

BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of:) Case No. CC-2020-PUB-10-001
Encroachment Permit Application No. L-97-S-1195) **FINAL ORDER**
Happy Days Cabin, LLC,)
Applicant.)
_____)

I. NATURE OF PROCEEDINGS

Encroachments, including single-family docks, 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, “Rules for the Regulation of Beds, Waters, and Airspace over Navigable Lakes in the State of Idaho.”

On December 18, 2019,¹ IDL received an encroachment permit application filed by Happy Days Cabin, LLC. A hearing was held on February 12, 2020. Andrew Smyth served as duly appointed hearing officer. On March 13, 2020, the hearing officer issued his Preliminary Order, which contains Procedural Background, Findings of Fact, and Conclusions of Law.

As Director of IDL, my responsibility is to render a decision pursuant to Idaho Code § 58-1305(c) and IDAPA 20.03.04.025 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

¹ The Application was received on or around July 31, 2019, but the last update to the Application was received December 18, 2019.

through education, training, and experience. I relied on the record for this matter, including examining the hearing officer's Preliminary Order in light of the entire record in this contested case.

II. PROCEDURAL BACKGROUND & 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 to amend the following as described:

- On page 16, I amend paragraph 12 to include the following third condition, which is already found on page 15 of the Preliminary Order:
 3. That IDL's permit require that the Applicant, or any contractor of the Applicant, must use reasonable care to not disturb redds or visible spawning activities during the removal of the dock. IDL will use its expertise and discretion in drafting the language of this term.

IV. ORDER

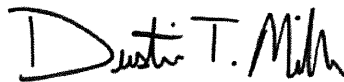
I conclude that the hearing officer's Procedural Background, Findings of Fact, and Conclusions of Law presented in the Preliminary Order are based on substantial evidence in the record, and I adopt the Preliminary Order's Procedural Background, Findings of Fact, and Conclusions of Law with the amendments set forth herein 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 Procedural Background, Findings of Fact, and Conclusions of Law, I HEREBY ORDER that Encroachment Permit Application L-97-S-1195 is **CONDITIONALLY**

APPROVED. The Applicant shall submit to IDL proof of registration with the Idaho Secretary of State demonstrating its eligibility to do business in the State of Idaho. IDL must issue a permit consistent with the terms outlined in the Preliminary Order and as set forth herein.

This is a final order of the agency. Pursuant to Idaho Code § 58-1305(c), Idaho Code § 58-1306(c), and IDAPA 20.03.04.025.09, the Applicant or any aggrieved party who appeared at the 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 § 58-1305(c), Idaho Code § 58-1306(c), and IDAPA 20.03.04.25.09, an adjacent littoral owner or other aggrieved party 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 27th day of March, 2020.



DUSTIN T. MILLER
Director, Idaho Department of Lands

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 2020, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Happy Days Cabin, LLC
c/o Steve Maris
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Camano Island, WA 98282

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Kourtney Romine

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-1195)	Case No. CC-2020-PUB-10-001
)	
Happy Days Cabin LLC,)	PRELIMINARY ORDER
Applicant.)	
)	
)	
)	
)	

I. PROCEDURAL BACKGROUND

On or around December 18, 2019¹, the Idaho Department of Lands (“IDL”) received a complete encroachment permit application (“Application”) filed by Happy Days Cabin, LLC (“Applicant” or “HDC”), a Washington limited liability company. Agency Record (“AR”) pp. Happy Days Cabin 00025 – 00044.² IDL assigned application number L-97-S-1195 to the Application. In the Application, the Applicant seeks authorization for a single-family dock with a boat lift on Priest Lake.

IDL processed the Application pursuant to Idaho Code § 58-1305 and IDAPA 20.03.04.025, which resulted in the following timeline of activities:

1. On July 31, 2019, IDL received an application from HDC. AR, pp. 120-128.
2. On August 2, 2019, IDL provided notice of the Application to Sally Powers and Michael and Anne Chamberlain. AR, pp. 129 – 130. On the Certificate of Organization filed with the Idaho Secretary of State, Sally Powers is identified as the “Governor” for Flamingo Bay, LLC, which is the adjacent littoral owner north of the Applicant. Andrea Patterson is identified as the

¹ IDL received the last update to the Application on December 18, 2019.

² All citations to the AR are hereinafter designated by using the Bates numbers only, not the preceding “Happy Days Cabin 0000.”

Registered Agent for Flamingo Bay, LLC. The Chamberlain's are the southern owner adjacent to HDC's property.

3. On August 10, 2019, IDL received an objection to the Application from John Powers, purporting to be acting on behalf of Flamingo Bay, LLC. AR, pp. 131 – 133.

4. On August 14, 2019, IDL emailed the Applicant that the Application was incomplete. AR, p. 143 – 144.

5. On August 28, 2019, IDL emailed Idaho Department of Fish and Game ("IDFG") to solicit feedback on the Applicant's proposed plan. AR, p. 145.

6. On August 30, 2019, IDL received an email from IDFG stating input from a geomorphologist or engineer with hydraulic experience would be helpful. AR, p. 145.

7. On October 14, 2019, IDL received a copy of the Applicant's geomorphologist study conducted by Water, Civil, and Environmental Inc. ("WCE Inc."). AR, pp. 3 – 12.

8. On October 16, 2019, IDL received an email from IDFG stating, "we're okay with him going forward with his dock installation." AR, p. 153.

9. On November 14, 2019, IDL conducted an inspection of the Applicant's littoral right lines. AR, pp. 161 – 170.

10. On November 25, 2019, IDL received an updated Application. AR, pp. 134 – 142.

11. On November 26, 2019, IDL provided notice of the updated Application to Sally Powers and Michael and Anne Chamberlain. AR, pp. 13, 14, and 184.

12. On December 4, 2019, IDL received the written Consent of Adjacent Riparian or Littoral Property Owners from Anne Chamberlain. AR, pp. 15 – 18.

13. On December 9, 2019, IDL received comments from IDFG stating that: "We're OK with the dock." AR, p. 19.

14. Sally Powers called IDL employee Trevor Anderson and told him that she did not have objections to the application. AR, p. 45.

15. On December 16, 2019, IDL received an objection to the Application from Christine Powers, purporting to be acting on behalf of Flamingo Bay, LLC. AR, pp. 21 – 24.

16. On December 18, 2019, IDL received a further updated Application. AR, pp. 25 – 44.

17. On December 20, 2019, IDL requested legal documentation from Christine Powers that demonstrated she was authorized to file an objection to the Application on behalf of Flamingo Bay, LLC. AR, p.45.

18. On January 16, 2020, IDL provided notice of the further updated Application to Sally Powers, Christine Powers, and Michael and Anne Chamberlain. AR, pp. 98 – 100.

19. On January 10, 2020, Christine Powers provided IDL with a copy of the Operating Agreement of Flamingo Bay L.L.C., which indicated that Sally Powers was the sole member and manager for Flamingo Bay, LLC. AR, pp. 51 – 73.

20. On January 26, 2020, IDL received an email from Anne Chamberlain stating “[w]e have approved this in the past, and continue to approve the application.” AR, pp. 117 – 118.

21. Pursuant to Idaho Code § 58-1305(c), IDL ordered a hearing in this matter. On or around January 22, 2020, Mr. Dustin T. Miller, IDL Director, issued a Notice of Appointment of Hearing Officer and Hearing in which he appointed Mr. Andrew Smyth to be the Hearing Officer and scheduled the hearing to be held at 10:00 a.m. Pacific Time on Wednesday, February 12, 2020, at the IDL Office located in Coeur d’Alene, Idaho. AR, pp. 101 – 108.

22. At 4:25 p.m. on February 11, 2020, IDL received an email from Andrea Powers Patterson stating that: “Based on the internal correspondence among the members of Flamingo Bay LLC, all objections to this dock application are withdrawn.” AR, p. 177.

23. Pursuant to Idaho Code § 58-1305(c), a hearing regarding the Application was held on February 12, 2020. The participants appearing and offering evidence at the hearing were: Messrs. Steve and Neil Maris, members of HDC; Mr. Ken Hagman, Copper Bay Construction; Mr. Mike Ahmer, IDL Resource Supervisor; Mr. Trevor Anderson, IDL Resource Specialist, Sr.; and Ms. Angela Kaufmann, Deputy Attorney General, counsel for IDL. AR, p. 178; Hearing Recording.³

24. Evidence admitted into the administrative record during the hearing consisted of witness testimony on behalf of the Applicant and IDL, Mr. Hagman’s drawing, Mr. Steve Maris’ written statement, and Mr. Ahmer’s written statement. AR, pp. 179 – 188.

While this order discusses certain objections raised by purported members of Flamingo Bay, LLC, Christine Powers’ and John Powers’ standing to object on behalf of Flamingo Bay, LLC will not be discussed.

II. FINDINGS OF FACT

1. HDC is a Washington limited liability company. AR, pp. 171 – 176.
2. HDC owns Bonner County parcel RP059510010560A. AR, pp. 27 and 34.
3. HDC’s property has at least 157 feet of frontage along Priest Lake. AR pp. 25, 27 34, and 187.

³ 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.

4. If approved, HDC would be authorized to have a single-family dock with a boat lift. The dock would extend 100 feet from the ordinary high water mark (“OHWM”) and consist of 695 square feet of surface decking area. Rec. 2, 1:25.

5. The Application versions contained dock plans with slightly different dimensions. AR, pp. 32, 33, and 40. During the hearing, Mr. Hagman clarified that the decked triangle portion between Dock A and Dock B is 12.5 square feet (the length of each side of the triangle adjacent to dock is 5 feet), and modified the plans to reduce the width of Dock B from 8 feet to 7.5 feet. Rec. 2, 0:11. The dimensions of the dock are therefore, as follows:

Component	Length	Width	Area
Pier	48'	4'	192
Ramp	7'	4'	28
Dock B	35'	7.5'	262.5
Triangle	5'	5'	12.5
Dock A	10'	20'	200

6. HDC’s property is located to the south of littoral property owned by Flamingo Bay, LLC, and to the north of littoral property owned by Michael and Anne Chamberlain. AR, pp. 33, 34, 163, and 164.

7. The proposed dock would be located 10 feet from Flamingo Bay, LLC’s littoral right line and 125 feet from the Chamberlain’s littoral right line. AR, pp. 32 and 33; Rec. 2, 4:40.

8. The South Channel of Hunt Creek flows through the Applicant’s property and empties into Priest Lake. AR, pp. 3, 33, and 161.

9. Kokanee spawn near the mouth of Hunt Creek. AR, pp. 3, 20, 132, 161, and 183; Rec. 1, 19:48 and Rec. 2, 9:04.

10. The dock’s pier would be located approximately 15 feet north of the mouth of Hunt Creek. AR, p. 33 and 8.

III. CONCLUSIONS OF LAW

A. IDL Has Jurisdiction Over the Beds and Banks of Priest Lake.

1. The State of Idaho Board of Land Commissioners (“Land Board”) is authorized to regulate, control, and permit encroachments on, in 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. 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. 101; I.C. § 67-5245. The hearing in this matter began at approximately 10:05 a.m. Pacific Time and concluded at approximately 11:13 a.m. Pacific Time on February 12, 2020. 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. 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.

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

[A]ny 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. *See State v. Hudson*, 162 Idaho 888, 407 P.3d 202 (2017).

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 Applicant Must Complete Its Qualification to Make Application.

1. The Applicant is a limited liability corporation duly formed and existing under the laws of the State of Washington. AR, pp. 171 – 176. As such, under Idaho law, the Applicant is a foreign entity. I.C. § 30-21-102(15).

2. A littoral owner is defined as, “[t]he fee owner of land immediately adjacent to a navigable lake, or his lessee, or the owner of riparian or littoral rights that have been segregated from the fee specifically by deed, lease, or other grant.” IDAPA 20.03.04.010.33. I find that the Applicant, as owner of property adjacent to Priest Lake, is a littoral owner.

3. The mere ownership of lakefront property in Idaho by a foreign entity does not, in and of itself, constitute doing business in this state. “Owning, *without more*, property” does not constitute doing business in Idaho. I.C. § 30-21-505(a)(10) (emphasis added). However, the act of presenting HDC for regulation by IDL through the Application, and ongoing compliance with the terms of an encroachment permit by HDC, does subject the foreign entity to the requirement to register with the Idaho Secretary of State. I.C §§ 30-21-505(a)(10), 30-21-505(c), 30-21-502; *see also* IDAPA 20.03.04.010.26 and 020.02.

4. As a littoral owner, HDC has littoral rights, which include the right “to maintain their adjacency to the lake and to make the use of their rights as ... littoral owners ... in building or using aids to navigation” IDAPA 20.03.04.010.32. However, a littoral owner must also be a “person” in order to be eligible to apply for and receive an encroachment permit to build a dock in aid of navigation. “Only *persons* who are littoral owners or lessees of a littoral owner shall be eligible to apply for encroachment permits.” IDAPA 20.03.04.020.02 (emphasis added). In this specific context, a “person” is defined as follows: “A partnership, association, corporation, natural

person, or *entity qualified to do business in the state of Idaho* and any federal, state, tribal, or municipal unit of government.” IDAPA 20.03.04.010.26 (emphasis added).

5. As a foreign entity, HDC must register with the Idaho Secretary of State in order to do business in this state; which, is a requirement of a person qualified to apply for and receive an encroachment permit from IDL. There is nothing in the record showing that HDC is qualified to do business in the state of Idaho.

6. I find that the Applicant must provide IDL with proof of registration with the Idaho Secretary of State, demonstrating its eligibility to do business in the state of Idaho, in order to receive the requested encroachment permit.

D. The Application is Conditionally Approved.

1. IDAPA 20.03.04.010.36 defines 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.” The Applicant identified the proposed encroachment as a single-family dock and that the Applicant owns 157 feet of waterfront footage. AR, p. 25. No contrary evidence to either factor exists in the record. I find that the Application is for a single-family dock.

2. IDAPA 20.03.04.015.01.a, states, “[n]o 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.” The widest portion of the dock would be ten feet (10’). AR, p. 32 and 33; Rec. 1, 29:35. I find that the proposed dock would meet this requirement.

3. IDAPA 20.03.04.015.01.b, states, in applicable part, that the “[t]otal 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.” The

proposed dock would consist of 695 square feet of surface decking area. Rec. 2, 1:25; *see* ¶ II.5, above. I find that the proposed dock would meet this requirement.

4. IDAPA 20.03.04.015.01.c, states, “[n]o 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.” The line of navigability is defined as “[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; IDAPA 20.03.04.010.20. The proposed dock would extend 100 feet beyond the OHWM. This is longer than the Chamberlain’s dock, which is 64 feet long; and it is longer than Flamingo Bay, LLC’s dock, which is approximately 70 feet long. AR, pp. 109 and 132. However, Mr. Ahmer’s testimony was that the proposed dock does not extend beyond the line of navigability. AR, p. 187 and Rec. 2, 12:10. There is no contradictory evidence in the record, I therefore find that no portion of the docking facility would extend beyond the line of navigability.

5. 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.” While Mr. Hagman could not provide the exact angle the dock would extend from the shoreline, given the nature of the shoreline depicted in the drawings, it appears to be roughly perpendicular to the shoreline north of Hunt Creek. AR, pp. 33, 34, and 166. I find that the proposed dock would meet this standard.

6. IDAPA 20.03.04.015.13.e - Presumed Adverse Effect, states in applicable part, “[i]t 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.” 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. The Application shows that the proposed encroachments would be located ten feet (10’) or more from the littoral right lines. AR, p. 26, 32, and 33. In his November 8, 2019 email, Mr. Powers questioned the methodology of the littoral right line in the Application. AR, p. 165. In response, on November 14, 2019, IDL staff conducted an inspection to identify the littoral right line. AR, pp. 161 – 170. As a result of the inspection, Mr. Anderson, concluded that a “setback 10 feet off the established littoral line, could be installed on the Happy Days Cabin Llc’s [sic] waterfront that would adhere to IDL regulations.” AR, p. 162. Mr. Hagman confirmed that the dock will not be located closer than ten feet (10’) from Flamingo Bay, LLC’s littoral right line. Rec. 2, 4:41. Mr. Ahmer also stated, “[b]ased on IDL’s staff experience, the plat map, property pins, and field work performed by IDL staff, the littoral line that was set in the field is an accurate representation. IDL further determined the proposed dock and boat lift do not infringe into ten-foot littoral right line setback.” AR, p. 187; and Rec. 2, 15:09.

7. In his November 8, 2019 email, Mr. Powers also wrote, “[b]ased on the drawing provided, if the floating section of the dock never drifts in the north south direction then theoretically the dock would never enter the required 10 foot property line setback to the north. In real life, floating docks are not rigid by design so as drawn it will enter the required 10’ property setback and be an actual property encroachment.” AR, pp. 131 – 133. The floating dock will be

secured by 3 pilings, 2 located on the north side to prevent the dock from drifting to the north. AR, pp. 32 and 33. I find that the proposed encroachment, if constructed following the plans, would meet the standards for the required angle and setback from littoral line.

8. IDAPA 20.03.04.015.13.b states that “[s]ingle-family docks are allowed a single boat lift and two (2) jet ski lifts, or two (2) boat lifts, without adding their footprint to the dock square footage. Additional lifts will require that fifty percent (50%) of the footprint of the largest lifts be included in the allowable square footage of the dock or pier as per Subsection 015.01.” The proposed single-family dock will have one boat lift. As discussed previously, I find that the single-family dock with one boat lift meets the size limitations of IDAPA 20.03.04.015.01.

9. 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.” I.C. § 58-1302(f). However, the proposed encroachments must be weighed against the other Lake Values itemized in Idaho Code § 58-1301, as follows:

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

10. As to the economic necessity or justification for or benefit derived from the proposed encroachment, the Applicant is looking to exercise its littoral rights to build a dock adjacent to its property. The Applicant has previously shared its neighbor’s dock with two other families. AR, p. 180 and Rec, 12:55. The water is two feet deep on the north side of the neighbor’s dock, where the Applicant has moored its boat, making it challenging to moor a boat there. AR, p.

180; and Rec, 15:15. Since the Applicant could not come to an agreement on a new design for a shared dock or a plan to share the costs with the other two families, it decided to pursue a single-family dock adjacent to its own property. AR, p. 181; and Rec, 14:44.

11. 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.

As part of his objection, Mr. Powers wrote that: “As with any property encroachment, it will negatively affect the value of Flamingo’s property. Even if this dock is constructed in a way that doesn’t encroach upon the 10 foot setback it will still impact Flamingo’s property value.” AR, p. 133. No evidence was submitted in support of this statement. As discussed herein and shown by evidence in the record, the Applicant’s dock will not encroach on Flamingo Bay LLC’s upland property or its littoral right zone. The Applicant’s dock will not be located within ten feet (10’) of Flamingo Bay, LLC’s littoral right line. There is no evidence in the record supporting the claim that the Applicant’s dock would negatively impact Flamingo Bay LLC’s property value.

b. Fish and wildlife habitat and aquatic life.

The record contains information regarding the special nature of this location for kokanee salmon spawning. IDL staff and IDFG staff acknowledge this fact; Mr. Powers and Ms. Powers relied heavily on this fact in their written objections. AR, p. 22, 132, 154, 161, and 183. In addition, Mr. Hagman, who served on the Fish Advisory Committee for Priest Lake where he studied the fisheries for over five years, including the spawning location at Hunt Creek, stated that “this installation for encroachment permit . . . is probably the most unique that I’ve had in my 45 years of dock building because of the environmental concerns that are here. We’ve put over 1,100

docks on Priest Lake in my time and other lakes and this one provided the most unique challenges.”
Rec. Part 1, 19:05 and 19:48.

The record demonstrates that the Applicant takes the protection of the kokanee spawning habitat seriously. At the request of IDFG, the Applicant hired WCE Inc. to evaluate the possible impact of the proposed dock placement on the spawning substrate. In order to render recommendations, Ryan A. Eldridge, P.E. with WCE Inc., visited the Applicant’s property and reviewed its plan for the new dock. AR, p. 3. Mr. Eldridge concluded that: “Placing the dock in its proposed location is the preferred location at the site and is not anticipated to affect the kokanee spawning substrate along Hunt Creek Beach.” AR, p. 4.

Upon review of WCE Inc.’s memorandum, Merritt Horsmon, IDFG Environmental Staff Biologist, concurred with the conclusion and stated that: “It appears that Neil [Maris] has done his due diligence on the dock placement. The assessment was above and beyond what most folks are willing to do, and we’re okay with him going forward with his dock installation.” AR, p. 153.

A seemingly important circumstance to Mr. Eldridge’s conclusion that dock construction to the north of Hunt Creek is preferred to construction to the south of Hunt Creek, was the Applicant’s plan to remove the docks from the water each year. AR, p. 4. The record shows that the Applicant plans to remove the dock from the lake as the lake level drops and replace it when the water level rises again. AR, p. 4; Rec. 2, 17:00-18:44. Mr. Eldridge summarized his discussion with the Applicant and the resulting recommendation, as follows:

Both Dock A and Dock B will be removed from the water from the approximate first week of September to the middle of June the following year. The docks will not be placed back into the water until a majority of the spring runoff has occurred which typically causes the largest amount of sediment deposition and movement of sediment at the mouth of the creek. . . .

Placing the docks on the north side of the Hunt Creek discharge point and removing them each year during the runoff season, is preferential and will minimize the effects on the velocity jet and sediment deposition pattern of Hunt Creek entering into Priest Lake.

AR, p. 28. During the hearing, there was a discussion about how to best identify the timing of the dock removal and replacement as a provision in an encroachment permit. Mr. Ahmer stated, “IDL recommends a condition that the dock be pulled on to shore no later than October first of each year and returned to the water no earlier than June first of each year.” Rec. 2, 17:00 and AR, p. 188.

Mr. Hagman stated, “Normally the draw down of Priest Lake starts after the first full weekend of October and it can be very harmful for a dock to be drawn in and beached too early because then it is sitting against the shoreline and it is at the whim of nature, so we always try to pull the docks in right after that first full weekend [of October]. Rec. 2, 17:44. Mr. Hagman went on to say:

Spring runoff is so variable at Priest Lake. If we allow the dock to sit at the shoreline when the lake comes up to above its normal level, then the dock is going to run clear up on the beach and as soon as the lake starts coming down it could get grounded, but along with that, it will have a tendency to scour the shoreline. So, we usually put the docks out as soon as we obtain normal water level.

Rec. 2, 18:44.

In issuing this permit, IDL must include express requirements that the dock must be removed from the lake no later than when the water level reaches low water and must not be replaced in the water in the spring before the water reaches summer pool. The permit must require that the Applicant, or any contractor of the Applicant, must use reasonable care to not disturb redds or visible spawning activities during the removal of the dock. IDL must use its expertise and discretion in drafting compliant permit language. Ultimately, and regardless of the final language of the encroachment permit, the dock cannot be below the OHWM during the spring runoff, and in the autumn it must be moved at a time when neither the lakebed nor the dock will be damaged.

Based upon the conclusions reached, there is no evidence in the record demonstrating that the proposed dock will actually be detrimental to fish and wildlife habitat or aquatic life. After giving all related evidence due consideration, I find that the proposed encroachment will not be detrimental to this Lake Value.

c. There is no supported claim and no evidence that the proposed encroachment would negatively impact navigation, recreation, aesthetic beauty, or water quality.

12. I find that the proposed single-family dock complies with the Rules, and that the economic justification for and benefits of the proposed encroachment are not outweighed by the Lake Values.

I conclude that the Application is conditionally approved for a single-family dock with a boat lift as set forth herein, with the following conditions:

1. That the Applicant provides proof of registration with the Idaho Secretary of State demonstrating its eligibility to do business in the state of Idaho.

2. That IDL includes a term in the permit that requires the Applicant to remove the floating portion of the dock prior to the low water period at Priest Lake, and return that portion of the dock into the water no earlier than when the water reaches summer pool. IDL will use its expertise and discretion in drafting the language of this term so that HDC understands what is expected of it.

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-1195 is **CONDITIONALLY APPROVED**, subject to any conditions imposed by the Director of the Idaho Department of Lands.

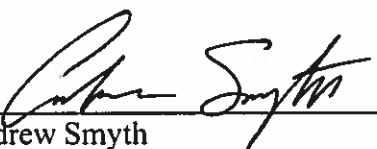
This order issued herein is a Preliminary Order, pursuant to Idaho Code §§ 58-1305(c), 67-5270 and 67-5272, and the Notice of Appointment of Hearing Officer issued on January 22, 2020, which states as follows:

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.

The Preliminary Order can and will become final without further action of the agency if the Director does not issue a Final Order within forty-five (45) days of the close of the hearing.

If this Preliminary Order becomes final, or if the Director issues a Final Order, 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. 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 13th day of March, 2020.



Andrew Smyth
Hearing Officer