

BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of Encroachment Permit Application No. ) Case No. PH-2021-PUB-20-002  
L-96-S-2633 )  
Troy Krumenaker – Troy’s Mini Barns, ) **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 December 10, 2020,<sup>1</sup> IDL received an encroachment permit application in this matter. A public hearing was held on June 10, 2021. Lincoln Strawhun served as duly appointed hearing coordinator. On June 11, 2021, the hearing coordinator issued his Preliminary Order, which contains an Issue, Findings of Fact, Discussion, and Conclusion of Law.

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

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<sup>1</sup> The Application was first received on or around December 10, 2020 filed by Avista Utilities. On April 28, 2021, Troy Krumenaker submitted documentation to replace Avista Utilities as the applicant.

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. ISSUE**

I delete the Preliminary Order's issue statement and insert the follow issue statement:

Whether Applicant's Encroachment Permit Application complies with the Lake Protection Act, Title 58, Chapter 13, and IDAPA 20.03.04.

## **III. FINDINGS OF FACT**

I adopt the Preliminary Order's Findings of Fact as my Findings of Fact.

## **IV. DISCUSSION**

I adopt the Preliminary Order's Discussion as my Discussion, except for the following amendments:

- I delete the second full paragraph on page 6, beginning with "Per IDAPA 03.04.015.13.e" and ending with "a presumed adverse effect." I replace it with the following paragraph:

Per IDAPA 20.03.04.015.13.e, "[i]t will be presumed, subject to rebuttal that . . . nonnavigational encroachments will have a [] adverse effect upon adjacent littoral rights if located closer than twenty-five (25) feet to adjacent littoral right lines." An IDL inspection report indicated that IDL staff inspected the site and concluded that no issues of concern were identified. At hearing, IDL also explained that the work will start within a Bonner County right-of-way with Bonner County's permission for the work and the Applicant owns Private Submerged Lands. IDL "determined that the project meets any setback requirements from adjacent littoral lines." No evidence or testimony on this topic was submitted by objectors. I conclude that the project meets setback requirements from adjacent littoral lines.

- I also add the following paragraph on page 7 after the end of the sentence on the second line and before the first full paragraph:

Additionally, the utility line will be bored at least four (4) feet below the bed of Fry Creek and no portion of the utility line will be visible within the banks of Fry Creek. Thus, it will not be visible or accessible to the boating public or the adjacent owners and will not affect aesthetic beauty, navigation, or recreation.

#### **V. CONCLUSION OF LAW**

I delete the Preliminary Order's Conclusion of Law and insert the follow sentence as my Conclusion of Law:

Applicant's Encroachment Permit Application complies with the Lake Protection Act, Title 58, Chapter 13, and IDAPA 20.03.04.

#### **VI. 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 Findings of Fact and Discussion with the amendments set forth herein as my decision in this matter. I hereby incorporate by reference the Preliminary Order's Findings of Fact and Discussion 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 Discussion and the above amendments, I HEREBY ORDER that Encroachment Permit Application L-96-S-2633 is APPROVED.

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

final decision. Pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.030.09, any aggrieved party other than the Applicant shall be required to deposit an appeal bond with the court in an amount to be determined by the court but not less than five hundred dollars (\$500) insuring payment to the Applicant of damages caused by delay and costs and expenses, including reasonable attorney fees, incurred on the appeal in the event the district court sustains the Final Order. The Applicant does not need to post a bond with the district court for an appeal. The filing of the petition for review to the district court does not itself stay the effectiveness or enforcement of the order under appeal. Idaho Code § 67-5274.

Dated this 12<sup>th</sup> day of July 2021.

A handwritten signature in black ink that reads "Dustin T. Miller". The signature is written in a cursive style with a large initial "D".

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DUSTIN T. MILLER

Director, Idaho Department of Lands

## CERTIFICATE OF MAILING

I hereby certify that on this 12<sup>th</sup> day of July 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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Troy Krumenaker  
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Sandpoint, ID 83864

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Avista Utilities  
Don Peterson  
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\_\_\_\_\_  
Kourtney Romine, Workflow Coordinator

**Copy sent via email and/or regular U.S. Mail, postage prepaid to Those Who Have Provided Comments.**

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**BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS**

In the Matter of:	)	
	)	Case No. PH-2021-PUB-20-002
ENCROACHMENT PERMIT APPLICATION	)	
No. L-96-S-2633,	)	
	)	<b>PRELIMINARY ORDER</b>
Troy Krumenaker – Troy’s Mini Barns,	)	
	)	
Applicant.	)	
_____	)	

After a hearing on this matter, held June 10, 2021, the hearing officer recommends to the Director of the Idaho Department of Lands (“IDL”) to approve Encroachment Permit Application No. L-96-S-2633 (“application”).

In summary, Applicant submitted an application to install a utility line under Fry Creek for the purpose of providing electricity to four tiny houses to serve as vacation rentals on a parcel of land owned by Applicant. Several neighbors filed objections. IDL and other agencies reviewed the proposed application and provided feedback.

On May 18, 2021, IDL sent *Notice of Appointment of Hearing Coordinator and Public Hearing* to schedule a public hearing in accordance with Idaho Code § 58-1306(c) to the interested parties—IDL, the Applicant and Objectors. The parties submitted comments and exhibits before hearing, and testimony at hearing. The hearing was held via Zoom videoconference. After the interested parties provided testimony, the hearing officer took public commentary from members of the public who participated in the proceedings.

After considering the written and testimonial evidence, this Preliminary Order is issued per Idaho Code § 67-5245 and IDAPA 20.01.01.730.02, and is organized by the following sections: *Issue, Findings of Fact, Discussion, Conclusion of Law and Preliminary Order.*

### **ISSUE**

Whether Applicant's Encroachment Permit Application complies with Idaho Code § 58-1301 and IDAPA 20.03.04.012.01.

### **FINDINGS OF FACT**

The hearing officer finds the following facts:

1. On December 10, 2020, Avista Utilities submitted an encroachment permit application to bore a power line under Fry Creek.
  - a. The application did not request to construct a dock.
2. On January 13, 2021, IDL received objection letters from adjacent neighbors Jon Hagadone and James and Deborah Pound.
3. On February 12, 2021, Avista Utilities waived the requirement of Idaho Code § 58-1306(c) that a public hearings will be held within 90 days from the application date.
  - a. On April 28, 2021, Troy Krumenaker submitted documentation to replace Avista Utilities as the applicant.
4. IDL provided application notices to adjacent neighbors in the area of the proposed application and to applicable federal, state and local resource agencies and organizations.



- a. Agencies receiving notice included the Idaho State Department of Agriculture; Idaho Transportation Department; Idaho Department of Fish and Game; Idaho Department of Environmental Quality; Idaho Department of Water Resources; Bonner County Parks, Recreation/Waterways; Bonner County Marine Division; Bonner County Building, Planning & Zoning; and the US Army Corps of Engineers.
  - b. Organizations receiving notice included the Idaho Conservation League, Bonner Environmental Alliance and Lake Pend Oreille Waterkeeper.
5. IDL's resource specialist visited the site for Public Trust Program Inspection Report. The report, dated April 13, 2021, concluded: "*No issues of concern identified.*"
6. Not a single federal or state agency replied to IDL's notice with comments or feedback expressing concerns with, or objecting to, the application.
  - a. Idaho Department of Environmental Quality ("DEQ") expressed that while it does not have water quality concerns pertaining specifically to the proposed application of installing a utility line under Fry Creek, it did have concerns for matters not at issue with the application—such as the overall construction and development of the project of building four tiny houses on the parcel of land (and potential impacts of that construction).
7. After its review of the application, and receiving comments and feedback from applicable agencies and organization, IDL recommended to approve the application.
8. Applicant's encroachment is a non-navigational encroachment. The proposed utility line would run from Bonner County public property underneath Fry Creek to Applicant's private property. The utility line would not run through neighboring private property.

## **DISCUSSION**

IDL's position. IDL referenced that Idaho Code § 58-1301 and IDAPA 20.03.04.012.01 declare that the public health, interest, safety and welfare requires all encroachments (upon, in or above the beds or waters of navigable lakes of the state) be regulated so 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; and that no encroachment can be made without prior approval.

That that most of the objectors' concerns dealt with upland issues (from the relevant watermark and affected area of the proposed utility line) that IDL has no jurisdiction over such as trespassing on private property, where future residents may park their vehicles, how future cabins may or not be able to build on a floodplain.

That IDL has no jurisdiction over issues above the ordinary or artificial high water mark; that the application type is a non-navigational encroachment; that IDAPA 20.03.04 does not have any specific requirements for minimum shoreline length or square footage requirements for non-navigational encroachments.

That since the proposed work is under Fry Creek, there is no affect or impact of the line of navigability; that the beginning of the bore entry point of the utility line is within a Bonner County right-of-way, and the exit point is on Applicant's property, there is no violation of setback requirements from neighboring property owners.

That IDL relies on its sister agencies for the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality; that all applicable agencies were noticed and none expressed concerns or objections to the application; that based on IDL's review of the application, agency comments, and public comments, IDL concludes that the application complies with Lake Protection Act, Title 58, Chapter 13, Idaho Code and recommends approval.

Applicant's position. Applicant and his contractor answered specific questions from IDL regarding the depth of Fry Creek where the utility line would be underneath, the expected project completion date, dimensions and distances, as well as questions and concerns from the objectors.

Applicant asserted that he has tried to work with his neighbors and be nice; that he has never intended or tried to cause damage to surrounding properties; that the intention is that the rental vacation houses will only be accessible by water (and not cause parking issues from the public road); that water and sewage needs could be self-contained on his parcel of land without further construction projects affecting his neighbors; that he has received cooperation from landowners on the other side of Fry Creek; and that the allegations from the objectors and neighbors on the project-side of Fry Creek are untrue.

Objectors' position. Objectors, a representative from the Lake Pend Oreille Waterkeeper (LPOW) and public commenters, expressed objections and concerns regarding the Applicant's past development efforts and doubts that he would comply with requirements of future development; that his application is incomplete in that it does not address specifics of how building the tiny homes will impact the environment.

That construction of the tiny homes will increase boat traffic, cause parking problems and noise pollution, have negative effects of fish and wildlife; that the parcel is on a floodplain, which Applicant has not accounted for in his plans; that Applicant has trespassed on private property (and was issued a warning by the Sheriff's Department) and caused damage to private property with moving equipment; that Applicant has a history of disregarding property rights of his neighbors and the environmental effects of his actions.

That Applicant's project already has and will continue to disrupts the enjoyment of neighboring property owners; that Applicant has broken federal rules, including a lack of notice and permit with the Environmental Protection Agency; that the utility line under Fry Creek can cause a magnetic force with negative consequences per Faraday's law of the U.S. Department of Energy Office of Scientific and Technical Information; that studies have shown that aquatic

species are electro sensitive and are affected by electromagnetic fields; that the electromagnetic fields can also cause a danger to humans swimming with currents to the body's nervous system, causing electronic shock drowning; and that the U.S. Supreme Court has ruled that all navigable water is owned by federal or state government; and that Applicant cannot own the land under Fry Creek where his utility cable will be.

Analysis and reasoning supporting recommendation. While objectors' concerns are understandable regarding the overall project of constructing four tiny houses on Applicant's parcel, and the hearing officer recognizes that the objectors care about their property and the encompassing environment, Applicant's application does not violate any law.

Per IDAPA 20.03.04.015.13.e, there is a presumed adverse effect—that an applicant would have to overcome—if the encroachment is a navigational encroachment. However, in this case, Applicant's encroachment is non-navigational because it is under Fry Creek and does not impact navigation. (Hearing Record; IDL-1). It does not request to build a dock. (Hearing Record). Therefore, Applicant does not have to overcome a presumed adverse effect.

The hearing officer recognizes that the objectors described multiple examples of Applicant's disregard for property rights of neighbors. (Hearings Record; Objector Exhibits). However, there is no requirement in the rules of past compliance with property laws—especially when the infraction was a warning—before a permit can be granted.

The only requirement is that the state regulate encroachments and give consideration to the encroachment's effect on the environment as described in Idaho Code § 58-1301 and IDAPA 20.03.04.012.01. Here, IDL gave notice of Applicant's application to its sister agencies for the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic

beauty and water quality and not a single agency expressed concerns or objections to the application. (Hearing Record; IDL-1).

Further, most—if not all—of the objectors’ concerns dealt with upland issues that IDL has no jurisdiction over such as trespassing on private property, where future residents may park their vehicles, how future cabins may or not be able to build on a floodplain. (Hearing Record; IDL-1).

Concerning the specific request in Applicant’s application (to run a utility line from Bonner County property underneath Fry Creek to Applicant’s property—and not run through neighboring private property), the objections to the application lacked relevant reasons to deny the permit. The permit would only be to install the utility line. (Hearing Record; IDL-1). Any other future construction such as a dock, or water or sewage, or the tiny home structure would be subject to other regulations that Applicant would have to comply with.

It is reasonable that neighboring property owners would want a complete project plan and review before a permit could be granted to start the process with a utility line. However, the rules do not require that. In conclusion, the application and its review by IDL complies with the rules and should be approved.

#### **CONCLUSION OF LAW**

Applicant’s encroachment application No. L-96-S-2633 complies with Idaho Code § 58-1301 and IDAPA 20.03.04.012.01.

#### **PRELIMINARY ORDER**

The hearing officer recommends that the Director of the Idaho Department of Lands issue a Final Order approving Applicant’s encroachment application No. L-96-S-2633.

DATE: June 11, 2021.

STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL

By: /s/ Lincoln Strawhun  
LINCOLN STRAWHUN  
Hearing Officer

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Idaho Code § 67-5245 and IDAPA 20.01.01.730.02 addressing petitions for review of preliminary orders are not applicable per the *Notice of Appointment of Hearing Coordinator and Public Hearing, May 18, 2021*, and Idaho Code § 58-1306, which requires a final order to be issued within 30 days of the hearing date.

\* \* \* \* \*