

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of Encroachment Permit)	
Application No. L-97-S-944B)	Case No. CC-2018-PUB-10-003
)	
Ben Brausen,)	FINAL ORDER
)	
Applicant.)	
)	
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)	
)	

I. PROCEDURAL BACKGROUND

Navigational encroachments such as single-family docks, placed in or on the beds of 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 or about November 6, 2018, Applicant Ben Brausen applied for an encroachment permit to reconfigure a single-family dock and boat lift on Priest Lake. The parties were allowed to conduct discovery and participate in pre-hearing briefing. A contested case hearing was held on July 8, 2019. Mr. Andrew Smyth served as the duly appointed Hearing Officer. Mr. Smyth issued the Preliminary Order on August 6, 2019, which contains Findings of Fact and Conclusions of Law derived from the administrative record including testimony received during the contested case hearing.

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 record for this matter, including the following materials:

- I have reviewed the written record including all documents and exhibits.
- I have examined the Hearing Officer's 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.

IV. ORDER

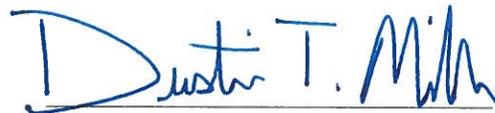
I conclude that the Hearing Officer's recommendations in the Preliminary Order are based on substantial evidence in the record, and I adopt those recommendations as my decisions in this matter. The Preliminary Order is hereby incorporated, by reference, in its entirety into this Final Order, and is enclosed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

As a littoral owner, Mr. Brausen is qualified to make application for an encroachment permit for a single-family dock on Priest Lake. However, the upland real property boundary was put at issue by adjacent owner and objector, Barbara Barry Trust. While IDL has jurisdiction over Priest Lake and is authorized to determine littoral right lines "through" the lake, IDL does not have jurisdiction to resolve upland real property boundary line disputes. Depending on where the disputed upland property boundary is found to be, materially impacts whether Mr. Brausen's application is compliant

with IDAPA 20.03.04. It appears from the administrative record that Mr. Brausen has not proven that the proposed dock configuration will not impinge on the ten-foot setback from adjacent littoral right lines, as required in IDAPA 20.03.04.015.13.e. Based upon all of the foregoing, IT IS HEREBY ORDERED that Encroachment Permit Application No. L-97-S-944B is DENIED.

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* I.R.C.P. 84. 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 22nd day of August, 2019.



DUSTIN T. MILLER
Director, Idaho Department of Lands

CERTIFICATE OF MAILING

I hereby certify that on this 22nd day of August, 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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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-944B)	Case No. CC-2018-PUB-10-003
)	
Ben Brausen,)	PRELIMINARY ORDER
)	
Applicant.)	
)	
)	
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I. PROCEDURAL BACKGROUND

On or around November 6, 2018, the Idaho Department of Lands (“IDL”) received an encroachment permit application (“Application”) filed by Mr. Ben Brausen (“Applicant” or “Mr. Brausen”). Agency Record (“AR”) pp. Brausen 00001 – 000011.¹ IDL assigned application number L-97-S-944B to the Application. In the Application, the Applicant seeks authorization to reconfigure a single-family dock and boat lift on Priest Lake. AR pp. 1 and 2; Ex. 1.

IDL processed the Application for a single-family dock pursuant to Idaho Code § 58-1305 and IDAPA 20.03.04.025.

1. On November 15, 2018, IDL provided notices of the Application to the two adjacent littoral owners, Barbara Barry, Inc.² and John Cocks. AR pp. 12-13.
2. On or around November 24, 2018, IDL received an objection on behalf of BBT from Mr. Robert L. Delsman, Attorney. AR pp. 14-21.
3. On or around November 24, 2018, IDL also received an objection from the Cocks family. AR pp. 22-29.

¹ All citations to the AR are hereinafter designated by using the Bates numbers only, not the preceding “Brausen0000.”

² While the letter was sent to Barbara Barry, Inc., it is the Barbara Barry Trust (“BBT”), which owns the littoral property adjacent to the Applicant’s property. Rec. 1, 2:02.

4. On or around December 7, 2018, IDL received a letter from Gregory M. Wilson, attorney for Mr. Brausen, providing his legal opinion regarding Mr. Brausen's property in relation to the Application. AR pp. 30-35.
5. On December 15, 2018, IDL received an email from Mr. Brausen agreeing to waive the 60-day IDAPA time requirement for processing the Application. AR p. 36.
6. Pursuant to Idaho Code § 58-1305(c), IDL ordered a hearing in this contested case. On December 17, 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. 37-39.
7. The parties requested, and were allowed, to file pre-hearing briefs. AR pp. 48-50.
8. In addition, Mr. Brausen filed a motion to conduct discovery, which was granted by the Hearing Officer on January 30, 2019, allowing the parties to engage in written discovery through March 12, 2019. AR pp. 51-52.
9. The contested case hearing was originally scheduled to take place on March 20, 2019; however, the parties filed a Stipulation and Motion to Vacate Hearing Date and Stay Further Proceedings, which was granted by the Hearing Officer. AR pp. 314-315.
10. Following a status conference held on May 20, 2019³, the undersigned Hearing Officer issued an Amended Scheduling Order on May 28, 2019, establishing the date, time, and location of the hearing. AR pp. 318-320.
11. Pursuant to Idaho Code § 58-1305(c), a contested case hearing regarding the Application was held on July 8, 2019. The participants appearing at the hearing were as follows: Mr. Ben Brausen; his legal counsel Mr. Gregory Wilson; Mr. Wilson's assistant Ms. Cassandra Wilson; Ernest Warner, P.L.S.; Mr. Rex Finney, lead counsel

³ The Amended Scheduling Order incorrectly states that the telephonic status conference was held on June 20, 2019.

for BBT; Mr. Robert Delsman, co-counsel for BBT; Mr. Trevor Anderson, IDL Resource Specialist; Mr. Mike Ahmer, IDL Resource Supervisor; and Ms. Angela Schaer Kaufmann, Deputy Attorney General counsel for IDL. In addition, Mr. Brad Diesen, PLS, CFedS participated for a portion of the hearing by phone. AR and Hr'g Recording.⁴

Evidence admitted into the administrative record during the hearing consisted of sworn witness testimony, documents, and a photograph taken of figures drawn on a white board during the questioning of Mr. Ahmer. During the hearing, a Stipulation to Admit Applicant's Exhibits Into Evidence signed by Mr. Wilson, Mr. Finney, and Ms. Kaufmann was provided. The Applicant offered Exhibit 22, a copy of Idaho Code § 58-1301, but this was not admitted into the record as it is a state statute to which the Hearing Officer takes official notice.

Mr. Brausen disagrees with the location of his northern littoral right line as depicted in his past encroachment permit applications and approved by IDL in issuing his current encroachment permit, L-97-S-944A. Mr. Brausen claims that his eastern property line extends from his northern property point following the section line dividing Sections 9 and 10 until it intersects with the OHWM of Priest Lake. This would provide well more than ten (10) feet between his dock and the littoral right line.

BBT asserts that there is nothing in the record to reflect that Mr. Brausen owns real property to the North of Lot 1 of Diamond Park and his Application should be denied. AR p. 146.

IDL contends that due to the uncertainty of the location where Mr. Brausen's and BBT's property lines intersects with the OHWM of Priest Lake, IDL cannot determine the location of their

⁴ The hearing was recorded 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. The hearing consists of two 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: Rec. #, mm:ss.

common littoral right line and is therefore unable to determine if Mr. Brausen's proposed encroachment would infringe upon BBT's littoral rights. AR p. 6. IDL also draws the distinction between its authority to determine littoral right lines when an encroachment permit application is filed, and its lack of authority to determine upland ownership and real property boundary lines. AR pp. 57; Rec. 2, 51:24

II. FINDINGS OF FACT

1. Mr. Brausen owns Lot 1 of Diamond Park, located in Section 9, Township 61 North, Range 4 West in Bonner County, Idaho. AR pp. 170-174. Lot 1 is triangle shaped, with westerly, easterly, and southerly facing sides.

2. Mr. Brausen's property is located adjacent to Priest Lake and consists of at least twenty five (25) feet of waterfront footage. AR pp. 1, 170-173 and Ex. 5.

3. The northern point of Mr. Brausen's property, where the westerly and easterly sides intersect, is the meander corner established with a survey monument in December 2008. Ex. 1.1 and 1.2; Rec. 1, 39:44.

4. The State of Idaho obtained title to land in Section 9, but not Section 10, of Township 61 North, Range 4 West, Section 10. Ex. 13.0.

5. On July 6, 2016, the State of Idaho issued a deed to BBT to convey, release and quitclaim title and interest in Lot 3 in Block 1 of State Subdivision Desmet Park. Lot 3 in Block 1 of State Subdivision Desmet Park lies within Section 10, Township 61 North, Range 4 West. Ex. 3.0.

6. The OHWM of Priest Lake is 2437.64 feet. *State v. Hudson*, 162 Idaho 888, 407 P.3d 202 (2017).

7. If approved, Mr. Brausen's private dock would have 380 square feet of decking area and extend 65 feet beyond the OHWM of Priest Lake. The dock would consist of a fixed pier measuring four feet (4') by twenty seven feet (27') supported by two pilings, a four-foot (4') by eight-foot (8') hinged ramp, an eight-foot (8') by thirty-foot (30') floating dock secured by two pilings located on the south side of the dock, and a boat lift located on the north side of the dock. AR p. 1, 2, and 6.

8. On or around April 12, 2010, IDL granted encroachment permit L-97-S-944A to Mr. Brausen to "construct and maintain a 5' x 27' fixed pier, 5' x 15' ramp, 8' x 30' straight floating dock, 2 pilings, a mechanical boat lift (covered) and a domestic water line." Ex. 1.5.

9. After IDL granted permit L-97-S-944A, Mr. Brausen sent a letter to IDL disputing the location of his property boundary and his northern littoral right line. Mr. Brausen has not recorded the permit, nor built his dock according to the permit. Ex. 6; Rec 1, 47:28.

10. If Mr. Brausen's northern littoral right line was drawn waterward from the meander corner, as is drawn on the figure incorporated in permit L-97-S-944A, Mr. Brausen's dock, as it exists today and as it is depicted in the subject application, would be located closer than 10 (ten) feet from that littoral right line. Rec 1, 26:30.

11. If Mr. Brausen's western property line extended north from the meander corner to the OHWM of Priest Lake, and the littoral right line drawn from that point, Mr. Brausen's dock, as it exists today and as it is depicted in the subject application, would be located more than 10 (ten) feet from that littoral right line. Rec 1, 1:52:06.

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 is authorized by the Director to issue this Preliminary Order. AR p. 37; I.C. § 67-5245. The hearing in this matter concluded at approximately 2:00 p.m. PST on July 8, 2019. 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/> and Ex. 15.

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).

B. Mr. Brausen is qualified to make application

1. IDAPA 20.03.04.010.033 states in part, “[o]nly persons who are littoral owners or lessees of a littoral owner shall be eligible to apply for encroachment permits. I find that Mr. Brausen, as owner of property adjacent to Priest Lake, is a littoral owner, as defined in IDAPA 20.03.04.010.33, and is qualified to make application for an encroachment permit.

C. 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).

D. The Application is Denied.

1. Applicant Has Not Proven Compliance with the Rules:

a. 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 find that Mr. Brausen’s dock meets the definition of a single-family dock given that the dock will be used for private purposes at Mr. Brausen’s property which consists of at least twenty-five (25) of waterfront footage.

b. IDAPA 20.03.04.015.01.a provides the following parameters governing the size and dimension of single-family docks, “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, excluding the slip cut out.” I find that Mr. Brausen’s dock meets this requirement, as the widest portion of the dock is eight (8) feet wide.

c. IDAPA 20.03.04.015.01.b states, “Total surface decking area waterward of the natural or ordinary or artificial high water mark shall not exceed seven hundred (700) square feet, including approach ramp and walkway for a single-family dock and shall not exceed one

thousand one hundred (1,100) square feet, including approach ramp and walkway for a two-family dock.” I find that Mr. Brausen’s dock meets this requirement, as the total surface decking area is 380 square feet.

d. Regarding single-family docks, IDAPA 20.03.04.015.01.c states, “No portion of the docking facility shall extend beyond the line of navigability. Shorter docks are encouraged whenever practical and new docks normally will be installed within the waterward extent of existing docks or the line of navigability.” There is nothing in the record regarding the line of navigability at this location. However, given that IDL granted Mr. Brausen an encroachment permit for a dock at this location that extended seventy-two (72) feet beyond the OHWM of Priest Lake, and this application is for a dock that is seven (7) feet shorter, I find that Mr. Brausen’s dock meets this requirement.

e. 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. IDAPA 20.03.04.010.34 defines littoral right lines as, “[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.”

ii. “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

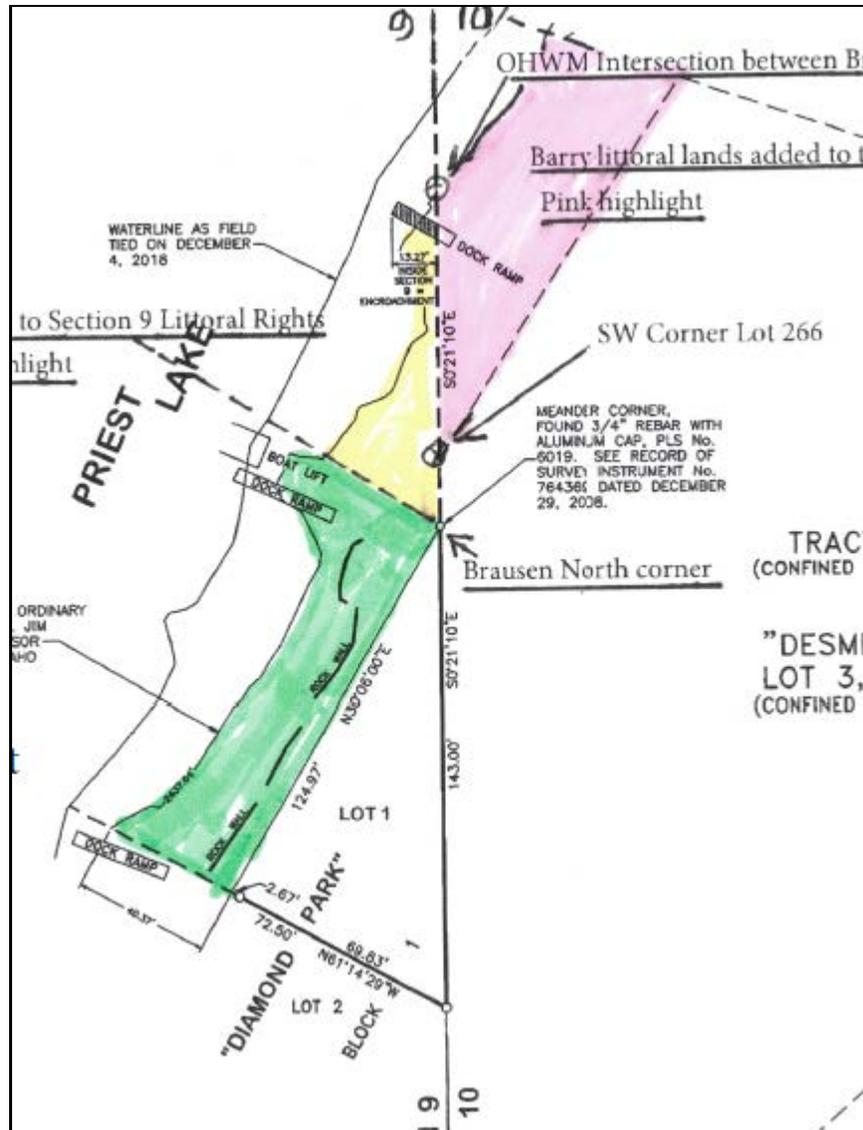
for the use and benefit of the public.” *Lake CDA Investments, LLC v. Idaho Dept. of Lands*, 149 Idaho 274, 278, 233 P.3d 721, 725 (2010).

iii. “A conveyance of an estate in real property may be made by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing.” Idaho Code § 55-601. “Every conveyance of real property ... is void as against any subsequent purchaser ... of the same property ... whose conveyance is first duly recorded.” Idaho Code § 55-812.

iv. The Idaho Supreme Court has long held that Idaho’s district courts have subject matter jurisdiction to adjudicate quiet title actions. *Whitney v. Randall*, 58 Idaho 49, 56, 70 P.2d 384, 387 (1937); *see also* Idaho Code §§ 10-1201 and 1202.

v. The record is clear that Mr. Brausen owns littoral property adjacent to Priest Lake. While Mr. Brausen’s deed shows his lot is triangle shaped, it is understood that his western property boundary extends to the OHWM, which is located west, or waterward, of his western property boundary depicted on the Diamond Park Plat. At this point, what is not clear, is whether Mr. Brausen has a northern property line that intersects the OHWM at a different point north of the established meander corner.

vi. Expert witnesses provided testimony for Mr. Brausen that his eastern property boundary should extend north past the meander corner, following the Section line between Sections 9 and 10 to the OHWM. However, such testimony is not sufficient to demonstrate Mr. Brausen’s clear title to all of that land. The record does not prove by a preponderance of evidence that Mr. Brausen owns the property north and west of the established meander corner. The area of concern is highlighted in yellow on Exhibit 5, as follows:



vii. Making a legal determination on the extent of Mr. Brausen’s ownership of disputed real property is outside the scope of this hearing. *See Notice of Appointment of Hearing Officer.*

viii. The Applicant, who bears the burden of proof on this matter, has failed to demonstrate that the proposed dock configuration is not located closer than ten (10) feet from adjacent littoral right lines.

f. The proposed single-family dock and boat lift do not comply with Rules; therefore, the Application for this boat lift must be denied.

IV. ORDER

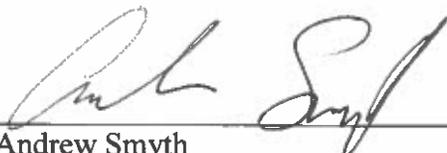
Based upon the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that Encroachment Permit Application No. L-97-S-944B is DENIED.

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 December 17, 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. 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 6th day of August, 2019.



Andrew Smyth
Hearing Coordinator