

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

|                                 |   |                             |
|---------------------------------|---|-----------------------------|
| In the Matter of:               | ) |                             |
|                                 | ) | Case No. CC-2018-PUB-10-001 |
| Encroachment Permit Application | ) |                             |
| No. L-97-S-776A                 | ) | <b>FINAL ORDER</b>          |
|                                 | ) |                             |
| Donald Howell,                  | ) |                             |
| Applicant.                      | ) |                             |
| <hr/>                           |   |                             |

**I. PROCEDURAL BACKGROUND**

Encroachments, including boat lifts and mooring buoys, placed in or on the beds of navigable lakes require a permit issued by the Idaho Department of Lands (“IDL”) pursuant to the requirements of the Lake Protection Act, Title 58, Chapter 13, Idaho Code; and the corresponding administrative rules promulgated by the State Board of Land Commissioners, IDAPA 20.03.04.000 *et seq.*, Rules for the Regulation of Beds, Waters and Airspace over Navigable Lakes in the State of Idaho.

On or about July 25, 2018, Applicant Donald Howell applied for an encroachment permit for a boat lift and mooring buoy on Priest Lake. A public hearing was held on October 26, 2018 in Coeur d’Alene, Idaho. Mr. Andrew Smyth served as the duly appointed Hearing Officer. The Hearing Officer issued his Preliminary Order, containing Findings of Fact and Conclusions of Law, on November 26, 2018. Then, on November 30, 2018, the Hearing Officer issued an Amended Preliminary Order, correcting the prior omission of the word “not” from a conclusion of law at paragraph III.C.1.c. of the Preliminary Order.

My responsibility, as Director of IDL, is to render a decision pursuant to Idaho Code § 58-1305(c) and IDAPA 20.03.04.030.07 on behalf of the State Board of Land Commissioners and

based on the record, which I have reviewed in the context of my personal expertise gained through education, training, and experience. In making this determination I have relied on the whole record for this matter, including the following materials:

- I have listened to the testimony and argument presented at the public hearing.
- I have reviewed the written record including all documents and exhibits.
- I have examined the Hearing Officer's Preliminary Order and Amended Preliminary Order in light of the entire record in this contested case.

## **II. FINDINGS OF FACT**

I concur with the Procedural Background and Findings of Fact presented by the Hearing Officer in the Preliminary Order.

## **III. CONCLUSIONS OF LAW**

I concur with the Conclusions of Law found by the Hearing Officer in the Preliminary Order and the Amended Preliminary Order.

## **IV. ORDER**

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

The Applicant is qualified to make application for an encroachment permit for a boat lift and mooring buoy on Priest Lake. A portion of that application is in conformance with applicable rules and regulations. Based upon all of the foregoing, IT IS HEREBY ORDERED that Encroachment Permit Application No. L-97-S-776A is APPROVED IN PART by IDL to authorize

the Applicant to place one mooring buoy thirty (30) feet from the eastern littoral right line, between forty (40) to fifty (50) feet from the high water mark, and within the line of navigability; and is DENIED IN THE REMAINING PART.

This is a final order of the agency. Pursuant to Idaho Code § 58-1305(c) and IDAPA 20.30.04.030.09, the Applicant, or any aggrieved party who appeared at the hearing, shall have the right to have the proceedings and this Final Order reviewed by the district court in the county in which the encroachment is proposed by filing a notice of appeal within thirty (30) days from the date of this Final Order. *See also* IRCP 84. Because this Final Order is for approval of an encroachment permit for one mooring buoy, any aggrieved party, other than the Applicant, appealing this Final Order must file a bond with the district court in accordance with Idaho Code § 58-1306(c). The filing of the petition for review to the district court does not itself stay the effectiveness or enforcement of the order under appeal. Idaho Code § 67-5274.

DATED this 10<sup>th</sup> day of December, 2018.



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DUSTIN T. MILLER  
Director, Idaho Department of Lands

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 10<sup>th</sup> day of December, 2018, I caused to be served a true and correct copy of the foregoing FINAL ORDER, by the method indicated below and addressed to the following:

Don Howell  
2820 S. Pittsburg  
Spokane, WA 99203

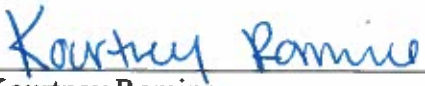
- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Email: dhlakeman@hotmail.com

Murray Acres Association, Inc.  
c/o Dave Spencer and Jerry Hertel  
1918 W. Toni Rae Drive  
Spokane, WA 99218

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Email: chrn40@comcast.net  
jrhert@aol.com

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

- Statehouse Mail
- Hand Delivery
- Federal Express
- Email: angela.kaufmann@ag.idaho.gov

  
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Kourtney Romine  
Administrative Assistant

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

|                                      |   |                             |
|--------------------------------------|---|-----------------------------|
| In the Matter of Encroachment Permit | ) |                             |
| Application No. L-97-S-776A          | ) | Case No. CC-2018-PUB-10-001 |
|                                      | ) |                             |
| Donald Howell,                       | ) | <b>PRELIMINARY ORDER</b>    |
|                                      | ) |                             |
| Applicant.                           | ) |                             |
|                                      | ) |                             |
|                                      | ) |                             |
|                                      | ) |                             |

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**I. PROCEDURAL BACKGROUND**

On or around July 25, 2018, the Idaho Department of Lands (“IDL”) received an encroachment permit application (“Application”) filed by Mr. Donald Howell (“Applicant” or “Mr. Howell”). Agency Record (“AR”) pp. Howell 0001 – 10 and 108.<sup>1</sup> IDL assigned application number L-97-S-776A to the Application. Prior to the hearing, the last modification to the Application was made by Mr. Howell on September 26, 2018. AR p. 21. In the Application, the Applicant seeks authorization to install a boat lift and mooring buoy on Priest Lake. AR p. 1; AR Ex. 1.

IDL processed the Application for a boat lift and mooring buoy pursuant to Idaho Code § 58-1305 and IDAPA 20.03.04.025. On or around September 9, 2018, IDL received an objection to the Application from an adjacent littoral owner, Murray Acres Association (“MAA”). AR p. 20. Pursuant to Idaho Code § 58-1305(c), IDL ordered a hearing in this contested case.

On October 5, 2018, Mr. Dustin T. Miller, IDL Director, appointed Mr. Andrew Smyth to be the Hearing Officer to preside over the contested case proceedings. AR pp. 22-24. On October 11, 2018, the undersigned Hearing Officer issued a Notice of Hearing establishing the date, time,

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<sup>1</sup> All citations to the AR are hereinafter designated by using the Bates numbers only, not the preceding “Howell.”

and location of the hearing. AR pp. 25-27. An attempt was made by the Hearing Officer to coordinate a prehearing conference; however, the parties were not unanimously available. No prehearing conference was held. AR pp. 28-106.

Pursuant to Idaho Code § 58-1305(c), a contested case hearing regarding the Application was held on October 26, 2018. The participants appearing at the hearing were as follows: The Applicant; the Applicant's daughter, Ms. Donelle Howell; and the Applicant's wife, Mrs. Kris Howell, who each presented testimony in support of the Application. MAA was represented by its President, Mr. Jerry Hertel. MAA members, Mr. Dave Spencer and Mrs. Cheryl Spencer, provided witness testimony in opposition to the Application. Mr. Trevor Anderson, IDL Resource Specialist, and Mr. Mike Ahmer, IDL Resource Supervisor, provided testimony on behalf of the agency. IDL was represented by Ms. Angela Schaer Kaufmann, Deputy Attorney General. AR and Hr'g Recording.<sup>2</sup>

Evidence admitted into the administrative record during the hearing consisted of sworn witness testimony, documents and video recordings. Mr. Howell's Exhibits 1 through 5 and 7, and MAA's Exhibits D, E, and G through O<sup>3</sup> were admitted into the record without objection. Mr. Howell's Exhibits 6 and 8, and MAA's Exhibits A through C and F were admitted into the record with objection.

On November 1, 2018, following the conclusion of the hearing, Mr. Anderson, included the Hearing Officer on an email to other IDL employees regarding the status of a public records request submitted by Mr. Howell to IDL prior to the hearing. This email was not substantive in nature.

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<sup>2</sup> The hearing was recorded on audiotape pursuant to IDAPA 20.01.01.651. A hearing transcript has not been prepared. The agency or any party may have a transcript prepared at its own expense. Two breaks were taken during the course of the hearing. A new recording was started after each break creating three recordings. All references to the hearing recording in this Preliminary Order will be described by reference to the recording number and the minute(s) and second(s) location on that recording. For example: Hr'g Recording #, mm:ss.

<sup>3</sup> There was no Exhibit N offered or admitted into the record.

Even if it had been substantive, it was not timely and it was not considered in rendering this Preliminary Order.

## II. FINDINGS OF FACT

1. Mr. Howell owns real property adjacent to Priest Lake with approximately 200 to 220 feet of lake frontage, and is therefore qualified to make application for encroachment permits on, in or above the navigable waters of Priest Lake. AR p. 1; Hr'g Recording 1, 31:15.

2. At this property, Mr. Howell currently has an existing permitted dock measuring 8 feet by 32 feet with a 10-foot long ramp. AR p. 108; Hr'g Recording 1, 19:25.

3. At this property, Mr. Howell has granted MAA a 15-foot wide easement along the eastern property line for a road and boat launch.<sup>4</sup> AR pp. 20 and 114; Hr'g Recording 1, 1:01:50 and 1:11:01.

4. Approximately 60 residents of Grandview Addition and MAA use the easement to access Priest Lake and launch their boats. Hr'g Recording 1, 1:31:20. Grandview Addition is not a party to this proceeding; but has some relationship to MAA, which is not at issue in this matter.

5. From the date of the Application, signed July 25, 2018, to September 26, 2018, Mr. Howell made six revisions to the Application. AR pp. 1-10, 21 and Ex. 1. At the hearing, the Applicant confirmed that the version of the Application he is seeking approval of had previously been identified by him as version 5, dated August 14, 2018. AR Ex. 1.

6. Mr. Howell's proposed boat lift would include an access ramp from the shore that would extend no more than 10 feet and would not exceed 3 feet in width to a 16 foot by 30 foot boat lift. The encroachment would extend up to 40 feet beyond the high water mark of Priest Lake.

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<sup>4</sup> I.C. § 58-1302(h) identifies a boat ramp as a type of a navigational encroachment. It is unclear if this boat ramp has been leased or permitted by IDL, or if such a private-use boat ramp is even permissible under Idaho law and IDL's rules, regulations and procedures. However, these questions are not relevant to this decision.

The boat lift would be located 14 feet from the Applicant's eastern littoral right line that is shared by MAA. AR p. 108; Hr'g Recording 1, 33:15 and 36:10.

7. The proposed access ramp and boat lift would not overlap with the Applicant's apparent grant of an easement to MAA. AR Ex. 1. The Applicant's ownership of real property ends at the ordinary high water mark of Priest Lake, and the length of the proposed access ramp up to the ordinary high water mark is west of the parties' purported easement.<sup>5</sup> AR Ex. 1.

8. Mr. Howell's proposed mooring buoy would be located 30 feet from the eastern littoral right line. At the proposed location, the mooring buoy would be 70 feet from Mr. Howell's existing dock, between 40 and 50 feet from the high water mark, and within the line of navigability. AR p. 108.

9. IDL provided notifications of Mr. Howell's application to adjacent littoral owners Travis Garske and MAA. AR pp. 11 – 13 and 18.

10. In response to the notification, on or around September 9, 2018, IDL received written comments from MAA objecting to the Application. AR p. 20. MAA's concerns outlined in this letter can be summarized as follows:

- a. The proposed encroachments would be located near the entrance to MAA's docking facility and the boat launch thereby impacting its member's ability to safely use the community navigational encroachment.
- b. IDL's written procedures require that boat lifts be located immediately adjacent to a proposed or existing dock.
- c. A 30 foot boat moored to the proposed mooring buoy located 30 feet from the littoral right line, could swing towards MAA's property and interfere with access to, or block, the entrance to MAA's docking facility.

AR p. 20.

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<sup>5</sup> The written contract comprising the parties' easement was not offered by either party and is not part of the record. Evidence of record regarding the fact of the easement is general. *See* AR Exs. 1 and 7. No authority exists in the Hearing Officer to opine on the validity or enforceability of a written contract between Mr. Howell and MAA.



11. Prior to the hearing, IDL employee, Mr. Anderson; the Howells; and members of MAA met at Mr. Howell's property. The parties identified their common property corner on Priest Lake, estimated the location of the littoral right line, and placed an orange buoy in the water to represent the easterly-waterward corner of the proposed boat lift. Video recordings show Mr. Spencer and another operator piloting motor boats, entering and exiting MAA's community dock on a non-windy day. AR, Ex. 2, Ex. 3, Ex. 4, Ex. 5, Ex. E, Ex. H, Ex. I.

12. During the hearing, Mr. Spencer testified that under certain weather conditions, a boat can be operated without hitting the buoy which represented the corner of the proposed boat lift. Hr'g Recording 2, 1:04.

13. Mr. Spencer also testified that "... trying to maneuver in and out of there is difficult within what [the Applicant] has proposed. . . The width of that opening right there is just approximately 24 feet, I believe it's 24.4. So when you're coming in and out of there, to be able to turn your boat sideways in a manner before you're out is very, very hard when you have a boat that's over that 24 feet." Hr'g Recording 1, 1:24:35.

14. Mr. Spencer testified that he has witnessed varying degrees of talent with respect to boaters at the dock and some have even experienced difficulty operating within the dock itself. Hr'g Recording 1, 1:28:24.

15. Mr. Spencer also testified about his concerns with other types of boats that do not turn as well as his boat because they have flatter bottoms, single props, or canvas tops. Hr'g Recording 1, 1:29:22.

16. MAA offered into the record other videos showing different types of boats entering and exiting MAA's community dock. AR Exs. A, B, C, D, and F. However, these videos do not identify the location of either of the Applicant's proposed encroachments; and therefore, the videos'

tendency to prove or disprove whether the proposed encroachments would be impediments to safety or navigation is limited.

17. Mr. Howell, and Ms. Donelle Howell testified that one of the purposes of the proposed location of the boat lift is to protect the safety of swimmers within their littoral rights area. Hr'g Recording 1, 1:14:03; Hr'g Recording 3, 9:20.

18. During the hearing, MAA's Exhibit O was offered and admitted into the record. Exhibit O is Section 25 of IDL's Navigable Waters Procedures Manual, entitled Encroachment Standards and Requirements ("Manual"). AR Ex. O. *See* Hr'g Recording 3, 3:37. The Manual is a public record that is available on IDL's website and upon request to the agency. Ms. Howell referenced this section of the procedure manual during her testimony. Hr'g Recording 1, 1:06:45.

19. For IDL, both Mr. Anderson and Mr. Ahmer testified regarding the proposed boat lift. Hr'g Recording 2, 11:07 and 28:09.

a. Mr. Ahmer, IDL Resource Supervisor testified:

If you own a single piece of property that has waterfront, that property is allowed to have one dock. An encroachment could be a waterline or riprap so there could be multiple encroachments on a property, but as far as it goes in relation to docks we only allow one dock per parcel. You cannot have multiple docks on your parcel. There is only one ramp and one dock. Those are our rules that we follow.

b. Mr. Ahmer also testified, as follows: "My concern was that the boat lift and the ramp appear to be a separate encroachment like a dock, another dock. Hr'g Recording 2, 33:36. He clarified this by stating, "My concern was that the boat lift and the ramp appear to be a separate encroachment like a dock, another dock. You already have an 8 by 32 and then now you're making application for a ramp and a boat lift that's separate

from that. So you're asking for two ramps; two different types of docking areas." Hr'g Recording 2, 34:20.

c. Mr. Ahmer went on to testify that "Every [boat lift] I have seen has been appurtenant to a dock; touching a dock within a boat slip or you'd walk from the dock out to the boat lift." Hr'g Recording 2, 30:45. He also stated, "All of the boat lifts I have seen have been contained within a dock, usually like I said, usually they are within a slip and every now and then they are on the outside of a dock, but they are adjacent to the dock. Hr'g Recording 2, 35:35.

d. Mr. Ahmer's testimony regarding his experience and knowledge is consistent with the Manual, Section 25, Encroachment Standards and Requirements which states, "[o]ne single-family dock shall be permitted for the owner of a legally established littoral lot, or lots, with associated littoral rights (IDAPA 20.03.04.010.36)." AR p. 135.

20. IDL did not offer any witness testimony or other evidence in support or opposition of the proposed mooring buoy. Hr'g Recording 2, 11:07 – 24:26 and 28:09 – 43:02.

### III. CONCLUSIONS OF LAW

#### A. IDL Has Jurisdiction Over Priest Lake.

1. The State of Idaho Board of Land Commissioners ("Land Board") is authorized to regulate, control, and permit encroachments in, on or above the beds of navigable lakes in the state of Idaho. I.C. §§ 58-104(9)(a) and 58-1303.

2. The Land Board exercises its authority through the instrumentality of IDL. *See* I.C. §§ 58-101 and 58-119. As a result, "the duty of administering the Lake Protection Act falls upon the IDL." *Kaseburg v. State, Bd. of Land Comm'rs*, 154 Idaho 570, 578, 300 P.3d 1058, 1066 (2013).

3. The Hearing Officer was authorized by the Director to issue this Preliminary Order. AR, pp. 22; I.C. § 67-5245. The hearing in this matter concluded at approximately 1:45 p.m. PST on October 26, 2018. With all evidence submitted, the matter is fully before the Hearing Officer.

4. In accordance with Idaho Code § 67-5206 and the Lake Protection Act, Title 58, Chapter 13, Idaho Code (“LPA”), IDL has promulgated rules for navigable waters encroachment permits – the Rules for the Regulation of Beds, Waters and Airspace Over Navigable Lakes in the state of Idaho (“Rules”). IDAPA 20.03.04.000 *et seq.*

5. Also under the LPA, IDL is authorized to adopt, revise and rescind regulations necessary to effectuate the purposes and policy of the LPA. I.C. § 58-1304; IDAPA 20.03.04.002. IDL has maintained written interpretations of the Rules, which includes a written procedures manual entitled, Navigable Waters Procedure Manual (“Manual”). *See* IDL, Navigable Waters Procedure Manual, <https://www.idl.idaho.gov/lakes-rivers/procedures-manual/>.

6. In enacting the LPA, the Idaho Legislature declared its intent that:

[T]he 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.

I.C. § 58-1301. “IDL is required to balance the competing interests involved while determining whether to approve permits for navigational encroachments.” *Brett v. Eleventh St. Dockowner’s Ass’n Inc.*, 141 Idaho 517, 523, 112 P.3d 805, 810 (2005); IDAPA 20.03.04.012.

7. Under the LPA and Rules, a navigable lake is defined as:

any permanent body of relatively still or slack water, including man-made reservoirs, not privately owned and not a mere marsh or stream eddy, and capable of accommodating boats or canoes. This definition does not include man-made reservoirs where the jurisdiction thereof is asserted and exclusively assumed by a federal agency.

I.C. § 58-1302(a); IDAPA 20.03.04.010.024. Priest Lake is a navigable lake under the LPA and therefore, IDL has jurisdiction to regulate the proposed encroachments. *State v. Hudson*, 162 Idaho 888, 407 P.3d 202 (2017).

8. As an owner of land adjacent to a navigable lake, Mr. Howell is a littoral owner, as defined in IDAPA 20.03.04.010.033, and is qualified to make application for an encroachment permit pursuant to IDAPA 20.03.04.010.36 and 020.02.

9. “Under Idaho law, a littoral owner on a navigable lake takes title down to the ordinary high water mark as it existed in 1890 when the State was admitted into the union, and the title to the lakebed below the ordinary high water mark is held by the State in trust for the use and benefit of the public.” *Lake CDA Investments, LLC v. Idaho Dept. of Lands*, 149 Idaho 274, 278, 233 P.3d 721, 725 (2010).

10. A littoral owner cannot grant an easement in land he does not own. *Id.* Therefore, an easement granted by a littoral owner may “only extend[] down to the ordinary high water mark.” *Id.*

#### **B. The Burden of Proof Is With the Applicant.**

1. The Applicant generally bears the burden of proof in this matter. “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).

2. 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). “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).

**C. The Application for A Boat Lift is Denied.**

1. Compliance with Administrative Rules and Department Procedures:

a. IDAPA 20.03.04.015.13.e, states, in applicable part, “It will be presumed, subject to rebuttal, that single-family and two-family navigational encroachments will have an adverse effect upon adjacent littoral rights if located closer than ten (10) feet from adjacent littoral right lines . . . All boat lifts and other structures attached to the encroachments shall be subject to the above presumptions of adverse affects.”

i. Given that the proposed boat lift would be located 14 feet from the littoral right line, there is no presumption that the proposed boat lift would adversely affect MAA’s littoral rights. Littoral Rights are defined as, “The rights of owners or lessees of land adjacent to navigable waters of the lake to maintain their adjacency to the lake and to make use of their rights as . . . littoral owners . . . in building or using aids to navigation.” IDAPA 20.03.04.010.32.

ii. MAA did not offer any evidence to rebut the presumption that its littoral rights would not be adversely affected by the proposed location of the boat lift. While the proposed location of the boat lift would reduce the space to navigate boats into and out of MAA’s community dock, it does not prohibit the use of the dock.

b. IDAPA 20.03.04.010.06 defines a boat lift as “[a] mechanism for mooring boats partially or entirely out of the water.” IDAPA 20.03.04.010.36 defines a single-family dock as “[a] structure providing noncommercial moorage that serves one (1) waterfront owner whose waterfront footage is no less than twenty-five (25) feet.”

i. Regarding single-family docks, Section 25 of the Manual states, “One single-family dock shall be permitted for the owner of a legally established littoral lot, or lots, with associated littoral rights (IDAPA 20.03.04.010.36).” AR p. 135.

ii. Regarding boat and jet-ski lifts, ports and ramp lifts, Section 25 of the Manual states: “If approved, a boat lift, jet-ski lift or ramp shall be located immediately adjacent to the proposed or existing dock.” AR p. 139.

iii. While a portion of the proposed boat lift may meet the definition of a boat lift, the fact that it connects to the shore by a ramp meets the definition of a single-family dock, and causes the pedestal boat lift to not be permissible under IDL’s interpretation and application of the Rules.

c. The proposed boat lift does comply with administrative Rules or department procedures; therefore, the Application for this boat lift must be denied.

2. Applicant’s navigational and economic necessity, justification, or benefit: The Lake Values, discussed below, must be “weighed against the navigational or economic necessity or justification for, or benefit to be derived from” the proposed boat lift. I.C. §58-1301. Mr. Howell currently has a single-family dock, but is requesting a pedestal boat lift in addition to the existing dock to raise a boat out of the water to avoid storm and wave action. AR p. 2. Mr. Howell testified that the “boat lift has to be above the projected wave actions that we have. This property is subject

to some pretty severe wave action storms.” Hr’g Recording 1, 33:40. Mr. Howell has demonstrated a benefit to be derived from the proposed boat lift.

3. Lake Value - Protection of property:

a. One of the stated purposes of the boat lift is to raise a boat out of the water to avoid storm and wave action. This encroachment would protect Mr. Howell’s property, namely, his boat.

b. Given the proximity to the launch ramp and the entrance to MAA’s community dock, the boat lift at the proposed location may cause damage to inexperienced boaters or experienced operators boating in inclement weather.

c. Operating a boat with little to no experience, or operating a boat in inclement weather increases the likeliness of damaging a boat, regardless of the proposed boat lift or any other encroachment located on a navigable waterway.

d. The evidence in the record indicates that the proposed boat lift would protect Mr. Howell’s property, but might also cause damage to both Mr. Howell’s property and MAA member’s property if boats were to run into the boat lift while entering or exiting MAA’s community dock.

4. Lake Value - Navigation:

a. The proposed boat lift, used to secure Mr. Howell’s boat, is by definition an encroachment in aid of navigation, from which Mr. Howell will benefit. See IDAPA 20.03.04.010.15.

b. The proposed boat lift could affect the use of the existing boat ramp and community dock. While the existing road and boat launch are located 15 feet onto Mr. Howell’s property, the boat lift would be located 14 feet from the littoral right line. The drawing of the proposed boat lift



shows the boat lift running parallel with the littoral right line. AR p. 108. The proposed boat lift would extend one foot in front of a boat ramp in the lake and restrict the use of the boat ramp.

c. In addition, the boat lift would be located between 27 and 30 feet from the entrance to MAA's community dock. During the recorded onsite gathering, one person said they observed a 30 to 32-foot boat cabin cruiser moored at the MAA community dock. AR Ex. E, 3:29. Witness testimony was provided that a boat lift at the proposed location could detrimentally impact navigability for the users of the MAA community dock.

d. The evidence indicates that the proposed boat lift, while providing a navigational benefit to Mr. Howell, would likely negatively impact navigation of the MAA members and guests who utilize the community dock.

5. Lake Value - Fish and wildlife habitat: There is no evidence in the record one way or another regarding the potential impact of the boat lift to fish and wildlife habitat.

6. Lake Value - Aquatic life: There is no evidence in the record one way or another regarding the potential impact of the boat lift to aquatic life.

7. Lake Value - Recreation: The Howells indicated that the proposed boat lift is also intended to protect swimmers within their littoral area. The Howells stated that while they could locate the boat lift at other locations within their littoral boundary lines, they desire to locate the boat lift at the proposed location to protect a swimming area. Hr'g Recording 1, 1:14:00; AR Ex. E, 8:52.

a. The possible endangerment of swimmers is hypothetical, as no evidence was submitted proving actual danger to life, or bodily injury in this case.

b. IDL's authority relating to an encroachment permit is limited. While IDL must balance an application for permissible encumbrances with the Lake Values policy, the agency

does not have authority to regulate all those values nor does it have authority to regulate the interests that abut to the lake's high water mark.

c. Pursuant to I.C. § 67-7031(1) and IDAPA 26, Title 1, Chapter 30, only the Idaho Department of Parks and Recreation or an authorized local authority may place regulatory makers for a swim area in public waters.

d. There is no evidence of record that the waters in front of the Applicant's real property have been designated as a swim area. Consequently, with or without the construction of the proposed boat lift, any person is allowed to drive their motorized vessel, safely, without wake, within a lawful distance from any person swimming in the waters of Priest Lake.

e. While the Application is not for a private swim area, to consider any non-navigational justification for the proposed encroachment, such as to aid in the creation of a swim area, would change the nature of the encroachment and would require IDL to process the application pursuant to Idaho Code § 58-1306.

f. For these reasons, I find that protection of swimmers is outside the scope of IDL's authority and this contested case.

g. There is no evidence in the record one way or another regarding the potential impact of the boat lift to recreation.

8. Lake Value - Aesthetic beauty: There is no evidence in the record one way or another regarding the potential impact of the boat lift to aesthetic beauty.

9. Lake Value - Water quality: There is no evidence in the record one way or another regarding the potential impact of the boat lift to water quality.

10. Because the boat lift, at the proposed location would likely negatively impact the navigation numerous MAA members who utilize the community dock, I find that the justification

for the boat lift does not outweigh the Lake Values and the application for the boat lift must be denied.

**D. The Application for One Mooring Buoy is Granted.**

1. Compliance with Administrative Rules and Department Procedures: IDAPA

20.03.04.015.09 states, “Buoys shall be installed a minimum of thirty (30) feet away from littoral right lines of adjacent littoral owners. One (1) mooring buoy per littoral owner shall be allowed.” These requirements are also stated in Section 25 of the Manual. AR p. 143. The proposed buoy would be located 30 feet from the littoral right line. I find that the proposed buoy, meets the applicable Rules and department procedures.

2. Applicant’s navigational and economic necessity, justification, or benefit: The Lake Values, discussed below, must be “weighed against the navigational or economic necessity or justification for, or benefit to be derived from” the proposed mooring buoy. I.C. §58-1301. The mooring buoy would offer moorage for a sailboat. Hr’g Recording 1, 19:36. Other than this fact, the record is silent as to the need, justification, or benefit of the mooring buoy.

3. Lake Value - Protection of property: There is no evidence in the record one way or another regarding the potential impact of the mooring buoy to protection of property.

4. Lake Value - Navigation: A boat moored to the buoy at the proposed location may swing in any direction. A 30-foot vessel swung towards MAA’s community dock, would leave at least 40 feet of access between it and the shore, and then 70 feet of access between the vessel/buoy and Mr. Howell’s existing dock. A 30-foot vessel moored at the buoy, swung toward the shore, away from the shore, or towards Mr. Howell’s existing dock, would leave a 43-foot path between the vessel/buoy and MAA’s dock. Regardless of which direction a 30-foot vessel swings, there will always be at least 40 feet of access to the lake.

a. Mr. Spencer was able to navigate to open water with 26 feet of access on a calm day. An additional 14 feet should provide enough room to safely navigate to open water.

While the mooring buoy and moored vessel may impact navigation, its impact would be minimal.

5. Lake Value - Fish and wildlife habitat: There is no evidence in the record one way or another regarding the potential impact of the mooring buoy to fish and wildlife habitat.

6. Lake Value - Aquatic life: There is no evidence in the record one way or another regarding the potential impact of the mooring buoy to aquatic life.

7. Lake Value - Recreation: There is no evidence in the record one way or another regarding the potential impact of the mooring buoy to recreation.

8. Lake Value - Aesthetic beauty: There is no evidence in the record one way or another regarding the potential impact of the mooring buoy to aesthetic beauty.

9. Lake Value - Water quality: There is no evidence in the record one way or another regarding the potential impact of the mooring buoy to water quality.

10. I find that the justification for the mooring buoy is not outweighed by the Lake Values, and it complies with Rules and department procedures.

#### IV. ORDER

Based upon the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that Encroachment Permit Application No. L-97-S-776A is APPROVED, IN PART, and DENIED, IN PART, subject to any conditions imposed by the Director of IDL and those stated in the encroachment permit. The application for the proposed mooring buoy is approved. The application for the proposed boat lift is denied.

IT IS FURTHER ORDERED that the order issued herein is a Preliminary Order, pursuant to Idaho Code § 58-1306(c) and the Notice of Appointment of Hear Officer issued on October 5, 2018, which states as follows:

The Hearing Officer shall submit a preliminary order to the Director of the Idaho Department of Lands within thirty (30) days after the close of the hearing. After receiving the preliminary order the Director shall issue a Final Order no more than forty-five (45) days after the conclusion of the hearing, or allow the preliminary order to become final forty-five (45) days after the conclusion of the hearing. As provided in Idaho Code § 67-5240, the contested case provisions of the Administrative Procedure 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 § 58-1305 that require a final order to be issued within forty-five (45) 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.

IT IS FURTHER ORDERED that if the Director allows this Preliminary Order to become final, pursuant to Idaho Code § 58-1305(c), any applicant or other aggrieved party has the right to have this decision 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 final decision. Because this Preliminary Order is for approval of an encroachment permit for the mooring buoy, any aggrieved party, other than the Applicant, appealing this decision shall file a bond with the district court in an amount to be fixed by the court, but not less than five hundred dollars, in accordance with Idaho Code § 58-1306(c). The filing of an appeal to the district court does not itself stay the effectiveness or enforcement of the order under appeal. Idaho Code § 67-5274.

DATED this 26th day of November, 2018.

A handwritten signature in black ink, appearing to read "Andrew Smyth", is written over a solid horizontal line.

Andrew Smyth  
Hearing Coordinator

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 26th day of November, 2018, I caused to be served a true and correct copy of the foregoing, by the method indicated below:

Don Howell  
2820 S. Pittsburg  
Spokane, WA 99203

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

Dave Spencer  
Murray Acres Association, Inc.  
1918 W. Toni Rae Drive  
Spokane, WA 99218

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Email: [chrm40@comcast.net](mailto:chrm40@comcast.net)

Jerry Hertel  
Murray Acres Association, Inc.

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

Angela Schaer Kaufmann  
Deputy Attorney General  
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)

Dustin Miller, Director  
Idaho Department of Lands  
300 N 6th Street, Suite 103  
Boise, ID 83702-0050

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

  
\_\_\_\_\_  
Kourtney Romine  
Administrative Assistant

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

|                                 |   |                             |
|---------------------------------|---|-----------------------------|
| In the Matter of:               | ) |                             |
|                                 | ) | Case No. CC-2018-PUB-10-001 |
| Encroachment Permit Application | ) |                             |
| No. L-97-S-776A                 | ) | <b>AMENDED PRELIMINARY</b>  |
|                                 | ) | <b>ORDER</b>                |
| Don Howell,                     | ) |                             |
| Applicant.                      | ) |                             |
| _____                           | ) |                             |

ALL PARTIES ARE TO TAKE NOTICE of this Amended Preliminary Order and its specific and limited amendment of the Preliminary Order, issued November 26, 2018.

“Any party or person affected by an order may petition to clarify any order, whether interlocutory, recommended, preliminary or final.” IDAPA 04.11.01.770. On November 27, 2018, Cheryl Spencer, Secretary for Murray Acres Association (“MAA”), emailed all parties and the Hearing Officer regarding a possible typographical error within the Preliminary Order. Upon review of MAA’s request for clarification and review of the Preliminary Order, it is apparent that a scrivener’s error did occur in the Preliminary Order that must be corrected in order to avoid confusion and inconsistency of conclusions in the Preliminary Order.

Specifically, at page 11 of the Preliminary Order, the following conclusion was stated:

- c. **The proposed boat lift does comply with administrative Rules or department procedures; therefore, the Application for this boat lift must be denied.**

(Prelim. Order p. 11.) The correct conclusion, that is consistent with the Order denying the application for the proposed boat lift (Prelim. Order p. 16) should have read, and through this Amended Preliminary Order, now reads, as follows:



c. The proposed boat lift does not comply with administrative Rules or department procedures; therefore, the Application for this boat lift must be denied.

Other than the addition of the word “not” to paragraph III.C.1.c., as amended herein, no other changes are made to the Preliminary Order, which is incorporated by reference into this Amended Preliminary Order, in its entirety.

DATED this 30<sup>th</sup> day of November, 2018.



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ANDREW SMYTH  
Hearing Officer

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30<sup>th</sup> day of November, 2018, I caused to be served a true and correct copy of the foregoing, by the method indicated below:

Don Howell  
2820 S. Pittsburg  
Spokane, WA 99203

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

Murray Acres Association, Inc.  
c/o Dave Spencer and Jerry Hertel  
1918 W. Toni Rae Drive  
Spokane, WA 99218

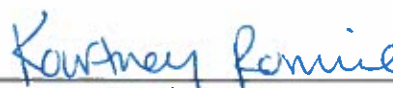
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Angela Schaer Kaufmann  
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- Hand Delivery
- Federal Express
- Email:



\_\_\_\_\_  
Kourtney Romine  
Administrative Assistant