

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of Encroachment Permit Application No. ERL-95-S-0565D)	Case No. CC-2020-PUB-22-003
)	
Philip M. O'Brien,)	FINAL ORDER
)	
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 October 21, 2020, IDL received an encroachment permit application filed by Philip M. O’Brien. A hearing was held on December 11, 2020. Andrew Smyth served as duly appointed hearing officer. During the hearing the parties agreed to give the Applicant until December 28, 2020 to submit an updated drawing that would incorporate littoral right lines. The parties also agreed to allow comments filed by January 4, 2021 in response to the updated drawing. The record was closed on January 4, 2021. On January 25, 2021, the hearing officer issued his Preliminary Order, which contains a 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 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 matter.

II. FINDINGS OF FACT

I adopt the Preliminary Order's Procedural Background and Findings of Fact as my Findings of Fact, except that I make the following amendments:

- In the Findings of Fact, I add the following paragraph 11 on page 5, and renumber current paragraphs 11-15 as paragraphs 12-16:

11. Based on the record and as explained in Conclusions of Law Section D, paragraph 2, I find the OHWM that HDB Marine identified in the Application as on the waterward side of the pier is not the OHWM in relation to the fill. The actual OHWM is on the landward side of the fill consistent with the schematic received by IDL on December 9, 1974 and incorporated into encroachment permit ERL95S0565C.

III. CONCLUSIONS OF LAW

I adopt the Preliminary Order's Conclusions of Law as my Conclusions of Law, except for the following amendments:

- In Section D, paragraph 7.f on page 13, I add the following words to the end of the last sentence of the paragraph: "and IDAPA 20.03.04.015.13.e."
- In Section D, I delete Paragraph 12 on page 16 and replace with the following new paragraph 12:

12. However, the Applicant has not met the burden of proof to justify a new location of the OHWM. The Applicant has not provided any evidence

regarding how and why the OHWM has moved from the landward side of the fill (as shown in current encroachment permit ERL-95-S-0565C), to below the fill. Thus, the surface decking area of the pier must be factored into the total surface decking area of the dock. Including those additional square feet in the calculation causes the dock to exceed the seven hundred (700) square foot surface decking limit in IDAPA 20.03.04.015.01.b. Even though the proposed dock appears to meet every other requirement, it does not meet IDAPA 20.03.04.015.01.b.

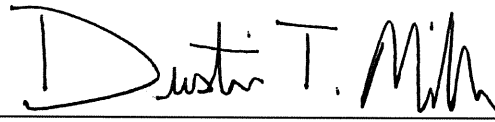
IV. ORDER

I conclude that the hearing officer's Preliminary Order is 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 Findings of Fact and Conclusions of Law, I HEREBY ORDER that Encroachment Permit Application ERL-95-S-0565D is DENIED.

This is a final order of the agency. Pursuant to Idaho Code § 58-1305(c), Idaho Code § 58-1306(c), and IDAPA 20.03.04.25.09, 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 11th day of February 2021.

A handwritten signature in black ink, appearing to read "Dustin T. Miller". The signature is written in a cursive, flowing style. The first letter "D" is large and loops around. The last name "Miller" is written with a series of connected loops.

DUSTIN T. MILLER

Director, Idaho Department of Lands

CERTIFICATE OF MAILING

I hereby certify that on this 11th day of February 2021. 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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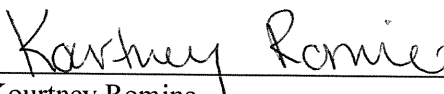
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Kourtney Romine
Workflow Coordinator

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of Encroachment Permit)	
Application No. ERL-95-S-0565D)	Case No. CC-2020-PUB-22-003
)	
Philip M. O'Brien,)	
Applicant.)	PRELIMINARY ORDER
)	
)	
)	

I. PROCEDURAL BACKGROUND

On or around October 21, 2020, the Idaho Department of Lands (“IDL”) received a complete encroachment permit application (“Application”) filed by Philip M. O’Brien (“Mr. O’Brien” or “Applicant”). Agency Record (“AR”) pp. O’Brien 00001 – 00014.¹ IDL assigned application number ERL-95-S-0565D to the Application. In the Application, the Applicant seeks authorization to replace and reconfigure his single-family dock on Lake Coeur d’Alene, in Kootenai County, Idaho.

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 October 23, 2020, IDL provided written notice of the Application to the adjacent littoral owners on each side of the Applicant’s property – Wysham Property, LLC, and the Paul Living Trust. AR, pp. 15 – 18.
2. On November 3, 2020, IDL received revised diagrams of the schematics of the proposed dock to supplement the Application. AR, pp. 19 – 31.

¹ All citations to the AR are hereinafter designated by using the Bates numbers only, not the preceding “O’Brien 0000.”

3. On November 4, 2020, IDL received an email from Douglas Wysham expressing his desire that the new dock not angle any closer toward his property than the old dock. AR, pp. 32-35.

4. On November 5, 2020, IDL received an email from Kip and Kathie Paul expressing their concerns with the fifteen (15) foot by ten (10) foot deck extending from the end of the Applicant's proposed dock towards their property, and their perceived impacts to navigation, recreation, and aesthetic beauty. AR, pp. 36 – 39.

5. On November 13, 2020, Mr. Wysham forwarded his November 4, 2020 email to IDL (after not receiving a reply to his first email) and objecting to the depiction of the littoral right line between his property and the Applicant's in the Application, and sent another email reiterating his objection to the Application. AR, pp. 40 – 48.

6. On November 15, 2020, Mr. Wysham sent two more emails to IDL providing his analysis of the riparian right lines in relation to the O'Brien and Paul docks. AR, pp. 49 and 50.

7. On November 18, 2020, Mr. Dustin T. Miller, IDL Director, issued a Notice of Appointment of Hearing Officer and Hearing, in which he appointed Mr. Andrew Smyth as the Hearing Officer and scheduled the hearing to be at held at 10:00 a.m. Pacific Time on Friday, December 11, 2020, via video teleconference. AR, pp. 51 – 54.

8. On December 11, 2020, a hearing regarding the Application was held pursuant to Idaho Code § 58-1305(c). The participants appearing and offering evidence at the hearing were: Mr. O'Brien; Mr. Douglas Wysham, on behalf of Wysham Property, LLC; Mr. Kip Paul, on behalf of the Paul Family Trust; Mr. Mike Ahmer, IDL Resource Supervisor; and Ms. Angela Kaufmann, Deputy Attorney General and legal counsel for IDL. Hearing Recording.²

² 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. One break was taken during the hearing. A new recording was started after the break creating two recordings.

9. Evidence admitted into the administrative record during the hearing consisted of witness testimony from Mr. O'Brien, Mr. Wysham, Mr. Paul, and Mr. Ahmer on behalf of IDL, and Exhibits W1, W2 and P1 – P5. Other exhibits of record were submitted by IDL and identified as IDL-1 – IDL-8. AR, pp. 36 – 47, 86 – 148; Rec. 1, 30:55 and 31:45.

10. During the hearing, the parties agreed to give the Applicant until December 28, 2020, to submit an updated drawing in order incorporate littoral right lines Mr. O'Brien, Mr. Wysham, and Mr. Paul agreed to during the hearing, modify the direction the dock would extend from the shoreline, and correct the distances between the proposed encroachment and the two littoral right lines. Rec. 2, 25:12. In addition, the parties agreed to allow the Mr. Wysham, Mr. Paul and IDL until January 4, 2021, to provide comments in response to the updated drawing and information from Mr. O'Brien. Rec. 2, 25:43

11. On December 17, 2020, HDB Marine provided updated drawings on behalf of Mr. Obrien. AR, pp. 216 – 222.

12. Neither the Objectors nor IDL provided a written response to the Applicant's updated drawings.

13. The record was closed on January 4, 2021.

II. FINDINGS OF FACT

1. The Applicant owns Kootenai County parcel 0-0580-000-004-C, AIN 117053. AR, pp. 1 and 8.

2. The Applicant's property is located adjacent to the Lake Coeur d'Alene with approximately 80 feet of shoreline. AR, pp. 6, 11, and 91; Rec. 1, 1:05:24.

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.

3. The Applicant currently holds encroachment permit ERL-95-S-0565C, which was assigned to him on May 21, 2020, authorizing a “6’x18.5’ pier, 7’x24.7’ approach, and a 22’x33’ floating single family one-slip dock with three piling; existing 1.5” polypipe 120’; launch rail system.” AR, pp. 116 – 131.

4. The six (6) foot by eighteen and a half (18.5) foot pier listed in the Applicant’s existing encroachment permit is located on top of fill placed on the lakebed by a prior owner of the Applicant’s property. AR, p. 124.

5. If the Application is approved, the pier identified above would be replaced by a six (6) foot by twenty (20) pier. AR, p. 222; Rec. 1, 23:10.

6. In the schematic accompanying the original Notice of an Encroachment on a Navigable Lake or Navigable Stream, received by IDL on December 9, 1974, Warren E. Morgan, the previous owner of the Applicant’s property, identified the ordinary high water mark (OHWM) to be located on the upland side of fill. AR, p. 97.

7. In the schematic accompanying the Application, HDB Marine identifies the OHWM to be located on the waterward side of the pier. AR, p. 222.

8. Mr. Paul’s father placed the rock pilings on the lakebed, creating a jetty, in 1967 or 1968. Rec. 1, 48:24.

9. Mr. O’Brien has not modified the fill since assuming ownership of this property on May 7, 2020. Rec. 1, 23:10.

10. If approved, the Applicant would be authorized to replace his existing single-family dock with one that, excluding the pier over the fill, extends 54 feet beyond the OHWM identified by HDB Marine, and consists of 686.5 square feet of surface decking area beyond that OHWM. AR, pp. 11 and 222.

11. Including the pier over fill, the single-family dock would extend approximately seventy-four (74) feet beyond the actual OHWM³ and consist of approximately eight hundred (800) square feet of surface decking area beyond the OHWM.⁴

12. No part of the proposed single-family dock would be wider than ten (10) feet. AR, pp. 10 and 222; Rec. 1, 1:05:17.

13. The Applicant's property is located between littoral property owned by Wysham Property, LLC, and the Paul Living Trust. AR, p. 4.

14. The proposed single-family dock would be located between one and a half (1.5) feet and two (2) feet from the Wysham littoral right line, and between twenty one (21) feet four (4) inches and twenty one (21) feet eleven (11) inches from the Paul littoral right line. AR, p. 221.

15. Mr. Wysham consents to, and does not object to, the Applicant's dock being rebuilt in the same footprint that it currently occupies. AR. p. 214; Rec. 1, 36:30, 1:24:11.

III. CONCLUSIONS OF LAW

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

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 Adding the twenty (20) foot pier to the fifty-four (54) foot approach, the dock equals seventy-four (74) total feet in length.

⁴ Adding the one hundred and twenty (120) square foot pier to the six hundred eighty-six and a half (686.5) square feet of dock equals eight hundred and six and a half (806.5) square feet.

3. The Hearing Officer is authorized by the Director to issue this Preliminary Order. AR, p. 51; I.C. § 67-5245. The hearing in this matter began at approximately 10:02 a.m. Pacific Time and concluded at approximately 12:04 p.m. Pacific Time on December 11, 2020. The deadlines for submissions following the hearing have passed. With all evidence submitted, the matter is fully before the Hearing Officer.

4. In accordance with Idaho Code § 67-5206 and the LPA, IDL has promulgated rules for encroachment permits on navigable lakes – 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. Lake Coeur d'Alene 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. Mr. O'Brien is qualified to make application

IDAPA 20.03.04.020.02 states, in part, “[o]nly persons who are littoral owners or lessees of a littoral owner shall be eligible to apply for encroachment permits.” I find that Mr. O'Brien, as the owner of property adjacent to the Lake Coeur d'Alene, is a littoral owner, as defined in IDAPA 20.03.04.010.33, and is therefore qualified to make application for an encroachment permit.

C. The burden of proof is with the Applicant.

1. The Applicant generally bears the burden of proof in this matter. “The customary common law rule that the moving party has the burden of proof – including not only the burden of going forward but also the burden of persuasion – is generally observed in administrative hearings.” *Intermountain Health Care, Inc. v. Bd. of County Comm'rs of Blaine County*, 107 Idaho 248, 251, 688 P.2d 260, 263 (Ct. App. 1984) *rev'd on other grounds* 109 Idaho 299, 707 P.2d 410 (1985).

2. Under Idaho law, “preponderance of the evidence” is generally the applicable standard for administrative proceedings, unless the Idaho Supreme Court or legislature has said otherwise. *N. Frontiers, Inc. v. State ex rel. Cade*, 129 Idaho 437, 439, 926 P.2d 213, 215 (Ct. App. 1996). “A preponderance of the evidence means that when weighing all of the evidence in the record, the evidence on which the finder of fact relies is more probably true than not.” *Oxley v. Medicine Rock Specialties, Inc.*, 139 Idaho 476, 481, 80 P.3d 1077, 1082 (2003).

D. The Application is Denied.

1. 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 owns approximately 80 feet of waterfront footage. AR, pp. 6, 11, and 87. I find that the Application is for a single-family dock.

2. The Application does not accurately depict the OHWM of Lake Coeur d’Alene adjacent to the Applicant’s upland property. Idaho Code § 58-1302(c) defines natural or ordinary high water mark as “the high water elevation in a lake over a period of years, **uninfluenced by man-made dams or works**, at which elevation the water impresses a line on the soil by covering it for sufficient periods to deprive the soil of its vegetation and destroy its value for agricultural purposes.” (Emphasis added.)

a. In the schematic accompanying the original Notice of an Encroachment on a Navigable Lake or Navigable Stream, received by IDL on December 9, 1974, Warren E. Morgan, the previous owner of the Applicant’s property, identified the OHWM to be located on the upland side of the fill. AR, p. 97.

b. This original schematic with the location of the OHWM at the landward end of the fill is incorporated in the current encroachment permit for this property, ERL95S0565C. AR, pp. 127.

c. On the HDB Marine schematics of the proposed dock, the OHWM is represented to be located on the waterward side of the proposed six (6) foot by twenty (20) foot pier and existing rock jetty. AR, p. 222. No explanation is provide for how HDB Marine determined the OHWM had moved twenty feet waterward.

d. Mr. Paul stated his dad placed the rock pilings in 1967 or 1968. Rec. 1, 48:24.

e. Mr. O'Brien confirmed that the rock jetty identified in the Application is the fill identified in his existing encroachment permit, and he has not modified the fill since assuming ownership of this property on May 7, 2020. Rec. 1, 23:10.

f. Mr. Ahmer stated, "the applicant's waterfront property includes a small fill point that has rock and a fixed pier on it. The fill was not included in the permit and permit description which is common for these type of properties. IDL has jurisdiction below the Ordinary High Water Mark (OHWM) and the pier structure is above the OHWM." AR, p. 91 and Rec. 1, 1:05:56.

g. IDL's testimony insinuates that the fill *permissibly* altered the location of the OHWM, effectively allowing the upland owner to create new land on the lakebed and then claim such land as existing above the OHWM and outside the jurisdiction of IDL and this proceeding. I disagree. While it may have been common in the 1970's to not include fill as a component of an overlying fixed pier in a permit and permit description, here, these encroachments have been identified in the drawings accompanying the original and previous applications; which, are incorporated into the current permit associated with the Applicant's property. AR, pp. 117 – 131. Moreover, regardless of the fill, the 6'x18.5' pier was part of the original encroachment permit, and the Applicant plans on replacing that pier. AR, pp. 116 – 131. For nearly fifty years, the owner of the subject property and IDL have recognized the fill at this location and that the OHWM is located on the landward end of the fill.

h. While encroachments, such as fill, that were constructed prior to January 1, 1975, and not modified since 1974, may be permitted pursuant to I.C. § 58-1312(2), they do not change the location of the OHWM.⁵

⁵ Idaho law provides that: "A private person cannot obtain a prescriptive right against the state with respect to navigable waters." *West v. Smith*, 95 Idaho 550, 555, 511 P.2d 1326, 1331 (1973). Disposition of public trust land, underlying navigable waters, can only be done by the Land Board.

i. Based on the testimony and evidence in the record, I find that the OHWM depicted in the Application is based on the current shoreline which has been impacted by man-made works; and, therefore is not a true representation of the OHWM of Lake Coeur d'Alene at this location.

3. 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. 222. I find that the proposed dock would meet this requirement.

4. 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 Application shows that the total surface decking area of proposed dock would be 686.5 square feet. AR, p. 2. However, since the OHWM is located landward of the rock jetty, *see supra* III.D.2(a-i), most if not all of the surface decking area of the six (6) foot by twenty (20) foot pier that is located over the existing rock jetty should be included in the total surface decking area of the proposed dock. Adding the one hundred and twenty square foot pier, the total surface decking area of the proposed dock is closer to 800 square feet. I find that the proposed dock would exceed seven hundred (700) square feet and does not meet the requirement of IDAPA 20.03.04.015.01.b.

I.C. §§ 58-104(9)(a) and 58-1203(1); and Idaho Const. art. IX, § 7. A private person acting without the State’s authority cannot alter navigable waters in order to create more upland property, or attempt to adversely possess lands impressed with the public trust doctrine. See I.C. § 58-1203(1); *see also Idaho Forest Indus. v. Hayden Lake Watershed Imp. Dist.*, 112 Idaho 512, 520, 733 P.2d 733, 741 (1987) (Huntley, J., concurring). 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).

5. 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 54 feet from the waterward end of the fill and approximately 74 feet beyond the OHWM at the landward end of the fill. AR, p. 222. Mr. Wysham is permitted to have a single-family dock that extends seventy-nine (79) feet beyond the OHWM. AR, p. 148. Mr. Paul is permitted to have a single-family dock that extends sixty-five (65) feet beyond the OHWM. AR, p. 137. Mr. Ahmer stated that the dock would not extend beyond the current line of navigability. AR, p. 91; Rec. 1, 1:05:20. I find that the proposed single-family dock would be located within the line of navigability and comply with this requirement.

6. IDAPA 20.03.04.015.13.c.i - Angle from Shoreline states, “[w]here feasible, all docks, piers, or similar structures shall be constructed so as to protrude as nearly as possible at right angles to the general shoreline, lessening the potential for infringement on adjacent littoral rights.” The proposed single-family dock would follow the angle of the existing dock and protrude towards the Wysham Property, LLC’s, property and not at a right angle to the general shoreline. AR, p. 221. However, Mr. Wysham, stated, “I’m happy to have [the proposed dock] rebuilt in exactly that same footprint, but I’m not happy to have the new one now cross over the riparian right line.” Rec. 1, 36:30. Given that the adjacent littoral owner that would be affected by the angle of the dock has agreed to the proposed angle, I find that the proposed dock would meet this standard.

7. 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 . . . Written consent of the adjacent littoral owner or owners will automatically rebut the presumption.” 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.

a. IDL did not offer an analysis of the locations of the littoral right lines or any substantial comments regarding the littoral right lines. AR, p. 221; Hearing Recording.

b. During the hearing, Mr. O’Brien, Mr. Wysham, and Mr. Paul agreed to the littoral right line calculations and depiction found in Exhibit P-5 prepared by Mr. Paul. Rec. 1, 1:23:22, 1:24:05, and 1:25:08.

c. Mr. Paul’s littoral right lines were replicated in HDB Marine’s revised diagram submitted after the hearing on December 17, 2020. AR, p. 221. This new diagram shows that the proposed dock would be located at least twenty-one (21) feet and four (4) inches from the Paul Living Trust’s littoral right line and at least one and a half (1.5) feet from the Wysham Property, LLC’s littoral right line. AR, p. 221. The new diagram also shows that the proposed dock would extend from the shoreline at the same angle as the existing dock and not extend any closer to Mr. Wysham’s littoral right line than the existing dock. AR, p. 221.

d. During the hearing, Mr. Wysham stated, “I’m happy to have [the proposed dock] rebuilt in exactly that same footprint, but I’m not happy to have the new one now cross over the riparian right line.” Rec. 1, 36:30. Mr. Wysham later stated, “it’s very helpful to know where that

piling is in relation to [the littoral right line] and we can setup a sight along there and establish that along the shoreline prior to construction. I'm happy to concede the ten-foot set back and everything else that's in the law that might have required him to orient more towards the Pauls." Rec. 1, 1:24:11.

e. Neither the Objectors nor IDL offered any comments on the updated diagram.

f. Given that the proposed encroachment would be located more than ten (10) feet from the Paul Living Trust's littoral right line and that Mr. Wysham consented to have the dock located just one and a half (1.5) feet from Wysham Property, LLC's littoral right line, I find that the proposed encroachment would meet the minimum standard of IDAPA 20.03.04.010.34.

8. 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.

9. As to the navigational or economic necessity, justification for, or benefit derived from the proposed encroachment, Mr. O'Brien stated that the slip in the existing dock is too small for his boat, a section of the approach is sinking, and given the shallow nature of the lakebed near the shoreline, it is difficult to navigate into the slip which opens towards the shore. Rec. 1, 10:28, 24:26.

10. The navigational and economic necessity, justification, or benefit derived must be weighed against the Lake Values of protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. I.C. § 58-1301.

a. Protection of navigation.

The Pauls' objection to the proposed encroachment is limited to the ten (10) foot by twenty (20) foot section of dock extending towards their property. AR, p. 38 and Rec. 1, 45:20. The proposed dock would reduce the distance between their docks to twenty-six (26) feet. Rec. 1, 46:00. The Pauls' boat slip opens towards the shore. AR, p. 39. Regarding his egress, Mr. Paul stated, "when we take our boat out of our boat slip we have to back it out and back it out all the way to the front of the dock because it is shallow water back there and so we can't back it out and then go forward so we have to back it out all the way. And ending up with 26 feet between the two docks to do this is very little clearance to back a boat out." Rec. 1, 46:32. Mr. O'Brien faces a similar challenge accessing his slip right now and the configuration of the proposed dock seeks to address his challenge. Rec. 1, 24:30. The Applicant's proposed dock is located at least twenty (20) feet from the Pauls' littoral right line. AR, p. 221. This is double the distance required by the Rules. The Pauls' dock, which is not under review here, appears to be located very close to the Applicant's littoral right line. While I understand the concern about backing a boat out of the Pauls' slip, I find that the navigational benefits from the proposed dock to the Applicant outweigh the potential challenges to the Pauls' navigation. Moreover, the evidence of record does not indicate that the Pauls' will be prohibited from navigation, they will simply need to use more caution when moving between the two docks.

b. Recreation.

Mr. Paul stated that they have recreated in this area between their dock and the Applicant's proposed dock for fifty years and the proposed dock would limit the area where their family can play. AR, p. 37; Rec. 1, 46:09. While the area of the lake obstructed by the proposed dock would change, the repositioning of the Applicant's slip should improve the opportunity to recreate in the area between the docks. Mr. O'Brien stated that he plans to moor his boat within the slip as it would not fit in any other portion of the dock. The configuration of the proposed dock does not require the Applicant to ingress and egress between the docks, or near the shore, and should reduce the boat traffic operating between the Applicant's and the Pauls' dock – presumably creating a safer area to recreate.

c. Protection of aesthetic beauty.

The Pauls stated the dock would negatively impact their views from their house and dock. AR, p. 37 and Rec. 1, 47:13. While the proposed dock may change the Pauls' view, the Applicant, or any member of the public viewing docks along the shoreline, may view the proposed encroachment in a more positive light. I find that this criteria is neutral.

d. Protection of property, fish and wildlife habitat, aquatic life and water quality.

There is no claim or evidence in the record that the proposed encroachment would negatively impact property, fish and wildlife habitat, aquatic life, or water quality. I find that the proposed encroachment does not negatively impact property, fish and wildlife habitat, aquatic life, and water quality.

11. I find that the navigational and economic justification for, and benefits of, the proposed encroachment are not outweighed by the Lake Values.

12. However, the Applicant has not met the burden of proof to justify a new location of the OHWM. Even though the proposed dock appears to meet every other requirement, without evidence proving, how, and that the OHWM has actually changed, the surface decking area of the pier must be factored into the total surface decking area of the dock. Including those square feet in the calculation causes the dock to exceed the allowable size limit.

IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED that Encroachment Permit Application No. L95S0565D is DENIED, subject to any conditions imposed by the Director of the Idaho Department of Lands.

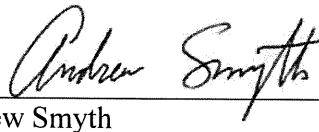
This order is a Preliminary Order, pursuant to Idaho Code §§ 58-1305(c), 67-5270 and 67-5272, and the Notice of Appointment of Hearing Officer and Hearing issued on November 18, 2020, which states as follows:

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), 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 25th day of January, 2021.



Andrew Smyth
Hearing Officer