

BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of Encroachment Permit)	Case No. PH-2019-PUB-22-001
Application No. L-95-S-5696B)	
)	FINAL ORDER
John and Gaila Condon for North Idaho)	
Maritime, LLC,)	
)	
Applicants.)	

I. NATURE OF PROCEEDINGS

Encroachments, including commercial encroachments, 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 (“LPA”), 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 May 10, 2018, IDL received an encroachment permit application filed by Mr. John Condon and Mrs. Gaila Condon with North Idaho Maritime (collectively “Applicants”). I appointed Mr. Mick Thomas as the Hearing Coordinator. The Hearing Coordinator held and presided over a public hearing on April 11, 2019. However, the hearing was not recorded due to technical problems with the audio recording equipment. The parties and public witnesses were notified of the error and that another public hearing would be held.

On July 2, 2019, Applicants submitted a supplement to their Application. After a telephonic status conference, the Hearing Coordinator issued a Notice of Rehearing. The Hearing Coordinator held and presided over a second public hearing on September 12, 2019. On October

7, 2019, the Hearing Coordinator issued his Preliminary Order, which contains Findings of Fact and Conclusions of Law.

As Director of IDL, my responsibility is to render a decision pursuant to Idaho Code § 58-1306(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. I relied on the record for this matter, including examining the Hearing Coordinator's Preliminary Order in light of the entire record in this contested case.

II. FINDINGS OF FACT

I concur with the Preliminary Order's Procedural Background and Findings of Fact.

III. CONCLUSIONS OF LAW

I concur with the Preliminary Order's Conclusions of Law, except on page 10, Section III.D, paragraph 1.e is amended to read:

e. IDAPA 20.03.04.015.13.e states:

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, and that commercial navigational encroachments, 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 effects.

The existing encroachment meets the ten (10) foot setbacks required for a single-family dock.

But it does not meet the twenty-five (25) foot setback required for a commercial dock on the west littoral boundary of Lot A, shared with DGID. However, the Applicants submitted a written agreement with DGID wherein it "agrees to waive the requirement that the dock be located no

less than twenty-five (25) feet from the Littoral Line, in order to be used for commercial purposes.” AR pp. 46-63 ¶ 6.

IV. ORDER

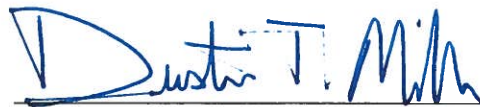
I conclude that the Hearing Coordinator’s Findings of Fact and Conclusions of Law presented in the Preliminary Order are based on substantial evidence in the record, and I adopt those Finding of Fact and Conclusions of Law as my decision in this matter. I hereby incorporate by reference the Preliminary Order’s Procedural Background, Findings of Fact, and Conclusions of Law into this Final Order except as specifically set forth herein. I have enclosed and served the Preliminary Order along with this Final Order.

Based on the adopted Findings of Fact and Conclusions of Law, I HEREBY ORDER that Encroachment Permit Application L-95-S-5696B is CONDITIONALLY APPROVED. The Applicants shall provide written evidence from the John and Gaila Condon Living Trust that is sufficient for IDL to determine in whose name the resulting commercial encroachment permit will be issued. As discussed in the Preliminary Order at page 8 in Section III.B, paragraph 7, Applicants must provide written evidence of authorization to represent the Condon Trust regarding the Application; or alternatively Applicants must provide a written lease agreement from the Condon Trust for the lease of its littoral rights. That written evidence shall be provided no later than thirty (30) days after the issuance of this Final Order. If the required written evidence is not provided within thirty (30) days after the issuance of this Final Order, then the conditional approval of the permit application shall expire.

This is a final order of the agency. Pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.030.09, the Applicant and any aggrieved party appearing at a hearing have a right to have the proceedings and Final Order reviewed by the district court in the county where the encroachment is proposed by filing a notice of appeal within thirty (30) days from the date of the

final decision. Pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.030.09, any aggrieved party other than the Applicant shall be required to deposit an appeal bond with the court in an amount to be determined by the court but not less than five hundred dollars (\$500) insuring payment to the Applicant of damages caused by delay and costs and expenses, including reasonable attorney fees, incurred on the appeal in the event the district court sustains the Final Order. The Applicant does not need to post a bond with the district court for an appeal. 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 14th day of October, 2019.



DUSTIN T. MILLER

Director, Idaho Department of Lands

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 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:)	
)	Case No. PH-2019-PUB-22-001
Encroachment Permit Application)	
No. L-95-S-5696B)	
)	PRELIMINARY ORDER
John and Gaila Condon for North Idaho)	
Maritime, LLC,)	
)	
Applicants.)	

I. PROCEDURAL BACKGROUND

On May 10, 2018, the Idaho Department of Lands (“IDL”) received an encroachment permit application (“Application”) filed by Mr. John Condon and Mrs. Gaila Condon with North Idaho Maritime, LLC (collectively “Applicants”). Agency Record (“AR”) pp. 1–11. In the Application, the Applicants sought authorization to change encroachment type from a residential, or single-family dock, to a commercial navigational encroachment on Hayden Lake. The previously issued permit for a single-family dock is L-95-S-5696A. The John and Gaila Condon Living Trust (“Condon Trust”) is the owner of the upland property for which the Application was made. AR pp. 1-11, 46-63, 170-171.

On May 16, 2018, IDL notified Mr. Condon that the Application was incomplete. AR p. 12. On October 29, 2018, IDL sent a follow-up letter to the Applicants regarding the incomplete application status. AR p. 13. On or around November 30, 2018, Mr. Condon provided a written response to IDL. AR pp. 14-15. Then, on December 28, 2018, IDL provided notice of complete

application to Mr. Condon; which, then triggered the notice and publication provision requirements for a commercial navigational encroachment under Title 58, Chapter 13, Idaho Code, *Idaho Lake Protection Act* (“LPA”); and IDAPA 20.03.04, *Rules for Regulation of Beds, Waters, and Airspace Over Navigable Lakes in the State of Idaho* (“LPA Rules”). Also on December 28, 2018, IDL mailed Notifications of Application for Encroachment to the Applicant’s two neighboring upland owners, Dalton Garden Irrigation District (“DGID”) and Mr. Joe Gentry; and emailed notice to ten different local, state, and federal agencies as well as the Idaho Conservation League. AR pp. 16-32.

On or around January 10, 2019, the Notice of Application was posted in the Coeur d’Alene Press as required by Idaho Code § 58-1306(b) and IDAPA 20.03.04.030.01. AR p. 33. On January 14, 2019, IDL began receiving objection letters from members of the public, including at least two requests for hearing on the Application. AR pp. 34-44, 64-66, 73-103, 105. A letter in support of the Application was also received by IDL. AR p. 104. Mr. Condon submitted a written waiver of the 90-day timeframe for hearing to IDL. AR p. 45.

On January 25, 2019, Mr. Condon provided IDL with copies of an agreement and attached quitclaim deeds between DGID and the Condon Trust that appear to resolve a boundary location dispute, a littoral line location dispute, and an encroachment permit application dispute between the two upland owners. AR pp. 46-63. As a term of the Agreement: “[DGID] agrees to not object to the existing placement of the 10’x70’ pier and dock on Lot 140, agrees to not oppose the Encroachment Permit Application of the Trust to use that pier and dock for commercial purposes, and agrees to waive the requirement that the dock be located no less than twenty-five (25) feet from the Littoral Line, in order to be used for commercial purposes.” AR pp. 46-63, ¶ 6. IDL accepted the Agreement as written consent from DGID.

Pursuant to Idaho Code § 58-1306(c), IDL ordered a public hearing in this case. On February 25, 2019, Mr. Dustin T. Miller, IDL Director, appointed Mr. Mick Thomas to be the Hearing Coordinator to preside over the public hearing proceedings. AR pp. 67-69. Pursuant to IDAPA 20.01.01.000 *et seq.*, Director Miller issued a Notice of Hearing designating 6:00 p.m. on April 11, 2019 as the public hearing date and time. AR pp. 70-72. The Hearing Coordinator presided over the public hearing of the Application. Due to technical problems with audio recording equipment, the April 11, 2019 public hearing was not recorded. Idaho Code §§ 67-5242(3)(d) and 5249(2)(e) require that administrative hearings be recorded and that the recording be maintained as part of the agency record. On April 26, 2019, the Applicants, IDL, and the public witnesses who had requested the hearing were informed of the error and that another public hearing would be held.

On July 2, 2019, Applicants submitted a supplement to the Application. AR pp. 157-171. The Application now requested permission to install two (2) pilings to be used for moorage. AR pp. 157-171. On July 26, 2019, following a telephonic status conference, the Hearing Coordinator issued the Notice of Rehearing, which included instruction on what the agency record would consist of going into the rehearing. AR pp. 172-174, 215-219. IDL published the Notice of Application and Notice of Hearing in the Coeur d'Alene Press as required by Idaho Code § 58-1306(b) and IDAPA 20.03.04.030.01. AR pp. 213-214, 221-222. IDL received additional written objection letters. AR pp. 106-156, 175-212, 220, 223-243.

Pursuant to Idaho Code § 58-1306(c), the matter was scheduled to be reheard during a second public hearing that was conducted on September 12, 2019. The Hearing Coordinator presided over the public rehearing of the Application. The parties to the rehearing who appeared or participated were as follows: Mr. and Mrs. Condon; the Applicants' attorney, Mr. John

Magnuson; IDL Resource Specialist, Sr., Mr. Mike Ahmer; and IDL's attorney, Ms. Angela Kaufmann. Numerous public witnesses appeared and testified, both in opposition and in support of the Application. AR pp. 244-247; Rehearing audio.

In addition to the party testimony and the public witness testimony, evidence admitted into the administrative record during the rehearing consisted of the following:

1. IDL Hearing Statement. AR pp. 248-250.
2. Applicants' Exhibits consisting of 368 letters of support, 46 images, property history, permit packages, correspondence, and a diagram. AR pp. 251-700.
3. Mr. Shawn Hathaway Exhibits. AR pp. 701-747.
4. Mr. Jim Barney Exhibits. AR pp. 748-754.

II. FINDINGS OF FACT

1. The Condon Trust owns Kootenai County parcel 0-3520-000-1400, AIN 262367 in Kootenai County, Idaho ("Lot B"), and is therefore a littoral owner. AR pp. 11, 46-63, 170-171.

2. The Condon Trust owns a second, adjacent lot ("Lot A") and the two lots together have a combined frontage of approximately 150 lineal feet. AR pp. 46-63, 170-171.

3. The Applicants are seeking to change Lot A's encroachment type from a single-family dock permit to a commercial navigational encroachment permit, as well as installing two (2) pilings within Lot B's littoral right lines for barge and piling moorage. AR pp. 157-171, 248. The commercial activities that will take place at the whole site include the storing of barges and piling material, assembly of dock sections, loading and unloading of materials and supplies, and disassembly of old docks for removal. AR p. 248. No winter dock storage will occur at the site. AR pp. 157-171, 248.

4. No lease agreement or other type of documentation authorizing use of the littoral rights of the Condon Trust was submitted by the Applicants.

5. IDL encroachment permit L-95-S-5696A, assigned to John and Gaila Condon on February 14, 2017, authorizes a single-family dock for a ten foot by seventy-foot (10'x70') fixed pier encroachment for Lot A. AR p. 248. However, the current dock consists of a ten-foot by thirty-foot (10'x30') pier, and an eight-foot by forty-eight-foot (8'x48') floating dock. AR p. 250.

6. The Idaho Department of Fish and Game did not comment on the proposed encroachment regarding fish habitat and aquatic life. AR p. 250.

5. The Idaho Department of Environmental Quality did not comment on the proposed change in use type regarding water quality. AR p. 250.

6. The existing and proposed encroachments do not extend beyond the current Line of Navigability for Hayden Lake. AR p. 250.

7. During his rebuttal testimony, Mr. Condon testified that the Hathaway Exhibit #6, entitled, "Floating Junkyard" were images from other locations on the lake and other lakes in the area. The images in Hathaway Exhibit #6, AR pp. 726-734, were not of the lake lot or dock being considered in the rehearing and were not considered in rendering this Preliminary Order. Other images in the Hathaway Exhibits show upland uses which is of nominal, if any, evidentiary value in considering the Application.

8. The Applicants' primary business intent for the requested encroachment is for the commercial operation of their business, North Idaho Maritime, LLC ("NIM"). Operations will include final assembly of docks, dock repair, and dock disassembly. AR Rehearing audio.

9. Normal business hours of NIM are Monday through Friday, from approximately 7:00 AM to approximately 5:00 PM. Mr. Condon testified that there may be exception to the hours of operation if there is an emergency, which usually involves a request for hauling services from the Kootenai County Sheriff's Office. AR Rehearing audio.

10. Mr. Barney's Exhibit #1-7 consist of images that were taken on a Sunday, of people engaged in activities that were not related to NIM's business operations. AR Rehearing audio; AR pp. 748-754. Barney Exhibits #1-7 also mainly show upland uses which is of nominal, if any, evidentiary value in considering the Application.

III. CONCLUSIONS OF LAW

A. IDL Has Jurisdiction Over Hayden 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 Coordinator is authorized by the Director to issue this Preliminary Order. AR pp. 67-69; I.C. § 67-5245. The hearing in this matter began at 1:00 p.m. PST and concluded at approximately 4:30 a.m. PST on September 12, 2019. With all evidence submitted, the matter is fully before the Hearing Coordinator.

4. In accordance with Idaho Code § 67-5206 and the LPA, IDL has promulgated rules for navigable waters encroachment permits – the LPA Rules. IDAPA 20.03.04.000 *et seq.*

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 the LPA Rules, a navigable lake is defined as:

[A]ny permanent body of relatively still or slack water, including manmade 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. Hayden Lake is a navigable lake under the LPA and therefore, IDL has jurisdiction to regulate the proposed encroachments. *See State v. Hudson*, 162 Idaho 888, 407 P.3d 202 (2017).

B. The Condon Trust, or its authorized lessee, is qualified to make application.

1. IDAPA 20.03.04.010.033 defines Littoral Rights 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 or lessees in building or using aids to navigation....”

2. The Condon Trust is the littoral owner of Lot A and Lot B, the lands adjacent to Hayden Lake for which Mr. and Mrs. Condon and NIM seek to make use of the littoral rights.

3. Mr. and Mrs. Condon did not file the Application as trustees or authorized agents of the Condon Trust. They filed the Application as agents for their business, NIM.

4. Mr. and Mrs. Condon did not appear at the hearing as authorized representatives of the Condon Trust, and there is nothing in the record specifying that they or NIM were authorized to file and pursue the Application on the Condon Trust's behalf.

5. However, neither IDL nor any public witness objected to Mr. and Mrs. Condon's participation on behalf of the Condon Trust.

6. Rule 202.01 of the Rules of Practice & Procedure Before the State Board of Land Commissioners provides, in pertinent part:

To the extent authorized or required by law, appearances and representation of parties or other persons at formal hearing or prehearing conference must be as follows:

- a. Natural person. A natural person may represent himself or herself or by represented by a duly authorized employee, attorney, family member or next friend.

IDAPA 20.01.01.202.01.a.

7. It is important that the record is clear regarding the Applicants' authority. Therefore, I am directing Mr. and Mrs. Condon to provide written evidence of authorization to represent the Condon Trust regarding the Application; such permit would then be issued in the Condon Trust's name. Or, in the alternative, Applicants are to provide a written lease agreement from the Condon Trust for the lease of its littoral rights.

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 Conditionally Approved.

1. Applicants Have Proven Compliance with the Rules:

a. IDAPA 20.03.04.010.10 defines a Commercial Navigational Encroachment as:

“A navigational encroachment used for commercial purposes.” I find that the nature of the use of the existing dock and the proposed pilings meet the definition of a commercial navigational encroachment given that the encroachment will be used for NIM’s commercial purposes; specifically, storing of barges and piling material, assembly of dock sections (which are constructed offsite), loading and unloading of materials and supplies, disassembly of old docks for removal from the waters of Hayden Lake.

b. IDAPA 20.03.04.015.13.d provides the following parameters governing the size and dimension of commercial encroachments:

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.

I find that the dock from Lot A meets this requirement, as the existing dock does not broach the line of navigability and extends to a depth that provides sufficient draft for the water craft and docks involved. Mr. Ahmer testified that the proposed dock would not extend beyond the line of navigability. AR p. 250. The current dock extends seventy-five feet (75') beyond the OHWM. AR p. 9. I find that the proposed dock will not extend beyond the line of navigability.

c. IDL encroachment permit L-95-S-5696A, assigned to John and Gaila Condon on February 14, 2017, authorizes a single-family dock for a ten foot by seventy-foot (10'x70') fixed pier encroachment. AR p. 248. The actual, current dock consists of a ten-foot by thirty-foot (10'x30') pier, and an eight-foot by forty-eight-foot (8'x48') floating dock. AR p. 250. The Application simply corrects the discrepancy between what was permitted and what was installed. As installed, the dock is 684 square feet and meets the size requirement of IDAPA 20.03.04.015.01.b. AR pp. 9, 250.

d. The Application seeks to change the type of use of encroachment permit L-95-S-5696A to a commercial navigational encroachment permit, and to install two pilings for moorage relating to NIM's commercial uses. As a condition of the encroachment permit, IDL may require a submerged land lease pursuant to IDAPA 20.03.04.055.01.

e. The existing encroachment meets the ten (10) foot setbacks required for a single-family dock. But it does not meet the twenty-five (25) foot setback required for a commercial dock on the west littoral boundary of Lot A, shared with DGID. The Applicants submitted a written agreement with DGID wherein it "agrees to waive the requirement that the

dock be located no less than twenty-five (25) feet from the Littoral Line, in order to be used for commercial purposes.” AR pp. 46-63, ¶ 6.

f. IDL accepted the agreement as the written consent from DGID, which rebuts the presumption of adverse effect under IDAPA 20.03.04.015.13.e. AR pp. 248-250.

g. As proposed, the two pilings would be located at least twenty-five (25) feet from the east littoral boundary of Lot B, shared with Mr. Gentry. No adverse effect is presumed where the pilings are installed twenty-five feet or further away from that littoral boundary. IDAPA 20.03.04.015.13.e. However, any structures or things attached to the pilings will be subject to the presumption of adverse effects. *Id.* Consequently, moorage to the pilings should not occur within the twenty-five foot setback.

2. The littoral rights of an upland owner adjacent to navigable waters include the right “to maintain their adjacency to the lake and make use of their rights” as littoral owners by “building or using aids to navigation,” such as a commercial dock. I.C. § 58-1302(f). However, the proposed encroachment must be weighed against the other Lake Values itemized in Idaho Code § 58-1301:

[A]ll 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 a navigable lake in the state shall hereafter be made unless approval therefor has been given as provided in this act.

3. Regarding the economic necessity or justification for or benefit derived from the proposed encroachment, Mr. Condon’s testimony and public testimony of record demonstrates that there is a need for effective, affordable dock building, maintenance and removal on Hayden

Lake. There are approximately 1,100 docks built on Hayden Lake, AR Rehearing audio 1:20:20, and there are a large number of property owners (both lakefront and non-frontage) around Hayden Lake. AR p. 96. Testimony received indicates a concern regarding illegal docks and structures, many in disrepair. AR p. 239. The Director of Kootenai County Parks Waterways and Noxious Weeds, Mr. Nick Snyder, stated that: “It is important that local marine contractors have access to local waterways in order to construct and repair these facilities for the benefit of the public.” AR p. 277. I find that the Applicants have established the economic justification for or benefit derived from the proposed encroachments.

4. 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: Testimony received from Mr. Condon indicates that this location is likely the best location on Hayden Lake for NIM operations. AR Rehearing audio 50:27. Mr. Hathaway indicate that the upland at this location is not suitable for a residential structure. AR Rehearing audio 1:17:00. While there is opposition to the allowance of this commercial encroachment permit, there were no recommendations for other locations on the lake that would serve NIM’s purpose more favorably.

b. Navigation: There is no evidence that the proposed pilings or the dock would impede navigation on the lake. Neither the current structure, nor the proposed pilings would extend beyond the Line of Navigability. AR. p. 250.

c. Fish and wildlife habitat and aquatic life: The Idaho Fish and Game Department did not comment on the Application. The record does not contain any evidence showing that the proposed boat dock would negatively impact fish and wildlife habitat or aquatic life.

d. Recreation: The record indicates that there are already a prolific number of watercraft using the lake on a near daily basis, from fisherman, to wake surfers, to pleasure cruisers, to Jet Ski enthusiasts. Navigating a boat or barge from the proposed location out into the lake is similar to that of any other boater leaving their residence to get out into the lake. AR. p. 250. The watercraft used by NIM in their dock operations are similar in size to other watercraft used on the lake, but with a lower speed capacity. AR Rehearing audio.

e. Aesthetic beauty: The record contains significant testimony and exhibits regarding aesthetic beauty. The testimony and these exhibits are both for and against the operations of NIM at this location. It is understandable that there is conflict, since assessing aesthetic beauty is highly subjective. AR Rehearing audio 2:32:28. This general lack of consensus on aesthetic beauty can be weighed along with the location of NIM's location, which is in a relatively obscure curve of the lake, on a lot that is generally not developable for other uses, adjacent to the DGID's spillway. It is also important to note that the IDL only has jurisdiction over encroachments into the beds and waters, and does not have authority over upland uses, vehicle parking, zoning changes or the potential need for a zone change. In this circumstance, upland uses do not fall under the authority of the IDL or the Hearing Coordinator.

f. Water quality: The lack of comment from the Idaho Department of Fish and Game and the Idaho Department of Environmental Quality indicate the respective agencies are not concerned that the proposed commercial encroachments would negatively impact water quality. AR pp. 16-32. An oil or chemical spill was alleged by a public witness, which raised comments of concern from IDL. AR Rehearing audio. However, during the rebuttal testimony, Mr. Condon explained that the public witness's photographs were not showing a spill, and he described the protections the Applicants have in place, both on their vessels and onsite

operations. AR Rehearing audio. As with any vessel in the waters of Hayden Lake, there is the possibility of a negative impact on water quality. The evidence of record does not show that NIM's vessels or commercial operations have, or will, negatively impact water quality. Mr. Condon also testified regarding services that NIM has provided for extracting large debris (e.g. portable toilets, broken down boats, etc.) from Hayden Lake. AR Rehearing audio.

5. I find that the proposed commercial navigational encroachments comply with the LPA Rules and the economic justification for or benefit of the proposed encroachments, with their location and intended use to provide an economic benefit to the residents on Hayden Lake. There is also a secondary recreational and aesthetic benefit to the residents of the lake by allowing affordable access to dock improvement, repair and maintenance of their docks and structures.

6. I conclude that the Application to change the type of use for permit L-95-S-5696A from a single-family dock to a commercial dock, and the installation – consistent with applicable IDL requirements – of two pilings is conditionally approved, as set forth below with the condition that Mr. and Mrs. Condon provide written evidence or their authority to act on behalf of the Condon Trust, or a lease agreement authorizing NIM's use of the Condon Trust's littoral rights, no later than thirty (30) days after issuance of the Final Order.

IV. PRELIMINARY ORDER

Based upon the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that Encroachment Permit Application No. L-95-S-5696B is CONDITIONALLY APPROVED, subject to any conditions imposed by the Director of the Idaho Department of Lands. Within thirty (30) days of the Final Order, Applicants shall provide written evidence from the John and Gaila Condon Living Trust that is sufficient for IDL to determine in whose name the resulting commercial encroachment permit will be issued.

IT IS FURTHER ORDERED that the order issued herein is a Preliminary Order, pursuant to Idaho Code § 67-5245, and the *Notice of Appointment of Hearing Coordinator* issued on February 25, 2019, which states as follows:

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 (30) 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 § 58-1306 that require a final order to be issued within thirty (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.

IT IS FURTHER ORDERED that if the Director allows the Preliminary Order to become final, or if the Director issues a Final Order, pursuant to Idaho Code § 58-1306(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. Idaho Code § 58-1306(c). Because the final decision would be for approval of an encroachment permit, any aggrieved party, other than the Applicant, appealing this final decision must file a bond with the district court 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 7 of October, 2019



Mick Thomas
Hearing Coordinator