

BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of Encroachment Permit Application)	Case No. PH-2020-PUB-22-003
No. L-95-S-5884)	
)	FINAL ORDER
North Idaho Maritime – John Condon,)	
)	
Applicant.)	
_____)	

I. NATURE OF PROCEEDINGS

The Idaho Department of Lands (“IDL”), through the State Board of Land Commissioners, “shall regulate, control and may permit encroachments in aid of navigation or not in aid of navigation on, in or above the beds or waters of navigable lakes” as provided in the Lake Protection Act, title 58, chapter 13, Idaho Code. Idaho Code § 58-1303. The corresponding administrative rules promulgated by the State Board of Land Commissioners are IDAPA 20.03.04, “Rules for the Regulation of Beds, Waters, and Airspace over Navigable Lakes in the State of Idaho.”

On or around May 20, 2020,¹ IDL received an encroachment permit application filed by North Idaho Maritime. A public hearing was held on November 4, 2020. Michele Andersen served as duly appointed hearing coordinator. On November 23, 2020, the hearing coordinator issued her Preliminary Order, which contains a Factual and Procedural Background and Conclusions of Law.

¹ The Application was received on or around May 20, 2020. After IDL notified NIM that the application was incomplete, NIM submitted an amended application on July 20, 2020 with additional materials provided July 27, 2020 and September 4, 2020.

As Director of IDL, my responsibility is to render a decision pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.030 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 matter.

II. FINDINGS OF FACT

I adopt the Preliminary Order's Factual and Procedural Background as my Findings of Fact.

III. CONCLUSIONS OF LAW

I adopt the Preliminary Order's Conclusions of Law as my Conclusions of Law.

IV. ORDER

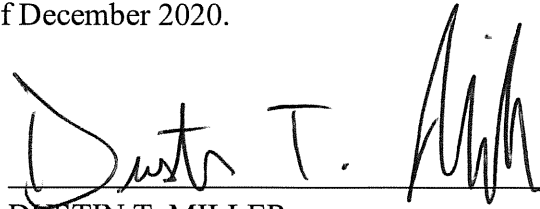
I conclude that the hearing coordinator's Preliminary Order is based on substantial evidence in the record, and I adopt the Preliminary Order's Factual and Procedural Background and Conclusions of Law as my decision in this matter. I hereby incorporate by reference the Preliminary Order's Factual and Procedural Background and Conclusions of Law into this Final Order. I have enclosed and served the Preliminary Order along with this Final Order.

Based on the adopted Factual and Procedural Background and Conclusions of Law, I HEREBY ORDER that Encroachment Permit Application L-95-S-5884 is DENIED.

This is a final order of the agency. Pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.30.09, the Applicant or any aggrieved party who appeared at the hearing has 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. 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 3rd day of December 2020.

A handwritten signature in black ink, appearing to read "Dustin T. Miller", is written over a horizontal line.

DUSTIN T. MILLER
Director, Idaho Department of Lands

CERTIFICATE OF MAILING

I hereby certify that on this 4th day of December 2020. I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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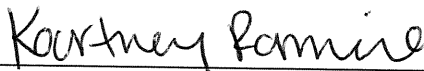
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BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of Encroachment Permit)	
Application No. L-95-S-5884)	Case No. PH-2020-PUB-22-003
)	
North Idaho Maritime – John Condon,)	PRELIMINARY ORDER
)	
Applicant.)	
)	
)	
)	

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Background of Administrative Record.

1. On April 20, 2020, the Idaho Department of Lands (“Department” or “IDL”) issued a Notice of Non-Compliance to North Idaho Maritime LLC through its manager, John Condon (collectively “NIM” or “Applicant”), for its dock storage in Cougar Bay because NIM did not have an encroachment permit for that activity. On May 20, 2020, NIM submitted its original encroachment permit application. On May 21, 2020, NIM responded to the Notice of Non-Compliance. On June 1, 2020, the Department extended the deadline for NIM to submit a complete application. On June 19, 2020, IDL informed NIM their application was still incomplete. On July 20, 2020, NIM submitted a revised encroachment permit application (“Application”). On July 27, 2020, NIM submitted additional information in support of the Application.

2. In a letter dated August 13, 2020, the Department informed the Coeur d’Alene Press regarding legal notice of an application the Department received from NIM for a winter dock storage area and a year round work area, located on Lake Coeur d’Alene in Cougar Bay.

3. On August 13, 2020, the Department sent a Memorandum to various public agencies, the Kootenai Environmental Alliance (“KEA”), the Idaho Conservation League, and

adjacent neighbors of the Application: “Enclosed is an application requesting permission to have a winter dock storage area and year-round work area in Cougar Bay on Lake Coeur d’Alene. Please submit your comments, recommendations or objections to IDL by September 15, 2020... .”

4. On September 1, 2020, the Idaho Department of Fish & Game (“IDFG”) sent written comments to the Department regarding the Application and providing technical information addressing “potential effects on wildlife and wildlife habitat and how any adverse effects might be mitigated.” The IDFG recommended “keeping the footprint of the facility to the smallest size practical, and away from the Cougar Creek Channel.”

5. On September 9, 2020, the Department sent a Memorandum noticing the recipients of a revised application “for winter and year-round storage area location on Lake Coeur d’ Alene. Please contact the Department within 30 days from the date of this letter to comment in writing on this proposal.”

6. On September 16, 2020, the Idaho State Department of Agriculture submitted written comments requesting that the “applicant mention their aquatic noxious weeds spread prevention plan” in the Application.

7. On September 18, 2020, the Department received consent from an adjacent property owner, Thomas Burns, agreeing to the encroachment.

8. On September 23, 2020, the Department received consent from an adjacent property owner, Edwin Haglund, agreeing to the encroachment.

9. On October 1, 2020, the Department received written comments from the Idaho Department of Environmental Quality regarding the disposition of demolition debris, Best Management Practices (“BMPs”) for petroleum products, retrieval and removal of submerged

demolition debris, and guidance on BMPs for the use of treated and preserved wood products in or around aquatic environments.

10. On October 2, 2020, the Department received consent from an adjacent property owner, Martha Cornwall McCain, agreeing to the encroachment.

11. On October 7, 2020, the Department received consent from an adjacent property owner, David Yadon, agreeing to the encroachment.

12. On October 29, 2020, the Hearing Coordinator issued an Amended Notice of Hearing re: Exchange of Hearing Exhibits and Official Notice.

B. The Applications.

1. On May 20, 2020, North Idaho Maritime filed its initial *Joint Application for Permits* (“initial application”) with the Department. The initial application states that fees were received by IDL on May 20, 2020. *Initial Appl’n* at 1. According to the initial application, the “[p]urpose of the project is for a designated area to perform winter storage, along with a designated work area within the footprint to be in use all year round.” *Id.* “Bring floating encroachments to Cougar bay with 1-2 man crew and tugboat. They will be tied together and secured to existing pile with rope. These will be stored from October-May. Storage area will be ~5-10 acres as needed. The max area would be ~1100’ long and ~400’ wide. Inside of the winter storage area will be a ~1-2 acre designated ‘work area’ ... will include the intermittent storage of miscellaneous docks for repair, resale, and disposal all year-round...suitable for assembly of modular dock sections that are built off site. ... no dredging or fill material will be used at this site.” *Id.* at 2, ln. 16. “Deadheads will be avoided in transport. Employees will practice responsible measures while building, repairing, and demolition when needed. Boats will be reasonably maintained to prevent any leaks of fluids. All necessary infrastructure is in place. ... Floating encroachments secured with multiple

lines and additional log boom if necessary. Docks are brought in in groups of up to 4 to maximize efficiency and to limit trips through bay.” *Id.* at 2, ln. 17. “Mitigation plan not necessary. BMP’s cover relevant hazards. ...Vessels are equipped with necessary prevention and containment equipment.” *Id.* at 2, ln. 18. It is anticipated no impacts will be caused. *Id.* at 2, ln. 20. “There have been ongoing operations in Cougar bay for over 100 years.” *Id.* at 2, ln. 21. The “Idaho Department of Lands Lease B-2186” was listed as a previously issued permit authorization. *Id.* at 2, ln. 22.

2. Attachments to the initial application include the Department’s required form titled Commercial/Community/NonNavigational Encroachment Permit Application (“Encroachment Application”) in which NIM states the type of encroachment is “Other - Winter Storage”. The proposed encroachment will exceed the maximum width of 10 feet. According to the Encroachment Application, necessary attachments included; county plat map, lakebed profile, general vicinity map, scaled air photos. According to the Encroachment Application, the littoral rights are, “Other – Public Trust.” According to the Encroachment Application, the tax record identifying the owner of the upland parcel indicated “N/A” and no tax record was included in the attachments.

3. Photos attached to the initial application display the dimensions of the encroachment, the location within Cougar bay, and indicate the distances from other encroachments and neighboring littoral right lines.

4. Another attachment depicts the encroachment footprint with existing pilings.

5. On June 19, 2020, IDL notified NIM that their application was incomplete as submitted. The Department stated that additional information was required for the “404 Joint Application for Permits. Questions: (9.) Tax Parcel ID# - provide the Littoral Rights that will be used for this application. (11c-e) Section, Township and Range of this proposed encroachment. (16) Detailed Description of Each Activity with overall Project – this narrative will need to clearly state

amounts of acres and or feet of area will be used during each use.” Additionally, the “lake profile drawing” and a “brief project narrative” that the proposed “Encroachment Not in Aid to Navigation meets IDAPA 20.03.04.030.02” were necessary for IDL to receive within “30 days of receiving this letter”... “before the application can be considered complete.”

6. On July 20 2020 the Department received an amended application. The amended application included an attachment depicting the lakebed profile for the proposed encroachment. The amended application also included an attachment with answers to the application questions that the Department identified as incomplete in its Notice of Incomplete Application. For Question (9) Tax Parcel ID, NIM answered that, “this location does not have a parcel; however, the Applicant owns littoral rights at his property located at 6719 S Highway 97, Coeur d’Alene, ID. Sec. 06 Twp 49 N. R.2 W.B.M. Parcel AIN Number 111552.” For Question (11c-e) NIM added the following information, “property adjacent to the encroachment is in SE Sec. 15 Twn 50 N. R.4 W.B.M.” As an explanation that the Application is for Encroachments Not in Aid to Navigation, NIM stated:

The said encroachment is not in aid of navigation, but we do strongly believe our encroachment will provide environmental and economic benefits to the general public. Winter storage is a valuable service provided and hundreds of residents with littoral rights to Coeur d’Alene Lake take advantage of such service every year. In shallow areas, areas that ice over, and areas of the lake susceptible to storms are all detrimental locations to floating encroachments. Encroachments in these areas are at a greater risk to damage that is costly to fix and in extreme cases this damage can cause floating debris. By storing encroachments in a protected area with ample water depth we can help to mitigate the costs and safety hazards associated without having storage service.

7. Referring to the year-round work area, NIM stated that it “will include the intermittent storage of miscellaneous docks for repair, resale, and disposal all year-round ... suitable for assembly of modular dock sections that are built off-site. This will benefit the public because it will minimize the actual effect of work being done at their site location. ... When new

docks are installed ... old docks need to be disposed of. ...This area would also act as a temporary storage area.” The year-round work area would also be used “in the recovery of derelict and miscellaneous hazards in the form of docks and logs.”

8. The amended application also included a copy of an Idaho Commercial Lease Agreement between John & Gaila Condon and NIM for land and improvements at 6719 S Highway 97 Coeur d’Alene, ID, AIN 111552, TX#5934. The amended application along with the additional materials provided to the Department on July 27, 2020 and on September 4, 2020, appear to have been accepted by IDL as the complete Application.

C. Appointment of the Hearing Coordinator and Notice of the Public Hearing.

On October 2, 2020, the Director appointed the Hearing Coordinator to preside over a public hearing to be held on November 4, 2020. According to the *Notice of Appointment of Hearing Coordinator and Public Hearing*, and considering the current public health climate and COVID-19¹, the public hearing would be held both in-person at the Department’s office in Coeur d’Alene, as well as by Zoom, enabling any member of the public to “attend and present comments at the public hearing. You may also submit written comments.... In order to be considered, all written comments must be received by the close of the hearing.”

D. Written Public Comments.

1. Numerous written comments from members of the public were received by the Department, most of which opposed the Application. Comments opposing the Application generally discussed adverse esthetics effects; potential impacts to property values for property owners in and near Cougar Bay; negative impacts to wildlife habitat, specifically related to noxious weed transport; impacts to water quality; adverse impacts from floating debris; impacts from an

¹ See <https://coronavirus.idaho.gov/>.

increased dock storage footprint; concerns regarding NIM's "after the fact" application; concerns regarding storage of floating debris rather than disposal of debris at an appropriate upland location; that the proposed encroachment will not greatly contribute to environmental, economic or social benefits to or for the general public, as compared to benefits to the fewer lakefront property owners who are NIM's customers; negative impacts to native fish populations and other wildlife species; negative impacts due to noise pollution from operational activities; negative impacts for boater safety; infringement on the use and enjoyment of the area in Cougar Bay by the public; concerns regarding the littoral right eligibility of the Applicant; incompatibility with current uses; reduction in sportsman access; disturbing potentially contaminated lakebed sediments; and whether there is truly a need for a floating work area in addition to NIM's existing upland work area adjacent to its littoral property in Wolf Lodge Bay on Lake Coeur d'Alene.

2. Comments supporting the Application generally discussed the essential services that marine contractors provide for constructing and managing public facilities on area waterways; critical service support provided by NIM during emergencies; the need for winter dock storage; and the historic industrial and commercial use of Cougar Bay for log storage and transportation to area mills that previously operated, but no longer in business.

E. The November 4, 2020 Public Hearing.

1. On November 4, 2020, a public hearing was held at the Idaho Department of Lands office in Coeur d'Alene and utilizing the Zoom videoconference platform. The hearing started just after 6:00 p.m. Pacific Time. The order of testimony was established by the Hearing Coordinator as follows: (1) testimony from North Idaho Maritime's representatives; (2) testimony from public agencies other than IDL; (3) testimony from members of the public; (4) testimony from IDL; and (5) any reply from North Idaho Maritime.

2. Testimony on behalf of the Applicant was first given by Rand Wichman. Mr. Wichman started off by thanking IDL staff for their assistance with the Application and stated that dock storage on Cougar Bay has been an issue in search of a solution for more than 10 years. Mr. Wichman explained that NIM is seeking an encroachment permit for winter dock storage with a work area that would allow for assembly of new docks and repair and rebuilding of docks that required such service. The total area covered by the Application is 5 acres, winter dock storage is the primary purpose of the Application and would take up most of the area, likely 2-3 acres as needed. A smaller portion of the site would be used for interim storage for floating encroachments that are awaiting repair, delivery to a new owner, or awaiting removal from the lake. The other activity proposed for this site is a work area for the repair and assembly of modular dock sections. These modular sections would not be built on this site.

3. Mr. Wichman stated that the need for winter dock storage has been well documented by the Department and that the Department has issued permits to other operators in different areas of Coeur d'Alene Lake as well as in Cougar Bay and referred to Staff remarks in the record supporting this request.

4. Referring to the year-round aspect of the storage area, Mr. Wichman explained that with wintertime storage, the stored docks return home at the end of each season, yet the infrastructure for that storage remains. The referenced infrastructure includes existing pilings, containment booms, and other materials necessary to secure the docks.

5. Mr. Wichman explained that cast-off docks, deadheads, and floating debris are year-round hazards for the (Kootenai County Sheriff's Office) Marine Division and recreational boaters. These are items that must be removed from the lake so that they are not a hazard to navigation or a nuisance to downwind property owners. Lake currents and wind make Cougar Bay a logical place

to tow and store these items until they can be removed. Removal of these hazard items is a service that NIM provides. The year-round dock storage infrastructure provides a suitable location to store these items until they can be removed. Mr. Wichman went on to explain that there is a need for the storage area to exist year-round and that “it serves a clear public benefit sequestering these navigational hazards until they can be removed from the lake.”

6. Referring to the public’s concern regarding the accumulation of “junk” and debris in Cougar Bay, Mr. Wichman stated that removal of these navigational hazards from the lake has been difficult due to the lack of necessary shoreline infrastructure. He then explained that NIM believes that they will have approval for that use (i.e. a crane) at their Wolf Lodge Bay commercial site in the near future. This will allow NIM to remove unserviceable docks and ameliorate the concerns regarding floating junk accumulation in the proposed year-round storage area in Cougar Bay.

7. Regarding the use of the proposed work area in Cougar Bay for dock repair and assembly, Mr. Wichman explained that dock repairs cannot always be completed at a shoreline owner’s location. Dock repair generally needs to be done in a protected area with relatively calm water and that these conditions do not always exist at a property owner’s location. Water depth, nearby encroachments, and shoreline configuration, and other conditions can prevent easy access for equipment necessary to facilitates repairs. These circumstances require towing the dock to an approved work area to facilitate repairs. Approval of the Wolf Lodge location will provide a work area for repairs; however, that site is inaccessible due to water depth for a significant portion of the year and has limited space, “the space in Cougar Bay is needed to fill that gap.” Mr. Wichman then stated his opinion that “all aspects of the Application are in aid of navigation and safety on the lake.”

8. Following Mr. Wichman, comments were given by NIM's manager, John Condon. Mr. Condon provided perspective regarding the historical use of Cougar Bay including historical log storage of 104 acres and the remaining infrastructure from those activities. Mr. Condon explained that it is their plan to "rehabilitate and upgrade that facility to handle this future need."

9. Mr. Condon discussed the revamping of NIM's business model from historically doing 90% of its business for the local mills, to now servicing waterfront development and dock construction. With this business reinvention, NIM started storing docks in Cougar Bay approximately 12-15 years ago.

10. Mr. Condon discussed how the lake hydrology contributes to debris accumulation within Cougar Bay, the historical lack of development along the shoreline, that there are shallow water depths within areas of the bay, and that the historic use of the area for log storage and transportation has protected the shoreline from boat wakes and enable the parts of the bay to become a nature conserve. These factors also contribute to the circumstance of a "safe harbor" that NIM would like to have for its year-round storage and work area.

11. Mr. Condon discussed the need for replacement of some of the piling and booms that would be used within the proposed encroachment area, the need to install lighting that meets Coast Guard requirements, and conducting regular safety inspections. In response to related questions from the Hearing Coordinator, Mr. Condon said that they would replace existing piling as necessary, would also upgrade the existing log boom system, which it is in disrepair. After further questioning by the Hearing Coordinator, Mr. Condon estimated that there are at least 30 pilings within the "backbone" system of 4-pilings per clusters that need to be replaced. These pilings are not identified or depicted in the Application but were discussed by both Mr. Wichman and Mr. Condon as being part of the infrastructure facilities of the proposed encroachment area.

12. Mr. Condon also stated that all the pilings NIM would use (if the Application were granted) were previously permitted by IDL to Foss Maritime, and that NIM sublet from Foss Maritime for the use of that encroachment area. While the Submerged Lands Lease No. B-2186 to Foss Maritime is in the record, it terminated by its own terms on December 31, 2009. There is no document in the administrative record that confirms Mr. Condon's statement that NIM sublet the pilings from Foss Maritime or that NIM has had any type of written permission from the Department to utilize Cougar Bay for its business operations since 2009.

13. No representatives from other government agencies were present at the hearing to provide testimony in addition to any written comments previously provided to IDL. Therefore, after the Applicant's representatives concluded, comments were taken into the record from members of the public. Most of the oral comments were opposed to the project, for the same or similar reasons given in writing and identified in paragraph D.1., above.

14. One gentleman, Mr. William Chapman, commented and agreed that there is a need for the pilings and log boom facility. However, Mr. Chapman disagreed that NIM just inherited the infrastructure from the logging companies. Mr. Chapman also suggested that, if the Application is granted, the shape of the encroachment area be changed from a long rectangle to a square-shaped area, so that it has less of a visual impact.

15. After comments were taken from the public, Mike Ahmer, Lands Resource Supervisor – Public Trust, with the Department, read into the record his *revised* written Hearing Statement, which contains comments on and recommendations for the Application ("IDL Report"). The initial IDL Report was made part of the record on November 2, 2020, as Exhibit IDL-1, along with Exhibit IDL-2 (Kootenai County GIS webpage depicting the Applicant's littoral ownership in Wolf Lodge Bay), and Exhibit IDL-3 (Google Earth Image dated 9/27/2005 showing historical log

storage in Cougar Bay). Mr. Ahmer explained that since the IDL Report was submitted, the Department had made some additional written recommendations and that he would be submitting a revised version prior to the close of the record. Mr. Ahmer also indicated that, based on Mr. Condon's representations at the beginning of the hearing, the Department had three additional recommended conditions, if the Application were to be granted.

16. The IDL Report explains that the initial application was received on April 20, 2020, but the application was incomplete. Following a series of exchanges with NIM, the Application was deemed complete on September 4, 2020. The Application proposes a 5-acre winter storage area and a 2-acre year-round work area on Cougar Bay in Lake Coeur d'Alene. Mr. Ahmer explained the timeline of events surrounding the Application. After reviewing pertinent sections of title 58, chapter 13, Idaho Code; and IDL's navigable water rules at IDAPA 20.03.04, the IDL Report states: "The location of the proposed encroachments is in Cougar Bay and not within nor near the applicant's littoral right area in Wolf Lodge Bay." *IDL Report p. 5*. "Historically, Cougar Bay was used as a log storage area. ... IDL leased a portion of the bed of Cougar Bay to Foss Maritime between 2000 and 2009 for log storage area." *Id. at 5*. In 2008, North Idaho Maritime and Murphy Marine Construction Company applied together for an encroachment permit for a dock storage area, but after holding a public hearing, the application was denied. In 2010, Murphy Marine Construction Company applied for a dock storage area and after a public hearing, the permit was granted." *Id. at 5*. "IDL has determined that NIM is seeking an encroachment permit for a winter storage area as well as a year-round work area. The winter storage area is for 'floating encroachments' which may include navigational encroachments such as single-family docks and nonnavigational encroachments such as boat garages and float homes. IDL also notes that it has no jurisdiction over tugs and barges." *Id. at 5*.

17. The IDL Report explained that: “The [Lake Protection Act] Rules do not have specific size limitations for winter dock storage areas or year-round work areas.” *Id. at 5*. The IDL Report also commented that:

There is a significant public benefit from the storing of floating encroachments through the winter ... the storing of docks prevents them from being damaged and becoming floating hazards throughout the lake, as well as from washing up on shore and becoming another waterfront owner’s problem to deal with. Additionally, the storage occurs in the winter months, when the water is lower and colder, and there is much less public recreating on the water. However, allowing a year-round area in Cougar Bay prevents the public from utilizing a portion of the lake during the prime summer months and it ensures that all members of the public see floating encroachments in Cougar Bay all year long. IDL does not see a significant benefit to the public by allowing a year-round work area in Cougar Bay.

Id. at 7.

18. The IDL Report recommended, “denying the year-round construction area and if the winter storage area is approved,” applying specific terms and conditions to that encroachment permit. *Id. at 7*.

19. After the Department gave its report and recommendation, a reply was given by Mr. Condon. Mr. Condon explained that his proposed encroachment does not represent a new impact on the lake and that their proposal would clean up, repair, and better manage the existing infrastructure. Mr. Condon stated that NIM has been trying to do this for 12 years. Mr. Condon explained that Wolf Lodge Bay is not suitable for winter dock storage. Mr. Condon acknowledged the differences between the year-round work area and the winter dock storage, but maintained that there is a necessity for each. In response to questions from the Hearing Coordinator, Mr. Condon stated that NIM had most-likely started moving docks into Cougar Bay for storage during the 2020-2021 winter, and that he was not aware of all the personal property or equipment that NIM currently has at the proposed encroachment location.

20. The public hearing concluded at approximately 7:51p.m. (PT) on November 4, 2020. The record was left open by the Hearing Coordinator through 5:00 p.m. (PT) on November 5, 2020, to allow for additional, requested documents to be provided to the Hearing Coordinator.

21. Additional written comments were received by IDL after the record closed on November 5, 2020. Those materials have not been reviewed by, and will not be considered by the Hearing Coordinator in rendering this Preliminary Order. With all evidence submitted, the matter is fully before the Hearing Coordinator.

II. CONCLUSIONS OF LAW

A. IDL Has Jurisdiction Over the Beds, Banks and Waters of Lake Coeur d'Alene.

1. Under the *Notice of Appointment of Hearing Coordinator and Public Hearing*, the Hearing Coordinator is authorized by the Director of the Department to issue this Preliminary Order. I.C. § 67-5245.

2. Lake Coeur d'Alene is a navigable lake within the state of Idaho. *See Newton v. MJK/BJK, LLC, et al*, 167 Idaho 236, 469 P.3d 23, 27 (2020); *Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 624, 671 P.2d 1085, 1087 (1983). A “navigable lake” is “any permanent body of relatively still or slack water ... capable of accommodating boats or canoes.” I.C. § 58-1302(a); *see also* IDAPA 20.03.04.010.024 (iterating definition).

3. Upon admission of the State of Idaho into the Union, and under the Equal Footing Doctrine, the title to the beds and banks of navigable waters became state property that is subject to the Public Trust Doctrine. I.C. § 58-1201(1). Under the Public Trust Doctrine, the “state board of land commissioners may approve, modify or reject all activities involving the alienation or encumbrance of the beds of navigable waters in accordance with the public trust doctrine.” I.C. § 58-1203(1). The Public Trust Doctrine “traditionally protected the public’s right to navigation, but

has since expanded to protect fish and wildlife habitation, recreation, aesthetic beauty, and water quality.” *Newton*, 469 P.3d at 29 (citing *Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist.*, 112 Idaho 512, 516, 733 P.2d 733, 737 (1987) (citing *Kootenai Env'tl. Alliance, Inc.*, 105 Idaho at 625, 632-33, 671 P.2d at 1088, 1095-96)).

4. Compatible with the Public Trust Doctrine are the Land Board’s general legislative authorities, which include the power to “regulate and control the use or disposition of lands in the beds of navigable lakes ... so as to provide for their commercial, navigational, recreational or other public use; provided, that the board shall take no action in derogation of or seeking to interfere with the riparian or littoral rights of the owners of upland property abutting or adjoining such lands” I.C. § 58-104(9)(a); *see also* Idaho Const. art. IX, § 7 (providing the Land Board shall have the power to direct, control, and dispose of public lands of the state, under such regulations as may be prescribed by law).

5. The “disposal” or “disposition” of public lands “incorporates conveyances other than just sales—it contemplates both sales and leases.” *Wasden v. State Bd. of Land Comm’rs*, 153 Idaho 190, 197, 280 P.3d 693, 700 (2012).

6. The scope of the state’s title in the beds of navigable lakes “extends to the natural high water mark as it existed at the time the state was admitted into the Union.” *Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist.*, 112 Idaho 512, 516, 733 P.2d 733, 737 (1987) (citations omitted); *see also* I.C. § 58-1302(b) (defining “beds of navigable lakes” as the lands lying under or below the natural or ordinary high water mark of a navigable lake).

7. As a navigable lake, Lake Coeur d’Alene may be used and disposed of by the state, but no such disposition shall interfere with the rights of the Land Board “to regulate commerce on . . . the navigable lakes, rivers, or streams as public highways over which every citizen has a natural

right to carry [on] commerce, whether by ships, boats, or the floating of logs or lumber, having due consideration and reasonable care for the rights of individuals, as well as the public, in the common use of such public highways.” *Callahan v. Price*, 26 Idaho 745, 146 P. 732, 735 (1915) (citing *Illinois C.R. Co. v. Chicago*, 176 U.S. 646 (1900)).

8. The granting of an encroachment permit or a submerged land lease is not a disposal of property in fee simple to a private party. Such grants maintain the public trust land within the control of the state because “the state is not precluded from determining in the future that this conveyance is no longer compatible with the public trust imposed on this conveyance.” *Kootenai Env'tl. Alliance, Inc.*, 105 Idaho at 631, 671 P.2d at 1094.

9. The Idaho Supreme Court has adopted a two-part test to determine the validity of a disposal, including the lease, of public trust property: “One, is the grant in aid of navigation, commerce, or other trust purposes, and two, does it substantially impair the public interest in the lands and waters remaining?” *Kootenai Env'tl. Alliance, Inc.*, 105 Idaho at 626, 671 P.2d at 1089 (citing *Illinois C.R. Co. v. Illinois*, 146 U.S. 387, 460 (1892)).

10. With limited exceptions that do not apply in this matter, the Land Board exercises its rights, powers and duties through IDL. I.C. § 58-119(1). “It is clear, therefore, that the Department of Lands acting as the representative of the State Land Board has the power to dispose of public [trust] lands.” *Kootenai Env'tl. Alliance, Inc.*, 105 Idaho at 632, 671 P.2d at 1095.

11. With “the public trust doctrine at all times [forming] the outer boundaries of permissible government action with respect to public trust [lands],” the Land Board and, therefore, IDL may manage navigable waters through any applicable statutory and regulatory framework. *Kootenai Env'tl. Alliance, Inc.*, 105 Idaho at 631-33, 671 P.2d at 1094-96. Such statutory and regulatory framework includes the Land Board’s general authority in Idaho Code § 58-104(9)(a);

and the Public Trust Doctrine, as codified in title 58, chapter 12, Idaho Code; along with the related administrative rules at IDAPA 20.03.17 – Rules Governing Leases on State-Owned Submerged Lands and Formerly Submerged Lands. The other often-used framework is the Lake Protection Act at title 58, chapter 13, Idaho Code (“LPA”); along with the administrative rules promulgated to implement the purposes and policy of the LPA at IDAPA 20.03.04 – Rules for the Regulation of Beds, Waters, and Airspace Over Navigable Lakes in the State of Idaho (“Rules”). *Kootenai Envtl. Alliance, Inc.*, 105 Idaho at 631-33, 671 P.2d at 1094-96 (upholding the LPA and Rules as consistent with the Public Trust Doctrine).

B. The Application is Denied because the Applicant, in this Specific Circumstance, is Not Qualified Under the LPA to Hold an Encroachment Permit at the Proposed Location in Lake Coeur d’Alene.

1. The Application and this administrative matter are being conducted according the LPA and the Rules. However, as discussed, below, the LPA and the Rules are not an applicable framework because the Applicant does not have littoral rights adjacent to land that has a common boundary with the low water mark at any location in or above the bed of Lake Coeur d’Alene that the Applicant seeks to encumber. Such littoral rights are a threshold requirement of the LPA.

a. Under the LPA, IDL must “regulate, control and may permit encroachments in aid of navigation or not in aid of navigation on, in or above the beds or waters of navigable lakes **as provided herein.**” I.C. § 58-1303 (emphasis added).

b. An application for a commercial navigational encroachment or a nonnavigational encroachment “**must be submitted** or approved **by the riparian or littoral owner.**” I.C. § 58-1306(a) (emphasis added); *see also* IDAPA 20.03.04.020.02 and 20.03.04.020.07.b (reiterating that only littoral owners or lessees shall be eligible to apply for an encroachment permit).

c. The “littoral owner” is the “fee owner of land **immediately adjacent** to a navigable lake, or his lessee, or the owner of ... littoral rights that have been segregated from the fee specifically by deed, lease, or other grant.” IDAPA 20.03.04.010.33 (emphasis added). The word “adjacent” is expressly defined in the Rules to mean “[c]ontiguous or touching, and with regard to land or land ownership having a common boundary.” IDAPA 20.03.04.010.01.

d. The two other phrases that must be understood in order to define who, as a littoral owner, is qualified to submit an LPA application for a commercial navigational encroachment or a nonnavigational encroachment are “littoral rights” and “low water mark.. The term “littoral rights” means “only 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 but does not include any right to make any consumptive use of the waters of the lake.” I.C. § 58-1302(f) (emphasis added); *see also* IDAPA 20.03.04.010.32 (iterating the definition). Finally, the term “low water mark” is defined as “that line or elevation on the bed of the lake marked or located by the average low water elevations over a period of years **and marks the point to which the riparian rights of adjoining landowners extend as a matter of right**, in aid of their right to use the waters of the lake for purposes of navigation.” I.C. § 58-1302(e) (emphasis added); *see also* IDAPA 20.03.04.010.21 (repeating definition).²

e. In summary of the above-quoted statutes: As provided for in the LPA, an application for a commercial navigational encroachment or a nonnavigational encroachment may

² “[O]ne of the basic rights enjoyed by owners of properties upon a navigable lake is the right to have access to the waters of such lake *at the low water mark*; this right is valuable and in many instances it is the controlling aspect of the value of such lands.” *Lake CDA Inv., LLC v. IDL*, 149 Idaho 274, 283, 233 P.3d 721, 730 (2010) (emphasis in *Lake CDA Inv.*).

be approved by IDL when the application is submitted by the owner or lessee of upland real property, the littoral rights of which touch and share the common boundary line with the low water mark at the location in or over the bed of navigable lake where the applicant requests an encroachment permit.³

2. Here, the Applicant admittedly is not a littoral owner on Cougar Bay. *See Appl'n; Exhibit IDL-2*. The Applicant does not hold the littoral rights of any upland location bordering Lake Coeur d'Alene anywhere near the location of the proposed encroachment area. *Id.* Under the LPA, the Applicant is not qualified to be issued an encroachment permit at the proposed encroachment location. Therefore, no part of the Application can be granted.

3. Indeed, no person's littoral rights extend to and exist at the proposed encroachment location. The most landward point of the encroachment location is approximately 431 feet waterward from the closest intersection with the line of navigability⁴ – as depicted in an aerial photograph submitted with the Application. *See Appl'n; IDL Report p. 5*. At the proposed location, the bed of Lake Coeur d'Alene is unencumbered public trust land owned by the state. Consequently, the legal authority to allow either of NIM's proposed encroachments is not the LPA and Rules since that framework is for permitting encroachments to enable adjacent littoral rights.

³ The single exception to the requirement of littoral ownership or permission appears to be at IDAPA 20.03.04.020.07.d, which requires that applications “for noncommercial encroachments intended to improve waterways for navigation, wildlife habitat and other recreational uses by members of the public must be filed by any municipality, county, state, or federal agency, or other entity empowered to make such improvements.”

⁴ The “line of navigability” means “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 the line has not already been established for the body of water in question.” I.C. § 58-1302(g).

C. The Applicant Could Be Issued a Submerged Lands Lease as the Requisite Government Approval for a Proposed Encumbrance of Lake Coeur d’Alene.

1. As discussed, above, IDL could evaluate whether to approve NIM’s proposed encumbrances to Lake Coeur d’Alene through another statutory and regulatory framework – namely the Land Board’s constitutional and statutory authority, including the Public Trust Doctrine, along with the corresponding administrative rules at IDAPA 20.03.17 – Rules Governing Leases on State-Owned Submerged Lands and Formerly Submerged Lands. Idaho Const. art. IX, § 7; I.C. §§ 58-104(9)(a), 58-1203(1); *see also* IDAPA 20.03.17.000 (citing as its legal authorities I.C. § 58-104(9) and title 58, chapter 12, Idaho Code).

2. In the Submerged Lands Rules, and consistent with its legal authorities, the state “asserts the right to issue leases for all encroachment, navigational or non-navigational, upon, in or above the beds or waters of navigable lakes and rivers” and provides instruction and the procedure for the issuance of a submerged lands lease that is **“in the public interest and consistent with these rules.”** IDAPA 20.03.017.001.02.b. and 20.03.017.025.02 (emphasis added).

3. Without permission from the state, and therefore in violation of Idaho law, NIM has been encumbering the water and bed of Lake Coeur d’Alene, in Cougar Bay, for at least 12 years. *See J. Condon testimony; IDL Report pp. 1 and 5.* While Mr. Condon expressed frustration with the government regulation of Lake Coeur d’Alene’s public trust resource, he also acknowledged that the lack of government approval has not caused NIM to cease its unauthorized uses of the lake. *See J. Condon testimony.*

a. In the administrative matter currently before the Hearing Coordinator, NIM has applied to receive the requisite government approval. However, as discussed, above, given the specific circumstances of the Applicant and Application, such permission cannot be granted

pursuant to the LPA and the Rules, and therefore cannot be approved by the Hearing Coordinator whose authority arises from the LPA and Rules.

b. NIM and Mr. Condon must be diligent in securing a submerged lands lease if it is to continue its occupation of Cougar Bay.

c. As the responsible regulatory agency, IDL must be diligent in either approving a submerged lands lease, if possible under those rules, or requiring NIM to completely remove all encroachments related to its business in Cougar Bay.

4. Although the IDL Report, including its written conclusions and recommendations and IDL's additional verbal recommendations offered during the public hearing in this matter, were presented under the legal framework of the LPA and Rules, the Hearing Coordinator is in agreement with IDL's analysis and conclusions, and believes that IDL's analysis and conclusions can be recast under the legal framework of the Submerged Lands Rules and its legal authorities. The Hearing Coordinator would encourage IDL to evaluate any submerged lands lease application with the same or similar scope of the current encroachment permit Application, the same way IDL evaluated the encroachment permit Application.

III. ORDER

Based upon the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that Encroachment Permit Application No. L-95-S-5884 is DENIED, 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 §§ 58-1306(c), 67-5270 and 67-5272, and the *Notice of Appointment of Hearing Coordinator and Public Hearing* issued on October 2, 2020, which states as follows:

In accordance with Idaho Code § 67-5240, 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.

The Preliminary Order can and will become final without further action of the agency if the Director does not issue a Final Order within thirty (30) 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 § 58-1306(c), the 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). 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 __23__ day of November, 2020.



Michele Andersen
Hearing Coordinator

CERTIFICATE OF MAILING

I hereby certify that on this __23__ day of November, 2020. I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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

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Kourtney Romine

Kourtney Romine
Workflow Coordinator