part, and reversed in part. The Supreme Court held the district court erred by setting aside IDL's denial of application for Encroachment Permit No. L-96-S-219-B, and held the district court properly set aside IDL's denial of application for Encroachment Permit No. L-96-S-219-C. The Supreme Court remanded the case to IDL, stating: "On remand, the IDL must make a finding, based on substantial evidence, establishing the line of navigability. Then, the IDL must process Application 219-C in accordance with that finding." *Kaseburg*, 154 Idaho at 580, 300 P.3d at 1058.

IDL initiated this proceeding to determine the line of navigability in, and in the vicinity of, Glengary Bay. Notice of the public hearing was published in the Bonner County Daily Bee on July 9 and 16, 2013. IDL held the public hearing at the Sandpoint Community Hall in Sandpoint, Idaho, on August 15, 2013. This recommendation is based upon the testimonial and documentary evidence in the record.

### **III. FINDINGS OF FACT**

Lake Pend Oreille is in northern Idaho. *IDL Hearing Memorandum* ("IDL Memo."), Ex. G, p. 2-1. Glengary Bay is located on the west side of Lake Pend Oreille in Bonner County. A *Study of the Line of Navigability for Glengary Bay on Lake Pend Oreille by Peter Kaseburg* ("Kaseburg Study"), p. 4 and Ex. 6F. Glengary Bay spans from Picard Point at the south to

North Point. Kaseburg Study, p. 3, Exs. 1F and 6F; and *Hearing Transcript* (“Tr.”), p. 22. The Kaseburgs own waterfront property on the north end of Glengary Bay, and they refer to this area of the bay as Glengary Cove. Tr., p. 11; and Kaseburg Study, p. 4, Ex. 2B.

Glengary Cove is “a small little inlet” within the larger Glengary Bay. Tr., p. 3. *See also* Kaseburg Study, Exs. 1F, 1G, 1H, and 4E. This location has been described by various references in the record, including “the head of Glengary Bay” (*Letter from Mark W.C. Nelson to Jim Brady (Nov. 11, 2009)* (“Nelson Letter”), p. 1), “the northwest corner of Glengary Bay” (Tr., p. 2), and the “small northern cove of Glengary Bay” (*Kaseburg Hearing Memorandum* (“Kaseburg Memo.”), p. 8). The area has also been described as “a sub-bay of Glengary Bay or . . . a small bay of its own.” IDL Memo., Ex. CC, p. 1.<sup>1</sup> For consistency, the location will be referenced as Glengary Cove for the remainder of this document.

Glengary Cove is generally the area from Heitman Docks Marina, owned by Tom and Marjorie Trulock, on the south end of the cove to the Kaseburgs’ property on the north end. Kaseburg Study, p. 4 and Ex. 2B; and IDL Memo., Ex. CC, p. 51. The waterfront property owners along the west side of Glengary Cove are Jerry Bringhurst, George Congleton, Mark W.C. Nelson, and Laurence H. Nelson. Kaseburg Study, Ex. 2B; IDL Memo., Ex. V; *Comments by George Congleton* (“Congleton Comments”), p. 9 (unnumbered); and Nelson Letter, pp. 1-2 (unnumbered). Glengary Cove is open to Glengary Bay and Lake Pend Oreille to the east. Kaseburg Study, Ex. 1F.

While Lake Pend Oreille was a natural lake, the water level of Lake Pend Oreille, and Glengary Cove, is now controlled by the Albeni Falls Dam, which is a project constructed and operated by the U.S. Army Corps of Engineers (“Corps”). Tr., p. 4. The purposes of the project

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<sup>1</sup> The Idaho Supreme Court described the area known as Glengary Cove as “a small sub-bay . . . which is part of the larger Glengary Bay.” *Kaseburg*, 154 Idaho at 572, 300 P.3d at 1060.

are flood control, navigation, fish and wildlife conservation, recreation, and power generation. IDL Memo., Ex. F, p. 4-1. The Albeni Falls Dam began regulating the level of Lake Pend Oreille in 1952, and the dam started operating in 1955. IDL Memo., Ex. F, p. 4-1, and Ex. H, p. 1. Since 1952, the Corps has been authorized to regulate the lake level between a low water elevation of 2049.7 ft. mean sea level (“msl”) and a high water elevation of 2062.5 ft. msl. IDL Memo., Ex. C, p. 12. In 1955, the Corps established a normal winter operating level elevation at 2051ft. msl. IDL Memo., Ex. D, p. 8. The Corps currently regulates the lake level between a high water level of 2062.5 ft. msl during the summer and a low water level of 2051 ft. msl during the winter. IDL Memo., Ex. G, pp. 2-2 and 7-7, and Ex. K. Starting in early September, the lake is drafted from the summer operating level to the winter operating level by no later than November 20 to supply water for hydropower generation, provide storage for occasional winter floods, protect the lakeshore from wind-wave action erosion, and provide a stabilized winter-spring lake level for fish resources. IDL Memo., Ex. G, p. 2-1. Consequently, the lake level fluctuates 11.5 ft. during a year.

IDL and the Corps regulate encroachments on Lake Pend Oreille under their respective authorities. The Corps has regulatory authority under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act. Congleton Comments, Appx. 1, p. 1. IDL has regulatory authority under the LPA, which was enacted in 1974. *Id.*; and Tr., p. 4. IDL and the Corps have established a joint permitting process for encroachment on Lake Pend Oreille, and the agencies coordinate their permitting activities and standards. Congleton Comments, Appx. 1, p. 1; and Tr. p. 5. Although the agencies use a joint application, authorization is required from each agency for encroachments. *Id.* IDL issues individual encroachment permits, whereas the Corps uses a regional permit for encroachments that meet specific requirements. Tr., p. 5.



Under the Corps' Regional Permit No. 27, piers and floating docks in certain areas of Lake Pend Oreille may not extend further than the line of navigation, which is generally 55 ft., but no more than 100 ft., waterward of the ordinary high water mark. IDL Memo., Ex. T, p. 1. The Corps considers the lake's high water elevation (2062.5 ft. msl) as its ordinary high water mark. IDL Memo., Ex. T, p. 4. If an applicant does not meet the regional permit's requirements, an applicant may apply to the Corps for a specific permit. Tr., pp. 24 and 26.

IDL considers the lake's high water elevation an artificial high water mark created by the Albeni Falls Dam. IDL Memo., p. 8. IDL considers the normal low water elevation (2051 ft. msl) as the lake's ordinary high water mark because IDL did not determine the ordinary high water mark before the construction of the Albeni Falls Dam. IDL Memo., p. 7. IDL's practice is to limit dock lengths to 55 ft. waterward from the artificial high water mark. IDL Memo., p. 11.

The Kaseburgs, Trulocks, and Mr. Bringhurst own permitted encroachments in Glengary Cove. Kaseburg Study, p. 4. The Trulocks' Heitman Docks Marina is a commercial marina on the south side of the cove. Tr., p. 23; and IDL Memo., Ex. CC, p. 51. Mr. Bringhurst owns a dock on the west side. Kaseburg Study, p. 4 and Ex. 2B. The Kaseburgs own a dock and wooden piling on the north side of the cove. *Id.* Douglas McLean was the original owner of the dock and piling, and in 1974 Mr. McLean submitted to IDL a drawing of the dock and piling. IDL Memo., Ex. BB and Ex. CC, pp. 59-60. The other shoreline property owners along Glengary Cove, Mr. Congleton, Mark W.C. Nelson, and Laurence H. Nelson, do not have any encroachments at this time. Kaseburg Study, p. 4. Mr. Congleton obtained approval for a dock from IDL and the Corps, but he has not yet constructed the dock. Congleton Comments, p. 9 (unnumbered).

## IV. ANALYSIS

### A. Legal Authorities

The rights and interests of littoral land owners, the public, and the state converge on the shores of navigable lakes. *West v. Smith*, 95 Idaho 550, 554, 511 P.2d 1326, 1330 (1973). The state owns, in trust for the public, title to the beds and banks of navigable waters below the natural or ordinary high water mark. *In re Sanders Beach*, 143 Idaho 443, 446, 147 P.3d 75, 78 (2006). The public is entitled to use navigable waters for navigation and recreation subject to state regulation. *West*, 95 Idaho at 555, 511 P.2d at 1331. The upland property down to the natural or ordinary high water mark of navigable waters is owned by riparian or littoral owners. *In re Sanders Beach*, 143 Idaho at 453, 147 P.3d at 85; *West*, 95 Idaho at 554, 511 P.2d at 1330. Riparian or littoral owners have the right to “maintain their adjacency to the lake and to make use of their rights . . . in building or using aids to navigation.” Idaho Code § 58-1301(f). The right to build aids to navigation is subject to state regulation. *West*, 95 Idaho at 554, 511 P.2d at 1330.

The use of the beds and banks of navigable lakes below the ordinary or high water mark is regulated by the State Board of Land Commissioners (“Land Board”) pursuant to the Lake Protection Act, Idaho Code § 58-1301 et seq. (“LPA”), and the corresponding administrative rules, IDAPA 20.03.04, Rules for the Regulation of Beds, Waters, and Airspace over Navigable Lakes in the State of Idaho. IDL is the instrumentality of the Land Board (Idaho Code §§ 58-101 and 58-119(1)) and has “the duty of administering” the LPA. *Kaseburg*, 154 Idaho at 578, 300 P.3d at 1066.

Under the LPA, encroachments of any kind on, in, or above the beds of navigable lakes require an encroachment permit. Idaho Code §58-1303; IDAPA 20.03.04.020.01.

Encroachments fall within two categories: encroachments in aid of navigation and encroachments not in aid of navigation. Encroachments in aid of navigation (also known as navigational encroachments) “include docks, piers, floats, pilings, breakwaters, boat ramps, channels or basins, and other such aids to the navigability of the lake, on, in or above the beds or waters of a navigable lake.” Idaho Code § 58-1302(h). Encroachments not in aid of navigation (or nonnavigational encroachments) “include[] all other encroachments on, in or above the beds or waters of a navigable lake, including landfills or other structures not constructed primarily for use in aid of the navigability of a lake.” Idaho Code § 58-1302(i).

IDL evaluates applications for encroachment permits based on the encroachment’s purpose and location from a line of navigability. Applications for noncommercial navigational encroachments *not extending beyond the line of navigability* are processed with “a minimum of procedural requirements and shall not be denied” except in the most unusual of circumstances or if the proposed encroachment infringes upon littoral rights of an adjacent property owner. Idaho Code § 58-1305(a); *see also* IDAPA 20.03.04.025. Applications for all other encroachments—nonnavigational encroachments, commercial navigational encroachments, community navigational encroachments, and navigational encroachments *extending beyond the line of navigability*—are processed according to the standards in Idaho Code § 58-1306 and IDAPA 20.03.04.030. The location of an encroachment in relation to the line of navigability impacts how an encroachment permit application is processed by IDL. *Kaseburg*, 154 Idaho at 574, 300 P.3d at 1062.

The LPA’s definition of line of navigability provides criteria to determine the location of a line if one has not been established:

[A] line located at such distance waterward of the low water mark established by the length of legally permitted encroachments, water depths waterward of the low

water mark, and by other relevant criteria determined by the board when a line has not already been established for the body of water in question.

Idaho Code § 58-1302(g). The threshold issue is whether a line of navigability has “already been established for the body of water in question.” *Id.* If a line of navigability has not been established, IDL uses the criteria in the statute to determine the location of such line.

The Supreme Court directed IDL to “make a finding, based on substantial evidence, establishing the line of navigability.” *Kaseburg*, 154 Idaho at 580, 300 P.3d at 1068. Substantial evidence is “relevant evidence that a reasonable mind might accept to support a conclusion.” *Chisholm v. Idaho Dept. of Water Res.*, 142 Idaho 159, 164, 125 P.3d 515, 520 (2005), quoting *Jarvis v. Rexburg Nursing Ctr.*, 136 Idaho 579, 583, 38 P.3d 617, 621 (2001). Such evidence is “less than a preponderance of evidence, but more than a mere scintilla.” *Chisholm*, 142 Idaho at 164, 125 P.3d at 520. “Substantial evidence need not be uncontradicted, nor does it need to necessarily lead to a certain conclusion; it need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusion as the fact finder.” *Id.*

**B. A Line of Navigability Has Not Already Been Established for Glengary Cove**

The initial inquiry in this proceeding is whether a line of navigability has already been established for the body of water in question. The first issue is identifying the body of water in question, and the second issue is whether a line of navigability has been already established in this area.

The Notice of Hearing identifies the subject of the instant proceeding: “[T]he determination for a line of navigability in and in the vicinity of Glengary Bay of Lake Pend Oreille.” Tr., p. 1. By narrowing the purpose of the hearing to Glengary Bay, the notice makes clear the purpose of this hearing is not to determine a line of navigability in Lake Pend Oreille generally. The evidence in the record for the line of navigability, however, is actually focused

on a smaller area within Glengary Bay. Participants at the hearing offered evidence that focused specifically on encroachments and the line of navigability in area in Glengary Cove. Jim Brady from IDL explained “the NW [sic] corner of Glengary Bay . . . is the area in question we are trying to identify for a line of navigability.” Tr., p. 5. Mr. Brady further explained he could not “attest to what the line of navigability would be outside of this cove.” Tr., p. 26. While the hearing notice identified Glengary Bay as the subject area, the evidence in the record is specific to Glengary Cove. For these reasons, I find that Glengary Cove is the water body in question and the focus of this proceeding.

The next issue is whether a line of navigability has already been established for Glengary Cove. The Kaseburgs argue that a line of navigability has not been established for “this northern part of Glengary Bay on Lake Pend Oreille, nor has there been a line of navigability established for Lake Pend Oreille by any legal process.” Kaseburg Memo., p. 5. IDL offered evidence that a line of navigability was established for Lake Pend Oreille prior to the enactment of the LPA, but IDL did not offer evidence of a pre-LPA line for Glengary Cove.<sup>2</sup> IDL argues the line of navigability in Lake Pend Oreille has been established at 55 ft. from the artificial high water mark (elevation 2062.5 ft. msl) since the 1970s based on historical dock information and regulatory actions of IDL and the Corps. IDL Memo., p. 11. IDL further argues the pre-LPA line of navigability applies “*outside* the immediate confines of Glengary Bay.” *Id.* at 18 (emphasis added). IDL did not offer evidence of a pre-LPA line of navigability in Glengary Bay due to “limited historical evidence” of pre-LPA encroachments in the bay.<sup>3</sup> *Id.* at 14. Since there is no evidence in the record that a line of navigability was established for Glengary Cove prior to

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<sup>2</sup> In a concurring opinion in *Kaseburg*, Justice Jim Jones stated, “IDL should have the option of trying to show that the line of navigability was established for Glengary Bay prior to the enactment of the Lake Protection Act, and that, when established, the line was landward of the low water mark.” 154 Idaho at 580-581, 300 P.3d 1068-1069.

<sup>3</sup> IDL acknowledged a line of navigability “may vary from place to place on Lake Pend Oreille, particularly in a small, relatively shallow bay like Glengary Bay.” IDL Memo., p. 11.

the enactment of the LPA or at any time prior to this proceeding, I find that a line of navigability “has not already been established for the body of water in question.” Idaho Code § 58-1309(g).

### **C. Recommended Line of Navigability in Glengary Cove**

The LPA provides the criteria to determine a line of navigability in Glengary Cove. The line of navigability is based on the location of the low water mark, the length of legally permitted encroachments, water depths waterward of the low water mark, and other relevant criteria. Idaho Code § 58-1302(g). IDL recommends establishing the applicable line of navigability at an elevation of 2049.6 ft. msl. IDL Memo., p. 18, and Ex. U. The Kaseburgs recommend establishing the line of navigability at an elevation of 2045 ft. msl. Kaseburg Memo., p. 8. The line of navigability will be determined based on the criteria in Idaho Code § 58-1302(g) as applied to the evidence in record.

#### **1. Low water mark**

A line of navigability must be “located at such distance waterward of the low water mark.” Idaho Code § 58-1302(g). The LPA defines low water mark as:

[T]hat line or elevation on the bed of the lake marked or located by the average low water elevations over a period of years and marks the point to which the riparian rights of adjoining landowners extend as a matter of right, in aid of their right to use the waters of the lake for purposes of navigation.

Idaho Code § 58-1302(2) (emphasis added).

IDL offered evidence of the low water mark based on the “average low water elevation over a period of years” that satisfies the LPA’s definition of low water mark. *Id.* IDL averaged the low water elevation using United State Geological Survey data starting in water year<sup>4</sup> 1952 (when the Albeni Falls Dam started regulating the lake level) through water year 2005 (the last year of data). IDL Memo., p. 8, Ex. I. Based on this data, IDL calculated the low water mark of

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<sup>4</sup> A water year starts in October and ends the following September. IDL Memo., Ex. I.

Lake Pend Oreille is elevation 2052.61 ft. msl. *Id.* No other participant offered evidence of the low water mark that complies with the LPA's definition.<sup>5</sup> I find the line of navigability must be located waterward of the elevation 2052.61 ft. msl.

Some participants argued that it is unfair to locate the line of navigability waterward of the low water mark, rather than measuring the line from the elevation 2062.5 ft. msl (IDL's artificial high water mark and the Corps' ordinary high water mark) in light of the annual lake level fluctuations and the current permitting standards of IDL and the Corps. *Email from Jamie Brunner to Jim Brady (Aug. 15, 2013)*, p. 2; and Congleton Comments, p. 2 (unnumbered). The definition of line of navigability in the LPA controls in the event a line was not established for a water body prior to the enactment of the LPA. The LPA's definition of line of navigability does not consider a scenario whereby a line may be established landward of the low water mark through permitting practices or other circumstances that develop after the enactment of the LPA. Since a line of navigability was not established in Glengary Cove prior to the LPA, the line of navigability must be waterward of the low water mark as required by the statute.

## 2. Encroachments

The "length of legally permitted encroachments" is used to establish a line of navigability. Idaho Code § 58-1302(g). The permitted encroachments in Glengary Cove include the Trulocks' Heitman Docks Marina, the Kaseburgs' dock and piling, and Mr. Bringhurst's dock. These encroachments, however, are not evidence of the line of navigability in Glengary Cove.

Heitman Docks Marina is a commercial marina. The nature of a commercial marina is different from a single-family or two-family dock, which are navigational encroachments within

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<sup>5</sup> In his written comments, Ralph Sletager asserted the low water mark is below elevation 2051 ft. msl or 2048 ft. msl without providing evidence this level was based on the "average low water elevations over a period of years." Idaho Code § 58-1302(e).

the line of navigability. Applications for commercial marinas are processed under the requirements in Idaho Code § 58-1306 and IDAPA 20.03.04.030. A commercial marina is not required to be located within a line of navigability. Rather, as explained by IDL, commercial marinas typically extend beyond a line of navigability, are longer than private encroachments, provide a public benefit, and are required to pay for a submerged lands lease pursuant to IDAPA 20.03.17, Rules Governing Leases On State-Owned Lands and Formerly Submerged Lands. IDL Memo., p. 13. Since a commercial marina may extend beyond the line of navigability, the length of a commercial marina is not substantial evidence of a line of navigability.

The Kaseburgs own several wooden piling in the cove, and they argue the pilings have defined the line of navigability since the 1930s. Kaseburg Memo., p. 7. The piling, however, are a nonnavigational encroachment and not evidence of the line of navigability in Glengary Cove. In *Kaseburg*, the nature of the piling was an issue and the court concluded, “[T]here is no evidence in the record that the series of wooden pilings has ever served as an aid to navigation, in fact, all the evidence shows that this encroachment is a hazard to navigation.” 154 Idaho at 579, 300 P.3d at 1058. Since the piling are nonnavigational structures, they are not evidence of the line of navigability in Glengary Cove.

The two docks in Glengary Cove are not evidence of the line of navigability. Mr. Bringhurst’s dock is located 55 ft. from the artificial high water mark of 2062.5 ft. msl. Tr., pp. 22-23; Kaseburg Study, p. 4, Exs. 2B and 3A. The Kaseburgs’ dock is 7 ft. by 30 ft., as shown on Douglas McLean’s 1974 illustration. IDL Memo., Ex. BB. The docks are landward of the low water mark (2052.61 ft. msl). Since the line of navigability must be waterward of the low water mark, Mr. Bringhurst’s dock and the Kaseburgs’ dock are not probative of the line of navigability in Glengary Cove.



### 3. Water depths

A line of navigability is also determined by “water depths waterward of the low water mark.” Idaho Code § 58-1302(g). This factor involves determining the depth below the low water mark to provide reasonable access for boats.

The testimony surrounding the water depth involved arguments regarding what is reasonable or customary for boat draft depths on Lake Pend Oreille. Participants offered various recommendations for depth based on differing considerations. The Kaseburgs’ recommend water depth related to their pending encroachment application for a moveable dock system. Tr., p. 14. The Kaseburgs seek a depth of 7 ½ feet below the low water mark, which would allow three to five feet of draft for a boat moored on the side of the encroachment. Kaseburg Memo., pp. 7-8. The Kaseburgs also seek a line of navigability that “coincides very closely” with the blue shaded area in NOAA Chart No. 18554, however, the chart does not identify the location of a depth of 7 ½ feet in Glengary Cove. Kaseburg Study, p. 7. Jim Holland recommended a water depth of six to eight feet to provide safe and year-round access to real estate. *Letter from Jim Holland to Jim Brady (Aug. 14, 2013)*, p. 1. IDL recommended establishing the line of navigability three feet below the low water mark because it is consistent with IDL’s practice and the depth is sufficient for the majority of boats used on northern Idaho lakes. IDL Memo., p. 12.

I find IDL’s evidence of the necessary depth to be objective and persuasive. IDL’s practice is to set a line of navigability three feet below the low water mark. IDL Memo., Ex. X, p. 4; Ex. Y, p. 1. Boats that are 30 ft. long typically require 3 ft. of draft. IDL Memo., p. 12, Ex. AA. According to Idaho Department of Parks and Recreation boat registration data, 97% of the registered boats in Bonner and Kootenai Counties are 30 ft. or less in length. IDL Memo., Ex. Z. Placing the line of navigability three feet below the low water mark would safely accommodate

the vast majority of boats registered in Bonner and Kootenai Counties which are likely to use Lake Pend Oreille and Glengary Cove based on geographic proximity.

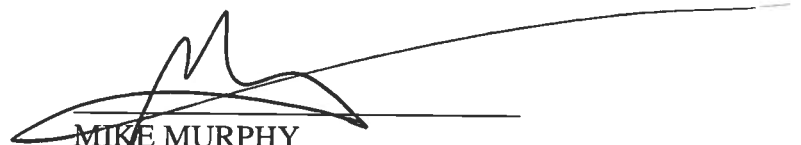
4. Summary

The LPA's definition of line of navigability applies in this proceeding. The line must be located waterward of the low water mark, as that term is defined in the LPA. The low water mark is 2052.6 ft. msl based on the average low water years from 1952 to 2005. None of the existing permitted encroachments in Glengary Cove provide substantial evidence of the location of the line of navigability. Locating the line of navigability three feet below the low water mark will safely accommodate the vast majority of boats registered in northern Idaho. Applying the criteria in Idaho Code § 58-1302(g) to the evidence in the record, I find the line of navigability in Glengary Cove is located at the elevation of 2049.6 ft. msl, which is three feet below the low water mark, and approximately 165 ft. waterward of the artificial high water mark. IDL Memo., p. 14 and Ex. U.

**V. CONCLUSION AND RECOMMENDATION**

The body of water in question is Glengary Cove. A line of navigability has not already been established for Glengary Cove. Based upon substantial evidence in the record, I recommend that the IDL Director issue a finding that the line of navigability within Glengary Cove is set at an elevation of 2049.6 ft. msl.

DATED this 7<sup>th</sup> day of April, 2014.

  
MIKE MURPHY  
Hearing Coordinator