

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of:)	
)	Case No. PH-2019-PUB-22-002
Encroachment Permit Application)	FINAL ORDER
No. L-95-S-5567B.)	
)	
Lewis Dock Homeowners Association, Inc.,)	
Applicant.)	
_____)	

I. NATURE OF PROCEEDINGS/ISSUES

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

On October 19, 2018, IDL received an encroachment permit application filed by the Lewis Dock Homeowners Association, Inc. (“LDHA”), and received the final amendment to that application on January 16, 2019. A public hearing was held on April 2, 2019, in Coeur d’Alene, Idaho. Andrew Smyth served as Hearing Coordinator. The Hearing Coordinator issued his Preliminary Order, including Findings of Fact, Conclusions of Law, and Preliminary Order (“Order”) on April 26, 2019.

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

- I have listened to the recording of the public hearing conducted in Coeur d’Alene, Idaho on April 2, 2019.
- I have reviewed the record including all documents and exhibits.
- I have examined the Hearing Coordinator's Preliminary Order in light of the entire record.

II. FINDINGS OF FACT

I concur with the Findings of Fact presented by the Hearing Coordinator.

III. CONCLUSIONS OF LAW

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


IV. FINAL ORDER

I conclude the Hearing Coordinator's Preliminary Order is based on substantial evidence in the record, and I adopt the Preliminary Order as my decision in this matter. The Preliminary Order is incorporated by reference herein and attached to this Final Order. The Applicant is qualified to make application for an encroachment permit for a community dock on Lake Coeur d'Alene, and the proposed encroachment is in conformance with the applicable standards.

On the basis of the record, it is my order that Encroachment Permit No. L-95-S-5567B is APPROVED by IDL.

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

DATED this 2nd day of May, 2019.



DUSTIN T. MILLER
Director, Department of Lands

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2019, 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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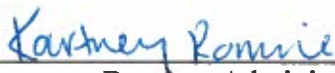
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I. BACKGROUND

On January 16, 2019, the Idaho Department of Lands (“IDL”) received the final amendment to an encroachment permit application (“Application”) filed by Lewis Dock Homeowners Association, Inc. (“LDHA”). In this Application, LDHA is seeking authorization to lengthen its southern dock by eight feet.¹ Agency Record (“AR”), p. 5 and 6, Rec 11:59. IDL assigned number L-95-S-5567B to the Application.

On November 2, 2018, IDL provided notice of the Application to various government agencies as well as to the adjacent littoral owners. AR, p. 19 – 22. IDL also caused a notice of application to be published in Coeur d’Alene Press (a newspaper with general circulation in Kootenai County) on November 2 and 9, 2018, pursuant to Idaho Code § 58-1306(b). AR, p. 26.

IDL received comments in opposition to the encroachment permit application from:

1. Attwood Family Partnership on November, 16, 2018. AR, p. 70.
2. Robbie Dennie on November 16, 2018. AR, p. 69.
3. Mark Patrick on November 26, 2018. AR, p. 66.
4. Pat Boland on November 29, 2018 and on April 1, 2019. AR, p. 32 and 67.

¹ The gangway of the South Dock is to be extended by 12 feet; however, the overall length of the dock would be extended by eight feet. The existing permit, L-95-S-5567A, authorizes the dock walkway to be 54 feet, but based on the Application, the dock walkway would be only 50 feet. AR, p. 6.

5. David and Jill Payton on February 19, 2019, which included a request for hearing. AR, p. 27.
6. Ilmar Kuljus March 26, 2019. AR, p. 68.

The concerns with the Application as set forth in the comments in opposition can be summarized as follows:

1. Community docks exponentially add to the increased boat traffic, noise problems, shoreline erosion, pollution, and reduction to water quality for fishing and swimming.
2. Extending the dock will reduce others' view of the lake and be located beyond the line of navigability.
3. The dock would be a hazard to swimmers, paddlers, kayakers, and rowers.
4. If the Application is approved, it would lead to an increase of boats and among single-family docks.

As a result of the Paytons' request for hearing, on March 14, 2019, IDL ordered that a public hearing be held pursuant to Idaho Code § 58-1306(c). AR, p. 28.

On April 2, 2019, IDL held that public hearing. At the hearing, Mr. John Magnsuon, attorney for LDHA, presented testimony in support of the Application. Ms. Jill Payton and Mr. Pat Boland provided testimony in opposition to the application, and their testimony was consistent with the concerns set forth in the written comments. Mike Ahmer, IDL Resource Supervisor, provided testimony on behalf of IDL. Hearing Recording ("Rec").

On Sunday, April 7, 2019, Robin and Ron Hilgart provided comments in opposition to the application; however, since the Hilgart's comments were received after the close of the hearing, they were not considered in this Preliminary Order.

II. FINDINGS OF FACT

1. LDHA leases the littoral rights of four contiguous parcels adjacent to Lake Coeur d'Alene, with a combined shoreline totaling approximately 360 feet. AR, p. 8 and 17 and Rec, 8:05 and 40:45.

2. LDHA's existing encroachment permit, L-95-S5567A, authorizes a community dock consisting of a North Dock and South Dock, each offering six boat moorages. AR, p. 35.

3. Under the Application, the North Dock would remain unchanged with 1,219 square feet of surface decking area.² The South Dock would increase in size to 1,285 square feet of surface decking area. The combined surface decking area of the two docks would total 2,504 square feet and the widest portion of either dock would be five feet. AR, p. 5 and 6.

4. Both the North and South Docks protrude at, or nearly at, right angles to the shoreline. AR, p. 9 and 15.

5. The shoreline along LDHA's and the adjacent littoral owners' properties is slightly concave. AR, p. 51 and Rec, 14:35, 19:17, 31:19, and 38:56.

6. The North Dock will remain approximately 47 feet from the northern littoral right line shared with the Bolands. AR, p. 7, 15 and 16.

7. Those testifying at the hearing set forth three approaches to identify the location of the common littoral right line between LDHA and the Paytons.

a. The first approach, which was used in encroachment permit application L-95-S-5567A, drew the littoral right line perpendicular to the shoreline from the intersection of LDHA and the Paytons' common property line with the OHWM. AR, p. 16. Following this method, the South Dock would be located 24.6 feet from the littoral right line.

² L-95-S-5567A authorizes the walkway of the North Dock to be 54 feet long, but this application describes it to be only 50' long.

b. The second approach, offered by LDHA, depicts the littoral right line at an approximately 63 degree angle from the shoreline. AR, p. 15. In explaining this methodology, Mr. Magnuson stated, “The common littoral boundary to define each property owners’ littoral zones is calculated, given the concave nature of the intersection of the two properties, in a manner to have an equal angle on each side, thereby apportioning the littoral rights in a completely equitable and fifty-fifty manner.” Rec, 16:06. Following this method, the South Dock would be located approximately 41 feet from the littoral right line.

c. The third approach, offered by Mr. Ahmer, follows a similar strategy as the second method, but results in different numbers. AR, p. 65. Describing his littoral right line analysis, Mr. Ahmer stated:

I used a projector and I stuck it on the chord that was created on Paytons’ property. And then the chord that extends north onto the Lewis Dock, that chord created a 167 degree angle and then I divided that in half to bisect that to form the angle that would come out. And that ends up being 83.5 degrees. And then, with my protractor still on that Payton chord, I drew with a ruler what that 83.5 would be. And it shows that it’s a little bit closer than the 41 line but not by significantly much.

Rec, 39:50. In addition, on his diagram, Mr. Ahmer, using a ruler, drew lines extending from the South Dock towards the littoral right line representing thirty feet (30’) showing that the dock would be located approximately thirty feet (30’) from the littoral right line. AR, p. 65 and Rec, 39:05.

8. The lakebed profiles submitted with the current application and the previous application, show that near the South Dock, the water depth is five feet, eight inches (5’8”) at a location forty feet (40’) from shore, and a water depth of seven feet, four inches (7’4”) fifty feet (50’) from shore. AR, p. 5 and 45.

9. The lakebed profiles further show that near the North Dock, the water depth is six feet, six inches (6’ 6”) at a location thirty feet (30’) from shore, and seven feet, eight inches (7’8”)

forty feet (40') from shore. The most landward slips of the North Dock are located approximately 30-40 feet from shore.

10. LDHA seeks to move the South Dock waterward so that the most landward edge of the South Dock is located approximately forty-seven feet (47') from shore, meaning that the water depth would be approximately seven feet (7') at that edge. *Id.* Currently, the landward edge of the South Dock is approximately forty feet (40') from shore, with a water depth of approximately five feet, eight inches (5'8"). I find that the water depth of the South Dock will be similar to that of the North Dock if the South Dock is moved pursuant to the Application.

11. The North Dock extends seventy-five feet (75') from a bulkhead into the lake. The bulkhead itself protrudes out beyond the OHWM. AR 15-16.

12. If the Application is granted, the South Dock will extend ninety-seven feet (97') from the OHWM. AR 15-17.

13. LDHA is not seeking to move the North Dock. LDHA requests authorization to move the South Dock lakeward to allow the slips closest to the upland to be located in deeper water. The Application further provides that if the South Dock is moved outward, its outer (lakeward) edge will not extend further into the lake than the edge of the North Dock.

III. ANALYSIS AND CONCLUSIONS OF LAW

A. IDL Has Jurisdiction Over Lake Coeur d'Alene

1. The State of Idaho Board of Land Commissioners ("Board" or "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) and -1303.

2. The Board exercises its authority through the instrumentality of IDL. *See* I.C. §§ 58-101 and -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. IDL’s authority under the LPA includes the authority to adopt such rules and regulations as are necessary to effectuate the purposes of the Lake Protection Act, Title 58, Chapter 13, Idaho Code (“LPA”) I.C. § 58-1304. IDL has exercised that authority and promulgated the Rules for the Regulation of Beds, Waters and Airspace Over Navigable Lakes in the State of Idaho, IDAPA 20.03.04.000 *et seq.* (“Rules”).

4. In enacting the LPA, the legislature expressed its intent that:

the public health, interest, safety and welfare requires that all encroachments upon, in or above the beds or waters of navigable lakes of the state be regulated in order that the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment. No encroachment on, in or above the beds or waters of any navigable lake in the state shall hereafter be made unless approval therefor has been given as provided in this act.

I.C. § 58-1301.

5. 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); IDAPA20.03.04.010.024. Lake Coeur d’Alene is a navigable lake under the LPA.

6. For purposes of the LPA, the “beds of navigable lakes” are defined as “the lands lying under or below the ‘natural or ordinary high water mark’ of a navigable lake and, for purposes of this act only, the lands lying between the natural or ordinary high water mark and the artificial high water mark, if there be one.” I.C. § 58-1302(b); IDAPA 20.03.04.010.04. The

proposed community dock would lie in whole or in part over the bed of a navigable lake. IDL therefore has jurisdiction to regulate the proposed encroachment.

7. “Encroachments in aid of navigation” or “navigational encroachments” includes “docks, piers, floats, pilings, breakwaters, boat ramps, channels or basins, and such other aids to the navigability of the lake” I.C. § 58-1302(h). LDHA’s community dock is a navigational encroachment

B. The Burden of Proof Is With the Applicant.

8. LDHA, as 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).

9. 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. Compliance with Legal Requirements for Community Navigational Encroachments.

10. IDAPA 20.03.04.015.02.b, states, “No part of the structure waterward of the natural or ordinary high water mark or artificial high water mark shall exceed ten (10) feet in width except breakwaters when justified by site specific conditions and approved by the

department.” As depicted in the Application, the widest portions of the docks are the walkways and the waterward most legs of the docks, each of which are and would be five feet wide. AR p. 5, 6, and 18. The proposed dock satisfies this requirement.

11. IDAPA 20.03.04.015.02.c states,

A community dock shall not have less than fifty (50) feet combined shoreline frontage. Moorage facilities will be limited in size as a function of the length of shoreline dedicated to the community dock. The surface decking area of the community dock shall be limited to the product of the length of shoreline multiplied by seven (7) square feet per lineal feet or a minimum of seven hundred (700) square feet. However, the Department, at its discretion, may limit the ultimate size when evaluating the proposal and public trust values.

The combined shoreline of the four littoral properties is approximately 360 feet, allowing for a community dock with up to 2,520 square feet of surface decking area. The combined surface decking area of the North and South Dock will be 2,504 square feet, which is within the limit set forth in IDAPA 20.03.04.015.02.c. The Application satisfies this requirement.

12. IDAPA 20.03.04.015.13.c.i Angle from Shoreline states, “[w]here feasible, all docks, piers, or similar structures shall be constructed so as to protrude as nearly as possible at right angles to the general shoreline, lessening the potential for infringement on adjacent littoral rights.” The existing docks meet this requirement, and the Application does not propose to change the docks’ angle to the shoreline. *See* AR, p. 9 and 15.

13. The “line of navigability” is “a line located at such distance waterward of the low water mark established by the length of existing 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.” I.C. 58-1302.

14. IDAPA 20.03.04.015.13.d, Length of Community Docks and Commercial Navigational Encroachments, states,

Docks, piers, or other works may extend to a length that will provide access to a water depth that will afford sufficient draft for water craft customarily in use on the particular body of water, except that no structure may extend beyond the normal accepted line of navigability established through use unless additional length is authorized by permit or order of the director. If a normally accepted line of navigability has not been established through use, the director may from time to time as he deems necessary, designate a line of navigability for the purpose of effective administration of these rules.

15. The objectors raised questions about LDHA's asserted need to extend the South Dock. AR, p. 67 and Rec, 24:50. The purpose of this Application is to lengthen the South Dock to provide sufficient depth to moor boats and ensure navigability, particularly as to the three slips nearest the shore. AR, p. 7 and Rec, 11:42. Specifically, the Application provides that it "seeks to move the South Dock into deeper water so as to ensure that all six (6) slips included in the South Dock are usable and navigable." AR, p. 7.

16. Mr. Magnuson stated:

[t]he docks were constructed in accordance with the permit as depicted and then resulted in the situation with the two interior slips on the southern dock being impeded as to navigability, but more particularly the one that is closest to the Payton property, due to site specific constraints. And the request was then made, which is the request before you, to extend that dock twelve feet further to provide for enhanced navigability for the internal slips, but primarily the one that is closest to the Paytons.

Rec, 11:35.

17. Based upon the record, as further detailed in the Findings of Fact above, I find that the requested additional length is needed to provide access to a water depth that will afford sufficient draft for watercraft; therefore, the proposed dock would meet this standard.

18. The existing North and South Docks currently extend further waterward than the single-family docks in the vicinity.³ AR, p. 51, 67 and Rec, 23:30. However, both are existing

³ The Rules specifically prohibit single family and two family docks from extending beyond the line of navigability. See IDAPA 20.03.04.015.01.c.

legally permitted encroachments. The North Dock, which currently extends lakeward further than the South Dock, provides an indication of the line of navigability. The South Dock will not extend beyond the line of navigability, so long as the lakeward edge of the South Dock does not extend beyond the lakeward edge of the North Dock. Regardless, as set forth above, LDHA demonstrated that additional length is needed for the South Dock to provide sufficient draft for watercraft.

19. IDAPA 20.03.04.015.13.e, Presumed Adverse Effect, states:

It will be presumed, subject to rebuttal ... community docks or nonnavigational encroachments will have a like adverse effect upon adjacent littoral rights if located closer than twenty-five (25) feet to adjacent littoral right lines. Written consent of the adjacent littoral owner or owners will automatically rebut the presumption. All boat lifts and other structures attached to the encroachments shall be subject to the above presumptions of adverse affects.

20. Littoral right lines are “[l]ines that extend waterward of the intersection between the artificial or ordinary high water mark and an upland ownership boundary to the line of navigation. Riparian or littoral right lines will generally be at right angles to the shoreline.” IDAPA 20.03.04.010.34.

21. The Idaho Supreme Court has held that:

[n]o one rule or formula [can] be invoked to determine the littoral boundaries which would apply in all cases; in instances where the shore line is substantially a straight shore line these boundaries are more readily and easily ascertained and determined because in such instances it is practical and equitable to draw a straight line according to the general course of the shore at high water mark and extend the lateral lines of all the properties upon such body of water at right angles with the shore line towards the low water mark; however, the irregularity in the formation of the shore line as above mentioned would make the application of this rule inequitable in many instances. . . . It seems quite firmly established that there are a few general and fundamental rules which in most instances may be applied with reference to the apportionment of littoral rights: If the shore line is straight or substantially so, the littoral lines are to be extended from the divisional lines on shore into the water perpendicular to the shore line; in the event the shore line is concave, converging lines shall be run from the divisional shore lines to the

line of navigability; again, if the shore lines are convex, the lines will be divergent to the line of navigability.

Driesbach v. Lynch, 71 Idaho 501, 508-59, 234 P.2d 446, 450-51 (1951) (additional citations omitted and emphasis added).

22. Based upon the record, and as further set forth in the Findings of Fact above, LDHA's community dock meets the standard set forth in IDAPA 20.03.04.010.34, as the North Dock is and will remain located 47 feet from the northern littoral right line. The South Dock with the proposed extension would be located at least 25 feet from the southern littoral right line and meet this minimum requirement.

23. Pursuant to Idaho Code § 58-1301,

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.

24. As to the economic necessity or justification for or benefit derived from the proposed encroachment, the record reflects that the additional length is needed to provide sufficient draft for watercraft as to the slips on the South Dock located nearest to shore. I find that LDHA has established the justification for or benefit derived from the proposed encroachment.

25. The economic necessity or justification or benefit derived must be weighed against the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality, i.e., the "Lake Values".

a. Protection of property: Although the extension of the South Dock would move it closer to the littoral right line shared with the Paytons, it would still be located at least 25 feet away from the littoral right line. The record does not contain any evidence that the extension of the dock would negatively affect property.

b. Navigation: The record contains evidence that the public currently enjoys both motorized and nonmotorized boats in this area. AR, p. 66, 68, and 69. However, there is no evidence that the proposed dock would impede navigation on the lake. It may impact the ability of boats to access certain parts of the water in front of Community Beach, but that is true of any dock. The public has a right, and will continue to have a right, to navigate anywhere above the beds of Lake Coeur d'Alene, below the OHWM.

c. Fish and wildlife habitat and aquatic life: The record contains evidence about the variety of wildlife that access the Community Beach lot, the water in front of the lot, and surrounding areas. However, there was no evidence that the proposed dock would in fact negatively impact fish, wildlife and aquatic life.

d. Recreation: The public currently enjoys motor boating, fishing, swimming, skiing, paddling, kayaking, and rowing on Lake Coeur d'Alene in this area. AR, p. 66, 68, and 69. While the proposed extension of the dock may impact these activities to a certain extent, the fact remains that the North and South Docks already exist. In addition, given that the public has a right to navigate over the beds of navigable lakes below the OHWM, boaters could potentially disrupt the above-listed activities, with or without the proposed extension to the dock.

e. Aesthetic beauty: Both of the adjacent littoral owners of the subject properties indicated that the proposed dock extension would impact their view of the lake. AR, p. 67 and 69 and REC, 24:03. While those opposed to the Application may negatively view the aesthetic

changes, proponents of the Application may view the changes in a more positive light. I find that this criteria to be neutral.

f. Water quality: One comment indicated that community docks increase boat traffic on the lake and add to the potential for more pollution and reduction of water quality. AR, p. 66. However, a community dock with 12 moorages is currently permitted at this location and no additional boat moorages would be permitted as a result of this application.

26. I find that the justification for or benefit of the proposed extension of the South Dock is not outweighed by the Lake Values.

PRELIMINARY ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that Encroachment Permit Application No. L-95-S-5567B is APPROVED, subject to any conditions imposed by the Director of the Idaho Department of Lands.

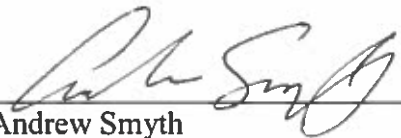
IT IS FURTHER ORDERED that the order issued herein is a PRELIMINARY ORDER. Idaho Code § 58-1306(c); Idaho Code § 67-5240; Idaho Code § 67-5245; *Notice of Appointment of Hearing Coordinator and Hearing*. The hearing in this matter was completed on April 2, 2019. Consistent with the *Notice of Appointment of Hearing Coordinator and Hearing*, “The Hearing Coordinator shall submit a preliminary order to the Director of the Idaho Department of Lands, who shall issue a Final Order no more than thirty days after the conclusion of the hearing.” This Preliminary Order is submitted fewer than thirty days after conclusion of the hearing.

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 § 58-1306 that require a final order to be issued within 30 days of the hearing, and leave insufficient time to consider petitions for review of the preliminary order, the procedures of Idaho Code § 67-5245 addressing petitions for review of preliminary orders are not applicable.

Notice of Appointment of Hearing Coordinator and Hearing.

DATED this 26th day of April, 2019.



Andrew Smyth
Hearing Coordinator