

BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of Encroachment Permit Application No. ) Case No. PH-2021-PUB-20-003  
L-96-S-2687 )  
 ) **AMENDED FINAL ORDER**  
William Brownlee – Camp Bay Community )  
Association, Inc., )  
 )  
 )  
Applicant. )

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The Director hereby WITHDRAWS the Final Order issued on September 24, 2021, and ISSUES this Amended Final Order. The Amended Final Order corrects an incorrect page number reference on the second line of the Final Order’s Conclusions of Law section as well as several clerical errors. The Director has authority to amend an order on his own motion by withdrawing the final order and issuing a new amended final order. IDAPA 20.01.01.760.

**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 28, 2021,<sup>1</sup> IDL received an encroachment permit application filed by Camp Bay Community Association, Inc. (“CBCA”). A public hearing was held on August 25, 2021. Chris Bromley served as duly appointed hearing coordinator. On September 13, 2021, the hearing coordinator issued his Preliminary Order, which contains a Findings of Fact and Conclusions of Law.

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

- I delete Findings of Fact paragraph one, and insert the following amended paragraph one in its place:<sup>2</sup>

On May 28, 2021, the applicant, Camp Bay Community Association, Inc.

(“CBCA”) filed a complete Joint Application for Permit, numbered L-96-S-2687

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<sup>1</sup> IDL received CBCA’s initial Application on May 13, 2021, and a complete Application on May 28, 2021.

<sup>2</sup> The Preliminary Order states that the Application is for “two community docks.” However, the Application plainly requests a permit for the entire dock system as a community dock as evidenced by it checking the box for “community dock” on *IDL’s Commercial/Community/Non-navigational Encroachment Permit Application*, providing diagrams of all 13 docks, and requesting approval of 19,925 square feet of docks, which is the total square footage of all docks. IDL’s hearing statement describes this Application for all 13 docks, including the two multi-slip docks, as a “community dock system.” To ensure clarity in this order, I will use the term “community dock system” in this Final Order to refer to all 19,925 square feet of docks proposed in the Application.

(“Application”) with the Idaho Department of Lands (“Department” or “IDL”) for a community dock system composed of 13 docks and a boat ramp. The proposed work would take place within Camp Bay on Lake Pend Oreille.

## 1. CONCLUSIONS OF LAW

I adopt the Preliminary Order’s Conclusions of Law, except as follows:

- I delete paragraph 14’s second sentence on page 13 and insert the following amended sentence in its place:

IDL received CBCA’s initial Application on May 13, 2021, and IDL deemed CBCA’s Application complete on May 28, 2021.

- I delete paragraph 19 on page 14 and replace it with the following paragraph 19:

19. CBCA proposes to construct a community dock system and a boat ramp in and around the bed of Lake Pend Oreille. The Lake is a navigable body of water that is regulated by the Department. *Kaseburg v. State of Idaho*, 154 Idaho 570, 572, 300 P.3d 1058, 1060 (2013).

- I amend paragraph 20 on page 14 with two changes:

- I delete the first sentence and insert the following sentence in its place:

- The Application was filed for a community dock system and a boat ramp; this section addresses the community dock system.

- In the second sentence of the paragraph, I delete the word “possession” and replace it with the word “possessing.”

- I delete paragraph 21 on page 14 and 15 and insert the following paragraph 21 in its place:

21. The Application shows a community dock system that includes 13 docks along Camp Bay. The Application provides that “all littoral rights for the

approximate 3,117 linear feet of lake frontage on Camp Bay within the master plan will be assigned to the Camp Bay Community Association and support the community dock application.” *Application* (emphasis added).

- I amend paragraph 36 on page 18 by deleting the words “community docks are” and inserting in its place “community dock system is.”
- I amend Paragraph 48 on page 22 with two changes:
  - I delete the first sentence and insert the following sentence in its place: “The Application proposes construction of a community dock system with the docks not extending beyond the line of navigability.”
  - I delete the words “community docks” in sentences five and seven and replace them with the words “community dock system” in both sentences.
- I amend Paragraph 54 on page 24 by deleting the words “community docks” and inserting “community dock system.”

### **ORDER**

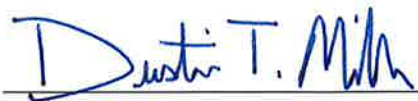
I conclude that the hearing coordinator’s Preliminary Order is based on substantial evidence in the record, and I adopt the Preliminary Order’s Findings of Fact and Conclusions of Law as my decision in this matter, except as specifically set forth herein. I hereby incorporate by reference the Preliminary Order’s 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 Findings of Fact and Conclusions of Law, I HEREBY ORDER that Encroachment Permit Application L-96-S-2687 is **CONDITIONALLY APPROVED** as to the community dock system and **DENIED** as to the boat ramp. Approval is subject to:

- Camp Bay Community Association establishing written proof by deeds or leases, to the satisfaction of the Department, of its littoral ownership. The written evidence shall be provided to the Department no later than thirty (30) days after the issuance of this Final Order. If the required written evidence is not provided within thirty (30) days after the issuance of this Final Order, then the conditional approval of the permit application shall expire.
- A permit condition that construction is undertaken and completed during the fall drawdown and winter pool, with current sound / vibration suppression and temporary erosion and storm water best management practices.

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 27th day of September 2021.

A handwritten signature in blue 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 SERVICE

I hereby certify that on this 27th day of September, 2021, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

William Brownlee  
Camp Bay Community Association Inc  
7033 E Greenway Parkway, Suite 100  
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- U.S. Mail, postage prepaid
- Hand Delivery
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[jkelly@m3companiesllc.com](mailto:jkelly@m3companiesllc.com)

Steve Holt  
Lake Pend Oreille Waterkeeper

- U.S. Mail, postage prepaid
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Chris Bromley, Hearing Coordinator

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Renee Jacobsen, Management Assistant

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

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**BEFORE THE DEPARTMENT OF LANDS  
OF THE STATE OF IDAHO**

In the Matter of:

Encroachment Permit Application  
No. L-96-S-2687

William Brownlee – Camp Bay Community  
Association Inc.,  
Applicant.

Case No. PH-2021-PUB-20-003

**PRELIMINARY ORDER**

**FINDINGS OF FACT**

1. On May 27, 2021, the applicant, Camp Bay Community Association, Inc. (“CBCA”) filed a complete *Joint Application for Permit*, numbered L-96-S-2687 (“Application”) with the Idaho Department of Lands (“Department” or “IDL”) for two multi-slip community docks and a boat ramp. The proposed work would take place within Camp Bay on Lake Pend Oreille.

2. As stated in the explanatory summary prepared by CBCA (“CBCA Explanatory Summary”), the property is intended as a planned development for:

35 to 40 custom homesites on 427 acres. The community will be gated with controlled access for the residents of Camp Bay and the residents of South Camp Bay Road. The community has been designed to provide all Camp Bay residents with access to the lake via an onsite boat launch and a private dock for recreation on Lake Pend Oreille. In addition to the approximately 14 residents on South Camp Bay Road. Providing this access will reduce congestion at the Bottle Bay and Garfield Bay boat launches, congestion on local roads and dust pollution to the lake.

As part of this application, all littoral rights for the approximate 3,117 linear feet of lake frontage on Camp Bay within the master plan will be assigned to Camp Bay Community Association and support this community dock application. In total, M3



is proposing to build 19,925 square feet of docks as compared to the 21,819 square feet allowed. The lakefront lots have been designed to provide individual docks (11) for each lakefront lot owner, in addition to the community docks for those residents who purchase non-lakefront lots (28). . . . The community dock will be a floating dock to mitigate the impact of pilings, with only six pilings below the ordinary low water level.

The proposed locations of the docks are parallel to the property lines and approximately 25' off the property line of each lakefront lot line to allow for adequate separation between docks. . . . This adjustment from a perpendicular dock maintains the setback from the adjacent property owner without impacts to the line of navigability, as the docks for these lots are in the corner of the bay.

. . . .

The Camp Bay property has a long and rich history on Lake Pend Oreille. Previously there were 21 cabins on the property, each with a dock on the lake. Six of those residences also had boat houses along the bay. All such docks and boat houses have been removed from the property.

The two community docks are located within the three-acre community recreation site for residents of Camp Bay that is planned for the southwest corner of the bay. The community docks will have a total of 30 slips and will provide non-waterfront lot owners access to a boat slip.

. . . .

A boat launch ramp is also being proposed for the community recreation facility that will serve the residents of the Camp Bay community, and the property owners along South Camp Bay Road. In meeting with the neighbors on South Camp Bay Road, they expressed their request for a boat launch facility in the bay due to heavy traffic at other launch facilities throughout the summer months. The Bottle Bay boat launch is located approximately 5.5 miles from Camp Bay and requires residents to pay a fee to launch and retrieve boats. Garfield Bay public boat launch is located approximately 6.3 miles from Camp Bay and is very congested during the peak recreational season. . . . The closest launch with year-round access is located in the city of Hope across the lake. At Camp Bay, the proposed launch facility extends up to 30' [] past the ordinary low water level to allow for year-round access for residents, as well as emergency service access [to] the lake.

*CBCA Explanatory Summary* at 1-2.

3. Included in the Application was an *Affidavit of Legal Interest*, dated May 26, 2021, signed by James Green, President of Green Enterprises, Inc. (“Green Enterprises”), stating permission was granted to M3 ID Camp Bay, LLC (“M3”) and CBCA to file the Application.

4. On June 4, 2021, the Department sent notice of the Application to adjacent neighbors, Tim and Theodora D’orazi (“D’orazi”) and Jim and Julie Frank (“Frank”).

5. On June 4, 2021, the Department sent a copy of the Application to other agencies and entities for comment.

6. Notice of the Application was published in the Bonner County Daily Bee for two consecutive weeks on May 27, 2021 and again on June 3, 2021.

7. On June 25, 2021, the Department received a comment letter from the Idaho Department of Fish & Game (“IDFG”). IDFG did not oppose the Application; however, the agency did recommend minimizing the footprint and to use “all current sound/vibration suppression and temporary erosion and stormwater BMPs . . . during construction . . . and completing work during the fall drawdown and winter pool . . . .”

8. On July 6, 2021, the Department received a comment and request for hearing from Steve Holt, Executive Director of Lake Pend Oreille Waterkeeper (“LPOW”). While not directly opposing the Application, LPOW cautioned the Department that “this project has a long history, a recent Petition for Judicial Review has been filed, and according to Panhandle Health no sewage disposal system, whether it be community or individual septic, has been approved. Due to a number of uncertain potential outcomes LPOW respectfully requests a public hearing for this application so that all community members and agencies involved are informed with the most current information regarding the entire project. . . . If in fact IDL approves the application is should only be on the condition that the Petition for Judicial Review be settled and

Panhandle Health has approved a reasonable solution for sewage treatment.” Included as an attachment to the comment, LPOW attached a *Petition for Judicial Review* filed with the Bonner County district court on behalf of Alfred and Jennifer Arn against Bonner County and the Bonner County Board of County Commissioners.

9. On July 28, 2021, the Director of IDL appointed Chris M. Bromley to serve as hearing coordinator, tasked with the responsibility to issue a preliminary order, and noticing a hearing to take place on August 25, 2021.

10. On August 13, 2021 and again on August 21, 2021, IDL published the time, date, and location of the public meeting in the Bonner County Daily Bee.

11. On August 23, 2021, a comment was received by IDL from Jennifer and Fred Arn (“Arn”), stating they “are in opposition of any approval for a ‘community’ marina at this time. Currently the decision made by the Bonner County Commissioners to give a portion of Camp Bay Road, a public road, to the developers is under a judicial review.” Emphasis in original. A second concern expressed by Arn is the “legality of how the lots in this community were created. They were made with no public over-site or Planning Commission review, using ‘lot line adjustment’ . . . . If challenged in court, it is possible that the location for the marina would need to be shifted.” Finally, Arn expressed concern as to whether the issue of “septic/sewer . . . has been resolved as of yet.” “So for these reasons we hope that IDL will hold off approving the proposed marina until these issues have been resolved.”

12. On August 23, 2021, a hearing statement (“IDL Hearing Statement”) was filed by the Office of the Attorney General, State of Idaho, on behalf of Mike Ahmer, Lands Resource Supervisor for the Mica Bay Supervisory Area of the Department. The IDL Hearing Statement distinguished between issues above and below the ordinary high water mark (“OHWM”), with

upland issues, such as septic and roads, which are outside IDL’s jurisdiction. *IDL Hearing Statement* at 8. In general, the IDL Hearing Statement explained that the Application for community docks could be approved if properly conditioned and contingent on CBCA “providing proof of littoral ownership.” *Id.* at 9. As to ownership, the Department found that Bonner County records show M3 is the record owner of the property. As to the boat ramp, the IDL Hearing Statement stated Department “guidelines typically do not allow private communities to install boat launches, based on the wide availability of public boat ramps.” *Id.*

13. The hearing was held on August 25, 2021, starting at approximately 6:00 p.m. Pacific time. The first person to provide comment was Alex Brownlee on behalf of the developer. Mr. Brownlee used a PowerPoint in aid of his comments to explain the scope of the project.

14. The next person to provide comment was Steve Holt, Executive Director of LPOW. Mr. Holt summarized his oral comments in a letter that was received into the record by the Hearing Coordinator. Mr. Holt took issue with how the IDL Hearing Statement calculated the square footage of dock that CBCA could be entitled to, asking IDL to exercise its discretion to limit the size, or to deny the application.

15. The next comments were provided by Gary Green, Randy Green, and Kathy Leflor, children of Jeanne and Ralph Green. *See Green v. Green*, 161 Idaho 675, 677, 389 P.3d 961, 963 (2017). Gary commented he is/was a 10% shareholder in Green Enterprises, which owned the property that will make up CBCA. Gary explained the property was intended to be placed in a conservation easement and should not have been sold to developers. Gary also explained the area where the community docks will be placed is known as a spawning area for Kokanee salmon. Randy commented he too is/was a 10% shareholder in Green Enterprises.

Because he is familiar with the property, Randy commented that there will be swells and wave action from the Clark Fork gorge that the design has not accounted for. Kathy commented the property was intended to be placed in a conservation easement, as the property had been in the family for 120 years, with her mother never intending that the property become a gated community. Gary, Randy, and Kathy all seemed to question the legality of the sale from Green Enterprises.

16. The next comment was provided by Eric Skinner, who formally represented Green Enterprises through the sale to M3. Mr. Skinner explained some of his understanding of the sale and some of the history associated with Green Enterprises, saying some of the matters had been looked at by the Idaho Supreme Court.

17. The next comment was given by Mr. Ahmer on behalf of IDL. Mr. Ahmer explained the waterfront owners within CBCA gave up their littoral rights to the community, allowing CBCA to construct a community dock, similar to other permitting seen on Lake Pend Oreille and Lake Coeur d'Alene. Mr. Ahmer clarified page 7, section III.A of the IDL Hearing Statement to explain that, of the 3,100 lineal feet of shoreline, the eastern most parcel within the development envelope is owned by Camp Bigfoot LLC ("Camp Bigfoot"). Given what he knows today, and subject to additional documentation, Mr. Ahmer said ownership in CBCA/M3 appears sound. Mr. Ahmer then read the IDL Hearing Statement into the record.

18. William Brownlee, on behalf of the Applicant, closed the hearing with his comments. Mr. Brownlee explained the 3,100 linear feet of shoreline is correctly calculated due to Camp Bigfoot not possessing littoral rights, as those littoral rights were assigned to M3 before the conveyance to Camp Bigfoot. In support of this statement, Mr. Brownlee cited the Hearing Coordinator to and provided him a copy of an *Assignment and Assumption of Littoral Rights*,

recorded in Bonner County on June 29, 2021 as Instrument No. 986319. Mr. Brownlee also stated he had spoken with Frank, a littoral neighbor, who did not oppose the Application. Mr. Brownlee provided the Hearing Coordinator with an email from Frank explaining they have “no objections to the dock plan submitted by M3Companies for the development project in Camp Bay.”

19. As explained by the Hearing Coordinator at the close of the hearing, and due to the hearing being conducted via Zoom, documents in aid of comment that were received by Mr. Ahmer by noon Pacific time on August 26, 2021 would become part of the record.

20. All exhibits, written comments, oral comments, and documents submitted to Mr. Ahmer in aid of comments were considered by the Hearing Coordinator.

### **CONCLUSIONS OF LAW**

1. The Hearing Coordinator was tasked by the Department to issue a preliminary order. Idaho Code § 67-5245 governs preliminary orders and states as follows:

- (1) A preliminary order shall include:
  - (a) A statement that the order will become a final order without further notice; and
  - (b) The actions necessary to obtain administrative review of the preliminary order.
- (2) The agency head, upon his own motion may, or, upon motion by any party shall, review a preliminary order, except to the extent that:
  - (a) Another statute precludes or limits agency review of the preliminary order; or
  - (b) The agency head has delegated his authority to review preliminary orders to one (1) or more persons.
- (3) A petition for review of a preliminary order must be filed with the agency head, or with any person designated for this purpose by rule of the agency, within fourteen (14) days after the service date of the preliminary order unless a different time is required by other provision of law. If the agency head on his own motion decides to review a preliminary order, the agency head shall give written notice within fourteen (14) days after the issuance of the preliminary order unless a different time is required by other provisions of law. The fourteen (14) day period for filing of notice is tolled by the filing of a petition for reconsideration under section 67-5243(3), Idaho Code.

(4) The basis for review must be stated on the petition. If the agency head on his own motion gives notice of his intent to review a preliminary order, the agency head shall identify the issues he intends to review.

(5) The agency head shall allow all parties to file exceptions to the preliminary order, to present briefs on the issues, and may allow all parties to participate in oral argument.

(6) The agency head shall:

(a) Issue a final order in writing, within fifty-six (56) days of the receipt of the final briefs or oral argument, whichever is later, unless the period is waived or extended with the written consent of all parties, or for good cause shown;

(b) Remand the matter for additional hearings; or

(c) Hold additional hearings.

(7) The head of the agency or his designee for the review of preliminary orders shall exercise all of the decision-making power that he would have had if the agency head had presided over the hearing.

I.C § 67-5245.

2. According to the *Notice of Appointment of Hearing Coordinator and Public Hearing*, “the Hearing Coordinator shall submit a preliminary order to the Director of IDL, who shall then issue a Final Order no more than thirty (30) days after the conclusion of the hearing. As provided in Idaho Code § 67-5240, the contested case provisions of the Administrative Procedures Act do not apply where the legislature has directed the use of alternative procedures. Because the legislature has enacted specific alternative procedures in Idaho Code § 58-1306 that require a final order to be issued within thirty (30) days of the hearing, and leave insufficient time to consider petitions for review of the preliminary order, the procedures of Idaho Code § 67-5245 addressing petitions for review of preliminary orders are not applicable.” *Notice of Appointment of Hearing Coordinator and Public Hearing* at 1-2.

3. According to Idaho Code:

All such hearings shall be public and held under rules promulgated by the board under the provisions of chapter 52, title 67 of the Idaho Code. The board shall render a decision within thirty (30) days following conclusion of the hearing and a copy of the board’s decision shall be mailed to the applicant and to each person or agency appearing at the hearing and giving testimony in support of or in

opposition to the proposed encroachment. Any applicant or other aggrieved party so appearing at a hearing shall have the right to have the proceedings and decision of the board 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 board's decision.

I.C. § 58-1306(c).

**A. The Applicant Bears The Burden Of Persuasion**

4. The applicant bears the burden of persuasion. “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). “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).

**B. The Application Meets The Procedural Requirements Of I.C. § 58-1306 And IDAPA 20.03.04, Subject To CBCA Establishing Evidence To The Satisfaction Of The Department That It Is A Littoral Owner**

5. Certain requirements contained in I.C. § 58-1306 and IDAPA 20.03.04 must be met for an application to be considered by IDL.

**a. The Application is sufficiently documented**

6. “Applications for construction, enlargement or replacement of a nonnavigational encroachment, a commercial navigational encroachment, a community navigational encroachment, or for a navigational encroachment extending beyond the line of navigability shall be submitted upon forms to be furnished by the board and accompanied by plans of the proposed encroachment containing information required by section 58-1302(k).” I.C. § 58-1306(a); *see*



also IDAPA 20.03.04.020.07. Plans are defined as meaning, “maps, sketches, engineering drawings, aerial and other photographs, word descriptions, and specifications sufficient to describe the extent, nature and approximate location of the proposed encroachment and the proposed method of accomplishing the same.” I.C. § 58-1302(k); *see also* IDAPA 20.03.04.020.07.

7. Here, the Application was submitted on the *Joint Application for Permits* form, approved for use by the Department. Through maps, aerial images, and site plans, CBCA describes the work that will occur. Therefore, the Application meets the requirements of I.C. § 58-1306(a), I.C. § 58-1302(k), and IDAPA 20.03.04.020.07.

**b. CBCA must establish proof of littoral ownership to the satisfaction of the Department**

8. Applications must be signed by the persons who are the “littoral owners or lessees of a littoral owner . . . .” IDAPA 20.03.04.020.02.

9. Here, the Application was filed in the name of CBCA and signed by William Brownlee, agent for CBCA / M3. According to the Application, the littoral rights are, “[o]wned, fee simple title holder.” As required by the Department’s rules, documents needed to be filed to verify “Proof of current ownership.” IDAPA 20.03.04.020.07.a.iii. Included with the Application was an *Affidavit of Legal Interest*, signed by James Green, President of Green Enterprises, authorizing M3 and CBCA to file the Application. This document leads to the conclusion that the property is owned by Green Enterprises, not M3 and/or CBCA.

10. Comments provided by Gary Green, Randy Green, and Kathy Leflor at the hearing raised questions as to whether Green Enterprises could convey the property due to their interests. In *Green*, the Idaho Supreme Court explained the history associated with Green

Enterprises as it relates to Gary, Randy, and Kathy, establishing that Green Enterprises was free to convey the property:

This is an appeal from the district court’s order granting summary judgment and dismissing a lawsuit brought by Dwight Randy Green, Kathy Leflor, and Gary Green (collectively “Siblings”) against James Green (“James”). Siblings brought this action to challenge the Sixth Amendment to the Ralph Maurice and Jeanne Green Revocable Inter Vivos Trust (“the Trust”), alleging it was the product of undue influence. The Trust was amended from an equal distribution between all of Ralph and Jeanne Green’s children to a 100% distribution to James to the exclusion of the Siblings. The district court granted summary judgment after determining that Siblings had failed to show a genuine issue of material fact which would support a finding of undue influence. We affirm.

....

In 1965, Jeanne Green inherited approximately 400 acres of property on Lake Pend Oreille in Bonner County. The property consists of timberland and includes 3,500 feet of shoreline. In 1976, Ralph and Jeanne formed Green Family Enterprises, Inc. (“the corporation”) and Jeanne conveyed the property to the corporation . . . .

Ralph and Jeanne have five children, Siblings, James, and Sheila Green (“Shelia”). Shelia is disabled and not a party to this action. By 1998, Ralph and Jeanne had gifted a 10% interest in the corporation to each of the Siblings and James. IN 1998, Ralph and Jeanne created the Trust to hold the remaining 60% interest in the corporation. The Trust was to be distributed equally among their children upon Ralph and Jeanne’s death.

....

In October of 2011, Ralph told Wallace “that he and Jeanne were frustrated and tired of the process of dealing with Gary, Kathy, and Randy.” Ralph then advised Wallace to prepare the Sixth Amendment as he and Jeanne felt that James was best able to follow his and Jeanne’s wishes. . . . The Sixth Amendment to the Trust provided that James would receive all of the Trust assets upon Ralph and Jeanne’s deaths.

Siblings brought this action on September 23, 2013. On August 29, 2014, James filed a motion for partial summary judgment. . . . On November 20, 2014, the district court entered its memorandum decision and order granting James’ motion for summary judgment.

....

We affirm the judgment of district court and award costs on appeal to James.

*Green* at 677-78, 682, 389 P.3d at 963-64, 968.

11. In the IDL Hearing Statement, it was stated: “the littoral parcels were owned by Green Enterprises, Inc. According to Bonner County records, M3 ID Camp Bay, LLC stated that all littoral rights will be assigned to CBCA. IDL recommends that as a condition of approval of this Application, CBCA be required to provide evidence in the form of a deed or lease that it is the owner of the littoral parcels or of the littoral rights.” *IDL Hearing Statement* at 7 (emphasis added).

12. At the hearing, Mr. Ahmer clarified what was explained in the IDL Hearing Statement as to what is understood from Bonner County records. According to Mr. Ahmer, Bonner County shows that, with the exception of the eastern most parcel within the development envelope, the property is owned by M3. As to the eastern most parcel, Bonner County shows that land is owned by Camp Bigfoot. William Brownlee, in his comments, explained that while this is true, the littoral rights associated with that property, as well as the property owned by M3, were assigned to CBCA, as documented in *Assignment and Assumption of Littoral Rights*, recorded in Bonner County on June 29, 2021 as Instrument No. 986319.

13. While the Court’s decision in *Green* shows that Green Enterprises is free to convey the property, and while there are comments in the record stating the property was conveyed to M3, there are no deeds to establish this fact. Without deeds, the Hearing Coordinator cannot conclusively find that the *Assignment and Assumption of Littoral Rights* from M3 to CBCA is effective. As a condition of any approval, CBCA must establish evidence to the satisfaction of the Department that it is a littoral owner of the littoral rights that were purportedly assigned to it by M3 by providing evidence in the form or deeds or leases.

**c. The Application was properly noticed**

14. According to Idaho Code, “Within ten (10) days of receipt of an application . . . the board shall cause to be published . . . once a week for two (2) consecutive weeks, a notice advertising of the application and describing the proposed encroachment and general location thereof.” I.C. § 58-1306(b); *see also* IDAPA 20.03.04.030.01. The Application was deemed complete and stamped received by the Department on May 27, 2021. Notice of the Application was published in the Bonner County Daily Bee on May 27, 2021 and June 3, 2021. Therefore, the Application was timely published in accordance with Idaho Code § 58-1306(b) and IDAPA 20.03.04.030.01.

15. According to Idaho Code, “Any resident of the state of Idaho, or a nonresident owner or lessee of real property adjacent to the lake, or any state or federal agency may, within thirty (30) days of the first date of publication, file with the board an objection to the proposed encroachment and a request for a hearing on the application.” I.C. § 58-1306(c); *see also* IDAPA 20.03.04.030.04. Notice was first published in the Bonner County Daily Bee on May 27, 2021 and June 3, 2021. The last written comment taken into the record by the Department was received before 12:00 p.m. Pacific time on August 26, 2021; therefore, the requirements of I.C. § 58-1306(c) are satisfied.

16. All oral testimony, written comments, and exhibits were considered by the hearing coordinator.

17. According to Idaho Code, a hearing may be held if an objection requesting a hearing is made, or upon the Department’s own discretion. I.C. § 58-1306(c); *see also* IDAPA

20.03.04.030.05. Here, LPOW requested a hearing with IDL noticing the same. Therefore, the hearing requirement of I.C. § 58-1306(c) and IDAPA 20.03.04.030.05 is satisfied.

**C. The Department Possess The Authority To Regulate Lake Pend Oreille**

18. The Department is vested with the authority, in the interest of “public health, interest, safety and welfare [to regulate] all encroachments upon, in or above the beds of waters of navigable lakes of the state . . . 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.” I.C. § 58-1301.

19. CBCA proposes to construct two community docks and a boat ramp in and around the bed of Lake Pend Oreille. The Lake is a navigable body of water that is regulated by the Department. *Kaseburg v. State of Idaho*, 154 Idaho 570, 572, 300 P.3d 1058, 1060 (2013).

**D. The Proposed Encroachment For The Community Docks Is Approvable Subject To CBCA Establishing Evidence To The Satisfaction Of The Department Of Its Littoral Ownership**

**a. The Application meets the requirements for community docks**

20. The Application was filed for two community docks and a boat ramp; this section addresses the community docks. IDAPA defines a community dock as: “A structure that provides private moorage for more than two (2) adjacent littoral owners, or other littoral owners possession a littoral common area with littoral rights including, but not limited to homeowner’s associations. No public access is required for a community dock.” IDAPA 20.03.04.010.11.

21. In documents associated with the Application, lots are platted along Camp Bay with individual docks and a recreation site where the community docks will be located. *Camp Bay Overall Dock Summary*. The CBCA Explanatory Summary explains there will be 11

lakefront lot owners and the community docks will provide moorage for the 28 non-lakefront lot owners, with the community docks having a total of 30 slips. “The two community docks are located within the three-acre community recreation site for residents of Camp Bay that is planned for the southwest corner of the bay. . . . The boat slips will be managed by the Camp Bay Community Association under a license agreement with the non-waterfront lot owners.” *CBCA Explanatory Statement* at 1. “As part of this Application, all littoral rights for the approximate 3,117 linear feet of lake frontage on Camp Bay within the master plan will be assigned to the Camp Bay Community Association and support the community dock application.” *Id.* (emphasis added).

22. Assuming CBCA can establish its littoral rights to the satisfaction of the Department, the Application will meet the ownership requirements for a community dock.

**b. Assuming CBCA can establish its littoral rights to the satisfaction of the Department, the shoreline exceeds 50 feet**

23. According to the Application, there is 3,117 feet of shoreline upon which to construct the encroachment. According to the IDL Hearing Statement, “the length of the applicable water frontage is approximately 3,100 feet.” *IDL Hearing Statement* at 7. *See also Green* at 677, 389 P.3d at 963 (“The property consists of timberland and includes 3,500 feet of shoreline.”).

24. According to IDL Rule, “A community dock may not have less than fifty (50) feet combined shoreline frontage.” IDAPA 20.03.04.015.02.c.

25. Using IDL’s more conservative shoreline measurement, there is significantly more than fifty (50) feet of frontage. Provided CBCA establishes proof of littoral ownership to the satisfaction of the Department, the Application is approvable.

**c. The square footage of the proposed encroachments is less than allowed under IDAPA**

26. According to the Application, CBCA seeks 19,925 square feet of decking. *See also IDL Hearing Statement at 7.*

27. According to IDL Rule: “The surface decking area of the community dock is limited to the product of the length of shoreline multiplied by seven (7) square feet per lineal foot or a minimum of seven hundred (700) square feet. However, the Department, at its discretion, may limit the ultimate size when evaluating the proposal and public trust values.” IDAPA 20.03.04.015.02.c.

28. Here, and assuming CBCA can establish evidence of littoral ownership to the satisfaction of the Department, the evidence shows there is either 3,117 feet of shoreline or 3,100 feet of shoreline. Using IDL’s more conservative figure, and when multiplied by seven (7), the maximum square footage CBCA is entitled to is 21,700. The Application seeks 19,925 square feet, which is 1,775 square-feet less than the maximum allowable square footage allowed by IDL Rule; therefore, the Application should be approved on this basis.

**d. The Application does not unreasonably extend into the Lake**

29. According to the Application, the encroachment will extend 203 feet into the Lake. According to the IDL Hearing Statement, the encroachment will extend “a maximum of 206 feet.” *IDL Hearing Statement at 7.*

30. According to IDL Rule: “Docks, piers, or other works may extend to a length that will provide access to a water depth that will afford sufficient draft for water craft customarily in use on the particular body of water, except no structure may extend beyond the normal accepted line of navigability established through use unless additional length is authorized by permit or order of the Director.” IDAPA 20.03.04.013.d.

31. According to the IDL Hearing Statement: “There are not very many existing docks in the immediate area. The existing docks on the north shore of Camp Bay are older docks that used to serve cabin owners on the property. With the exception of a few docks on the south shore of Camp Bay, the docks are also older and shorter. However, the proposed dock system does not extend beyond the Ordinary High Water Mark on Lake Pend Oreille, and due to the curvature of the bay the dock system does not appear to be a potential hazard to navigation.” *IDL Hearing Statement at 7-8.*

32. Based on the Application, the aerial images included therewith, and the IDL Hearing Statement that discusses the proposed encroachments in relation to the existing encroachments, the preponderance of the evidence shows the proposed docks will not impact navigation and should be approved.

**e. The Application does not adversely affect the littoral rights of D’orazi and Frank**

33. IDL Rule provides: “It will be presumed, subject to rebuttal . . . that commercial navigational encroachments, community docks or nonnavigational encroachments will have a [] adverse effect upon adjacent littoral rights if located closer than twenty-five (25) feet to adjacent littoral right lines. Written consent of the adjacent littoral owner or owners will automatically rebut the presumption.” IDAPA 20.03.04.015.13.e.

34. Littoral owners are defined as: “The fee owner of land immediately adjacent to a navigable lake, or his lessee, or the riparian owner or littoral rights that have been segregated from the fee specifically by deed, lease, or other grant.” IDAPA 20.03.04.010.33. Littoral rights are defined as: “The rights of owners or lessees of land adjacent to navigable waters of the lake to maintain their adjacency to the lake and to make use of their rights as riparian or littoral owners of 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.” IDAPA 20.03.04.010.32; *see also* I.C. § 58-1302(f).

35. Assuming CBCA establishes evidence to the satisfaction of the Department that it possesses littoral rights, the IDL Hearing Statement concludes: “The proposed CBCA community dock appears to have a 55-foot setback on the south side of the bay and a 102.5-foot setback on the north side of the bay.” *IDL Hearing Statement* at 8. The Application identifies the parcels owned the littoral parcels owned by D’orazi and Frank. According to IDL, the proposed encroachments in the Application will be more than 25 feet away from the shared littoral lines with D’orazi and Frank; thus, no adverse impact is presumed, and no adverse effect was established in the record. Moreover, Frank provided written comments that they did not oppose the Application.

36. As will be explained below, the community docks are consistent with the public trust doctrine.

**E. The Boat Ramp Is Not Approved**

37. CBCA proposes to build a community boat ramp that will also be open “to the approximately 14 residents on South Camp Bay Road. Providing access will reduce congestion at the Bottle Bay and Garfield Bay boat launches, congestion on location roads and dust pollution to the lake.” *CBCA Explanatory Summary* at 1. “The Bottle Bay launch is approximately 5.5 miles from Camp Bay and requires residents to pay a fee to launch and retrieve their boats. Garfield Bay public boat launch is located approximately 6.3 miles from Camp Bay and is very congested during the peak recreational season. . . . The closest launch with year-round access is located in the City of Hope across the lake. At Camp Bay, the

proposed launch facility extends up to 30' past the ordinary low water level to allow for year-round access for residents, as well as emergency service access [to] the lake.” *Id.* at 1-2.

38. IDAPA defines “Boat Ramp” as: “A structure or improved surface extending below the ordinary or artificial high water mark whereby watercraft or equipment are launched from land-based vehicles or trailers.” IDAPA 20.03.04.010.08. A boat ramp is “navigational encroachment” defined interchangeably with the term “encroachment[] in aid of navigation.” IDAPA 20.03.04.010.15.

39. A boat ramp is a navigational encroachment not extending beyond the line of navigability that is reviewed pursuant to I.C. § 58-1305. According to that section:

Applications for construction or enlargement of navigational encroachments not extending beyond the line of navigability nor intended primarily for commercial or community use shall be processed by the board with a minimum of procedural requirements and shall not be denied nor appearance required except in the most unusual of circumstances or if the proposed encroachment infringes upon or it appears it may infringe upon the riparian or littoral rights of an adjacent property owner.

I.C. § 58-1305(a).

40. “It will be presumed, subject to rebuttal . . . that commercial navigational encroachments . . . will have a like adverse effect upon adjacent littoral rights if located closer than twenty-five (25) feet to adjacent littoral right lines. Written consent of the adjacent littoral owner or owners will automatically rebut the presumption.” IDAPA 20.03.04.015.13.e.

41. According to the Department’s *Encroachment Standards & Requirements Manual* (“Manual”): “Boat ramps shall be issued only to city, county, state or federal agencies with parks and recreation facilities, except in the most unusual of circumstances. If a boat ramp is authorized for a commercial marina, the permit should typically specify that the facility will be open to the public. Boat ramps will generally not be permitted for exclusive use at single-family,

two-family, and community docks based on the wide availability of public boat ramps.” *Manual* at 37.<sup>1</sup>

42. Here, the record establishes the boat ramp will be more than twenty-five (25) feet from the adjacent littoral parcels owned by D’orazi and Frank. *IDL Hearing Statement* at 8. Frank provided written evidence in the record stating no opposition to the Application. While no statement was received from D’orazi, no adverse effect is found due to the community boat ramp being more than 25 feet from D’orazi’s property.

43. Idaho Code § 58-1305(a) views boat ramps differently if they are intended “primarily for . . . community use . . . .” I.C. § 58-1305(a). *See also Manual*. “The utilization of the word ‘primarily’ necessarily contemplates other attributes in addition to the most prominent one. The word ‘primarily’ means ‘of first importance,’ ‘principally,’ ‘essentially,’ or ‘fundamentally’ as opposed to ‘secondarily’ or ‘merely incidental.’” *Department of Employment v. Champion Bake-N-Serve, Inc.*, 100 Idaho 53, 55, 592 P.2d 1370, 1372 (1979). While CBCA says the boat ramp will be open to neighbors and emergency responders, those uses are incidental, as the intended, primary users are CBCA residents.

44. Based on the above, CBCA has not carried its burden to establish by a preponderance of the evidence that the boat ramp should be approved due to the boat ramp existing primarily for use by the CBCA, with other boat ramps existing at Bottle Bay, Garfield Bay, and the City of Hope. As will be explained below, the boat ramp is also inconsistent with the public trust doctrine.

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<sup>1</sup> [Encroachments Procedures \(idaho.gov\)](https://www.idaho.gov) (last visited 9/13/2021).

**F. The Approval Of The Community Docks Is Consistent With The Public Trust Doctrine, Whereas The Application For The Boat Ramp Is Inconsistent With The Public Trust Doctrine**

45. “The 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 . . . .” I.C. § 58-1303.

46. Consideration of an application for encroachment requires the balancing of interests:

The legislature of the state of Idaho hereby declares that the 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.

47. The public trust doctrine is “a limitation on the power of the state to alienate or encumber title to the beds of navigable waters as defined in this chapter.” I.C. § 58-1203(1). As explained by the Idaho Supreme Court, the following factors should be considered in evaluating an application for encroachment:

[T]he degree of effect of the project on public trust uses, navigation, fishing, recreation and commerce; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource, i.e. in this instance the proportion of the lake taken up by docks, moorings or other impediments; the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited, i.e. commerce, navigation, fishing or recreation; and the degree to which broad public uses are set aside in favor of more limited or private ones.

*Kootenai Env. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 629-30, 671 P.2d 1085, 1092-93 (1983).

48. The Application proposes construction of two community docks in the corner of Camp Bay with the docks not extending beyond the line of navigability. As explained in the record, and when examined cumulatively, there has been a presence of docks at Camp Bay for many years. As to fishing, IDFG did not describe an impact in its written comment. As to water quality, the comment from IDFG explains, so long as appropriate construction methods are used and that construction takes place during “fall drawdown and winter pool, most negative impacts to water quality should be temporary and minimal.” *IDFG Comment* at 2. As to the size of the community docks, IDFG recommended a minimized footprint, with the proposed docks 1,775 square-feet less than allowable under IDL rule. If work is undertaken and completed during the fall drawdown and winter pool, with current sound and vibration suppression and temporary erosion and stormwater best management practices, IDFG’s construction recommendations will be met. Thus, the preponderance of the evidence supports a finding that approval of the community docks is consistent with the public trust doctrine.

49. As to the boat ramp, the record establishes there are public boat ramps at Bottle Bay, Garfield Bay, and the City of Hope. *CBCA Explanatory Summary* at 1; *IDL Hearing Statement* at 9. The boat ramp described in the Application would extend deep enough into the Lake to provide year-round access when the evidence does not support there has previously been year-round access at Camp Bay. Moreover, the evidence establishes there are two boat ramps that provide year-round access, located at Garfield Bay and Hope. While providing access to emergency responders at the proposed CBCA boat ramp is laudable, constructing a boat ramp in an area devoid of boat ramps, where year-round access has not existed, and where the boat ramp is intended to primarily benefit CBCA violates the public trust doctrine.

**G. The Department’s Jurisdiction Does Not Extend Above The Ordinary High Water Mark**

50. According to the comment from LPOW and Arn, there are upland issues that must first be resolved prior to the Department addressing the Application. The upland issues involve approval of roads, how lots were platted, and septic/sewer permitting.

51. According to the IDL Hearing Statement: “IDL acknowledges that most of the concerns raised by the objector revolve around upland issues over which IDL does not have jurisdiction.” *IDL Hearing Statement* at 8.

52. The IDL Hearing Statement is consistent with Idaho law. I.C. §§ 58-1301, 55-1302, 55-1303, 55-1304, 55-1305. While the comments raised by LPOW and Arn dealing with approval of roads, how lots were platted, and septic/sewer permitting are potentially important for other reasons, they are above the OHWM and are therefore beyond the scope of this proceeding.

**H. Internal Changes To The Development Are Addressed By IDAPA 20.03.04.020.05.b**

53. As stated above, there are concerns as to matters dealing with upland issues. If upland issues are resolved in a way that impacts the development, those changes are anticipated through IDAPA 20.03.04.020.05.b:

Rearrangement of community docks and commercial navigational encroachments may not require a new application for an encroachment permit if the changes are only internal. The department shall be consulted prior to modifications being made, and shall use the following criteria to help determine if a new permit must be submitted:

- i. Overall footprint does not change in dimension or orientation;
- ii. No increase in the square footage, as described in the existing permit and in accordance with Paragraph 015.13.a., occurs. This only applies to community docks;
- iii. The entrances and exits of the facility do not change.

IDAPA 20.03.04.020.05.b.

54. If entrances or lots are adjusted, the Application remains approvable provided the overall footprint of the development does not change. Pertinent to approval of this Application is the shoreline length (greater than 50 feet) and the setbacks from littoral neighbors (greater than 25 feet). It is unlikely that those measurements will change. While the Application for the community docks is approvable – subject to CBCA providing evidence to the satisfaction of the Department of its littoral ownership – the risk is on CBCA to decide whether to move forward with the project in light of the potential uncertainty.

### **ORDER**

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that Encroachment Permit Application No. L-96-S-2687 is APPROVED as to the two community docks and DEINED as to the boat ramp.

IT IS FURTHER ORDERED that said approval is subject to Camp Bay Community Association establishing proof, to the satisfaction of the Department, of its littoral ownership, and is subject to any further conditions from the Director.

IT IS FURTHER ORDERED that said approval is subject to being undertaken and completed during the fall drawdown and winter pool, with current sound and vibration suppression and temporary erosion and stormwater best management practices.

IT IS FURTHER ORDERED that the order issued herein is a PRELIMINARY ORDER, I.C. § 67-5245. The hearing in this matter was completed on August 25, 2021. Consistent with the *Notice of Appointment of Hearing Coordinator and Hearing*, “The Hearing Coordinator shall submit a preliminary order to the Director of IDL, who shall then issue a Final Order no more than thirty (30) days after the conclusion of the hearing.” This Preliminary Order is submitted

fewer than thirty days after conclusion of the hearing.

Dated this 13<sup>th</sup> day of September, 2021.



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CHRIS M. BROMLEY  
Hearing Coordinator



**CERTIFICATE OF SERVICE**

I certify that on this 13<sup>th</sup> day of September, 2021, I caused to be served a true and correct copy of the foregoing was served upon the following persons by the method(s) indicated for further service upon the parties to this contested case:

Kourtney Romine Administrative Assistant Idaho Dept. of Lands P.O. Box 83720 Boise, ID 83720-0050	<input checked="" type="checkbox"/> Email: <a href="mailto:kromine@idl.idaho.gov">kromine@idl.idaho.gov</a>
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CHRIS M. BROMLEY