

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

In the Matter of Encroachment Permit Application No.	)	Case No. PH-2020-PUB-10-001
L-97-S-1081B	)	
	)	<b>FINAL ORDER</b>
Gregory M. and Debra B. Wilson,	)	
	)	
Applicants.	)	
_____	)	

**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 1, 2020, IDL received an encroachment permit application filed by Gregory M. and Debra B. Wilson. A public hearing was held on December 3, 2020. Andrew Smyth served as duly appointed hearing coordinator. On December 23, 2020, the hearing coordinator 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 § 58-1306(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 Procedural Background and Findings of Fact as my Findings of Fact, except that I make the following amendments:

- In the Procedural Background, I delete paragraph 9 on page 2 and replace it with the following new paragraph 9:

9. On November 20, 2020, IDL included in the record additional comments from Dr. Faloon, which were sent in an e-mail to IDL's Trevor Anderson on August 24, 2020.
- In the Findings of Fact, I delete paragraph 6 on page 4, and replace it with the following new paragraph 6:

6. If approved, the Applicants would be authorized to place 0.8 cubic yards of new material (cobble stones ranging in size from six to ten inches in diameter cemented together) within an area that is thirteen (13) feet long, and three (3) feet wide on the landward end and narrowing down to one foot wide on the waterward end. AR, pp. 2 and 5; Rec. 29:15 and 1:42:26.

## **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 A, I add the following sentence to the end of paragraph 5 on page 6:

Section 25 can be found on IDL's website within IDL's Encroachments Procedures policy document. *See Encroachments Procedures Agency Guidance Document* at

<https://www.idl.idaho.gov/wp-content/uploads/sites/116/2020/11/PublicTrustProgram-Encroachments-Procedures-111920.pdf> (Section 25 is at pp. 22-42; Riprap, Seawall, and Bulkheads Standards and Requirements is at pp. 38-39).

- In Section D, Paragraph 3.a on page 11, I amend the citation at the end of the paragraph from I.C. § 58-102(h) to I.C. § 58-1302(h).
- In Section D, I delete Paragraph 6 and 7 on page 14 and replace them with the following new paragraphs 6 and 7:

6. Testimony at hearing indicated that a wooden crib existed prior to fill being added to and on top of the pre-existing crib. The Application did not request a permit to authorize that wooden crib. Applicants are encouraged to submit a permit application for the pre-existing crib, which may be a pre-LPA encroachment pursuant to I.C. § 58-1312(1).

7. As to the existing fill in the area, whether natural or man-made, the matter is referred to the IDL Public Trust Program for further investigation into the status of the fill, its compliance with the LPA, and whether any additional compliance or other action is warranted.

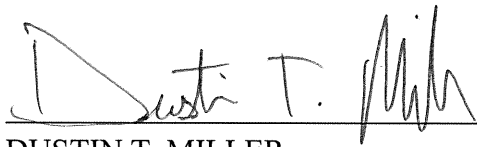
#### **IV. ORDER**

I conclude that the hearing coordinator's Preliminary Order is based on substantial evidence in the record, and I adopt the Preliminary Order's 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 L-97-S-1081B is DENIED.

This is a final order of the agency. Pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.30.09, the Applicant or any aggrieved party who appeared at the hearing has a right to have the proceedings and Final Order reviewed by the district court in the county where the encroachment is proposed by filing a notice of appeal within thirty (30) days from the date of the final decision. The Applicant does not need to post a bond with the district court for an appeal. The filing of the petition for review to the district court does not itself stay the effectiveness or enforcement of the order under appeal. Idaho Code § 67-5274.

Dated this 4<sup>th</sup> day of January 2021.

  
\_\_\_\_\_  
DUSTIN T. MILLER  
Director, Idaho Department of Lands

## CERTIFICATE OF MAILING

I hereby certify that on this 4<sup>th</sup> day of January 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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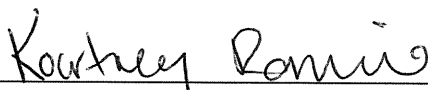
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Kourtney Romine, Workflow Coordinator

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

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BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

In the Matter of Encroachment Permit	)	
Application No. L-97-S-1081B	)	Case No. PH-2020-PUB-10-001
	)	
Gregory M. and Debra B. Wilson,	)	<b>PRELIMINARY ORDER</b>
	)	
Applicant.	)	
	)	
	)	

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**I. PROCEDURAL BACKGROUND**

On or around October 1, 2020, the Idaho Department of Lands (“IDL”) received a complete encroachment permit application (“Application”) filed by Gregory M. and Debra B. Wilson (“Applicants”). Agency Record (“AR”) pp. Wilson 00001 – 00009.<sup>1</sup> IDL assigned application number L-97-S-1081B to the Application. In the Application, the Applicants seek authorization for “riprap”<sup>2</sup> on Priest Lake. AR, p. 1.

IDL processed the Application pursuant to Idaho Code § 58-1306 and IDAPA 20.03.04.030, which resulted in the following timeline of activities:

1. On October 2, 2020, IDL provided notice of the Application to various agencies as well as to Phillips Keystone Inheritance Trust and William Faloon. AR, pp. 10 – 17.
2. On October 6 and 13, 2020, a notice of the Application was published in the Bonner County Daily Bee, which has general circulation in Bonner County, Idaho. AR, pp. 19 – 21.

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<sup>1</sup> All citations to the AR are hereinafter designated by using the Bates numbers only, not the preceding “Wilson 0000.”

<sup>2</sup> The nature of the encroachment is disputed between the Applicants and IDL. As discussed in the Conclusions of Law Section, below, placement of riprap is a defined activity. The Applicants’ proposal does not conform to the placement of riprap. The Applicants’ proposed activity is most similar to construction of a jetty, and will be referred to as a jetty in this order.

3. On October 7, 2020, IDL received an email regarding the Application from the Idaho Department of Environmental Quality stating, “DEQ has no comment on the proposed work.” AR, p. 18.

4. On October 25, 2020, IDL received an email from William Faloon (“Dr. Faloon” and “Objector”) objecting to the Application. AR, pp. 22 – 82.

5. On October 28, 2020, IDL received an email regarding the Application from the Idaho Department of Fish and Game stating, “The Idaho Department of Fish and Game does not have any comments to submit for this application.” AR, pp. 83 – 84.

6. On October 29, 2020, IDL received a written letter from Dr. Faloon objecting to the Application with a check for the publication deposit. AR, p. 85.

7. On November 9, 2020, IDL received an email from Dr. Faloon providing Priest Lake water level elevations from the USGS between 2000 and 2020. AR, pp. 86 – 103.

8. Pursuant to Idaho Code § 58-1306(c), IDL ordered a hearing in this matter. On November 10, 2020, Mr. Dustin T. Miller, IDL Director, issued a Notice of Appointment of Hearing Coordinator and Public Hearing (“Notice”) in which he appointed Mr. Andrew Smyth to be the Hearing Coordinator and scheduled the hearing to be at held at 1:00 p.m. Pacific Time on Thursday, December 3, 2020, via videoconference. AR, pp. 104 – 107.

9. On November 9, 2020, IDL received additional comments from Dr. Faloon. AR, pp. 108 – 121.

10. On November 30, 2020, Dr. Faloon submitted his comments, exhibit list and exhibits. AR, pp. 122 – 315.

11. On November 30, 2020, Ms. Kaufmann, legal counsel for IDL, submitted IDL’s hearing statement. AR, pp. 316 – 332.



12. On December 2, 2020, the Applicants submitted Applicants' Position Statement. AR, pp. 333 – 351.
13. On December 2, 2020, the Objector filed a Motion to Strike Applicants' Position Statement, on the grounds that the Position Statement was filed after the deadline stated in the Notice. AR, pp. 352 – 355.
14. During the hearing on December 3, 2020, the Objector submitted a letter from Gary Fievez as an additional exhibit. AR, pp. 356 – 357.
15. Pursuant to Idaho Code § 58-1306(c) and the Notice, a hearing regarding the Application was held on December 3, 2020. During the hearing, I took official notice of the Applicant's current encroachment permit, L-97-S-1081A. AR, pp. 358 – 365; Hearing Recording ("Rec.") 3:18.<sup>3</sup>
16. For the reasons stated on the record at the beginning of the hearing, the Objector's Motion to Strike Applicants' Position Paper was DENIED, and the Position Paper remained in the record. Rec. 3:33.
17. The participants appearing and offering testimony or argument at the hearing were: Mr. Gregory M. Wilson, Mr. Steven W. Syrcle, Mr. Tyler Wilson, Dr. William Faloon, Ms. Mischelle Fulgham as attorney for Dr. Faloon, Mr. Mike Ahmer, and Mr. Trevor Anderson.

## **II. FINDINGS OF FACT**

1. The Applicants own Bonner County parcel RP00087000017A0A. AR, pp. 1 and 9.
2. The Applicants' property is located adjacent to Priest Lake. AR pp. 1 and 5.
3. The Applicants purchased this property in 2003. Rec. 15:21 and 38:34.

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<sup>3</sup> 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. All references to the hearing recording in this Preliminary Order will be described by reference to the minute(s) and second(s) location on that recording. For example: Rec, mm:ss.

4. When the Applicants purchased the property, a log crib with cobble extending from the southern property line, below the ordinary high water mark, and into the lakebed existed (“pre-existing crib”). AR, p. 335; Rec. 8:12, 17:35, 30:00 and 36:20.

5. Since purchasing the property, the Applicants have replaced cobble and enhanced the pre-existing encroachment, in part, by adding rocks on top of the crib and the lakebed, resulting in the existing jetty. AR, pp. 192, 194 – 196; Rec. 18:52 and 1:11:11.

6. If approved, the Applicants would be authorized to place 0.8 cubic yards of new material (cobble stones ranging in size from eight to twenty inches cemented together) within an area that is seventeen and a half (17.5) feet long, and three (3) feet wide on the landward end and narrowing down to one foot wide on the waterward end. AR, pp. 2 and 5; Rec. 29:15 and 1:42:26.

7. At this location, the prevailing winds and wave action come from the southwest. Rec. 13:13, 22:27 and 32:06.

8. Also, at this location, sand accumulates to the north of structures extending out into the lake and erodes to the south of such structures. AR, pp. 123, 127 – 131; Rec. 51:46, 56:45 and 1:43:20.

9. The proposed encroachment would be located about one (1) foot from the southern littoral right line (shared with Dr. Faloon) on the landward end, and two (2) to three (3) feet from the littoral right line on the waterward end. Rec. 31:39.

10. The Applicants’ property is located to the north of the littoral property owned by Dr. Faloon. AR, pp. 4, 5 and 25.

11. A primary point of Dr. Faloon’s objection to the Application is that he believes the Applicants’ addition of fill on top of the pre-existing crib has caused erosion of his shoreline and

beachfront, to the detriment of Dr. Faloon's property value and aesthetics. AR, pp. 12-13, 24-40, 79, 108-141, 191-208.

12. In 2018, after replacing his dock, Dr. Faloon removed a concrete pier that had been part of his previous dock. The concrete pier was located on the north side of his property within twenty (20) feet of the littoral right line shared with the Applicants. AR, pp. 126, 195 and 336-337; Rec. 10:54 and 49:30.

13. The Applicants argue that the removal of the concrete pier by Dr. Faloon is the cause of the increased erosion of Dr. Faloon's shoreline to the south of the Applicants' jetty. AR, pp. 127 – 131 and 337; Rec. 27:10, 51:16, 1:43:20.

### **III. CONCLUSIONS OF LAW**

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

1. The State of Idaho Board of Land Commissioners ("Land Board") is authorized to regulate, control, and permit encroachments on, in or above the beds of navigable lakes in the state of Idaho. I.C. §§ 58-104(9)(a) and 58-1303.

2. The Land Board exercises its authority through the instrumentality of IDL. I.C. §§ 58-101 and 58-119. As a result, "the duty of administering the Lake Protection Act falls upon the IDL." *Kaseburg v. State, Bd. of Land Comm'rs*, 154 Idaho 570, 578, 300 P.3d 1058, 1066 (2013).

3. The Hearing Coordinator is authorized by the Director to issue this Preliminary Order. AR, p. 104; I.C. § 67-5245. The hearing in this matter began at approximately 1:07 p.m. Pacific Time and concluded at approximately 2:53 p.m. Pacific Time on December 3, 2020. With all evidence submitted, the matter is fully before the Hearing Coordinator.

4. In accordance with Idaho Code § 67-5206 and the Lake Protection Act, Title 58, Chapter 13, Idaho Code ("LPA"), IDL has promulgated rules for 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. IDL has also developed an internal policy, Section 25 – Encroachment Standards and Requirements, Navigable Waters Procedures (“Section 25”); which, establishes the standards and requirements that apply to construction of riprap, jetties and barb. Section 25, pp. 19-21; *see also* AR, pp. 6-7.

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

[A]ny permanent body of relatively still or slack water, including man-made reservoirs, not privately owned and not a mere marsh or stream eddy, and capable of accommodating boats or canoes. This definition does not include man-made reservoirs where the jurisdiction thereof is asserted and exclusively assumed by a federal agency.

I.C. § 58-1302(a); IDAPA 20.03.04.010.024. Priest Lake is a navigable lake under the LPA; and therefore, IDL has jurisdiction to regulate the proposed encroachment. *See State v. Hudson*, 162 Idaho 888, 407 P.3d 202 (2017).

**B. The Applicants are Qualified to Make Application.**

IDAPA 20.03.04.020.02 states, in part, that: “Only persons who are littoral owners or lessees of a littoral owner shall be eligible to apply for encroachment permits.” I find that the Applicants, as owners of property adjacent to Priest Lake, are littoral owners, as defined in IDAPA 20.03.04.010.33, and are qualified to make application for an encroachment permit.

**C. The Burden of Proof Is With the Applicants.**

1. The Applicants generally bear 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. The Application Cannot Accurately Depict the OHWM Because the Bed of Priest Lake Adjacent to the Applicants’ Upland Property Has Been Materially Altered. Idaho Code § 58-1302(c) defines natural or ordinary high water mark (“OHWM”) 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.) The OHWM depicted in the Application, labeled “[Elevation] 2438.00,” heads west from the Applicants’ southern property boundary for eight and a half (8.5) feet creating a south-facing beach and then turns northerly to the northern property boundary creating a west-facing beach (i.e. creating a miniature cove, or crescent shape, in the lake at the shoreline of the Applicants’ upland property). AR, p. 5. This depiction of the OHWM appears to be impacted by works performed by the previous owner of the Applicants’ property, the Applicants, the previous owner of the Objector’s property, and the Objector, specifically:

a. The previous owner of the Applicants' property placed a log crib with cobble at the south property line that caused sand and material to accumulate to the north of it. AR, pp. 122-315, 335 and 336; Rec. 8:12, 19:07, 24:07, 1:25:46 and 1:32:46.

b. The Applicants have altered and added to the pre-existing crib by replacing and adding cobble, and reinforcing it with sandbags and additional rocks on top of the lakebed, in an attempt to protect and increase the material that has accumulated to the north of the pre-existing crib. AR, pp. 25 – 26, 27, 108 – 109, 278, 279 and 319; Rec. 10:38, 17:37, 18:50, 18:57, 30:51, 1:16:28 and 1:41:21.

c. The previous owner of the Objector's property placed a large cement pier which caused sand to accumulate to the north of it. AR, pp. 25, 28 – 34 and 136 – 139; Rec. 34:44, 40:37, 46:09 and 51:17.

d. The Objector removed the concrete pier, leaving no structure to hold the accumulated sand or to cause additional accumulation of sand along the shoreline south of the Applicants' jetty. AR, pp. 27 – 34, 336 – 339, and 341; Rec. 9:47, 10:54, 21:19, 50:18, 1:27:35, 1:41:21, and 1:43:12.

e. The western facing portion of the OHWM depicted in the Application is relatively straight. AR, p. 5. Photos taken of the Applicants' shoreline in August 2003 and 2020, show how the shoreline makes two crescents - one between southern-boundary jetty and the rocks placed underneath the Applicants' pier, and another from the Applicants' pier north to the rocks placed under the next adjacent owner's pier to the north. AR, pp. 196 and 201. These crescent shapes along the shoreline follow the testimony that material accumulates to the north of man-made works that extend perpendicular to the general shoreline.<sup>4</sup>

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<sup>4</sup> 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

f. 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 Priest Lake at this location.<sup>5</sup>

2. The Application is Not for Riprap, It is for a Jetty. The Application depicts a stone wall following the southern property boundary line eight and a half (8.5) feet and then extending another four and a half (4.5) feet beyond the purported OHWM into the lake. AR, pp. 2 and 5.

a. Mr. Ahmer stated, “Given the location and orientation of the requested encroachment, it is IDL’s opinion that the Wilsons’ encroachment application more closely resembles an application to permit a ‘bank barb.’” AR, p. 322; Rec. 1:21:35.

b. Riprap, bank barb, and jetty are not terms that are defined in the LPA or the Rules. Merriam-Webster Dictionary defines riprap as, “a foundation or sustaining wall of stones or chunks of concrete thrown together without order (as in deep water);” and “a layer of this or similar material on an embankment slope to prevent erosion.” <https://www.merriam-webster.com/dictionary/riprap>. A jetty is defined by Merriam-Webster Dictionary as, “a structure extended into a sea, lake, or river to influence the current or tide or to protect a harbor.” <https://www.merriam-webster.com/dictionary/jetty>. Moreover, Section 25 provides that: “Riprap material shall be placed along the present contour of the shoreline and no riprap material shall be placed in excess of that

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land, underlying navigable waters, can only be done by the Land Board. 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).

<sup>5</sup> *Id.*

necessary to stop erosion ... .” Section 25, p. 19; AR, pp. 321-322. Finally, Section 25 states that: “Jetties and bank barbs shall generally not be permitted as a method of controlling erosion on lakes ... .” Section 25, p. 21; AR, p. 322.

c. The Application does not request permission to place riprap material along the shoreline. AR, pp. 2 and 5. And, perhaps more importantly, the record does not contain evidence that erosion is occurring at the Applicants’ shoreline. While the Applicants complain that their shoreline has changed shape over the years, and is impacted by wave energy and high water in the Spring, none of those facts, and no visual depiction in the record, show erosion of the Applicants’ shoreline. I find that the four and a half (4.5) foot section of the proposed encroachment that extends beyond the purported OHWM into the lake is a jetty, as it does not follow the shoreline, but rather extends out perpendicular from the shore into the water. Moreover, the record shows that the proposed jetty is not intended to stop erosion, it is intended to hold the sand and sediment that has been artificially deposited north of the pre-existing crib and the unpermitted existing jetty. No part of the LPA, the Rules or Section 25 enable IDL to permit the proposed encroachment.

d. The remaining eight and a half (8.5) feet of proposed “riprap” would follow the current contour of the shoreline, but as discussed above, the shoreline here has been influenced by man-made works that have caused materials to accumulate to the north and erode to the south. *See ¶ III.D.1.* Specifically, this eight and a half (8.5) feet section of shoreline follows cobble and sandbags placed by the Applicants and where the previous owner placed the pre-existing crib. These encroachments are perpendicular to the general shoreline at this location, and therefore any fill placed at this section would be perpendicular to the shoreline as well. Therefore, I find that this section of the proposed encroachment is also a jetty. It is possible that when the unaffected



shoreline and true OHWM reach their natural locations, this apparent “upland” jetty may be at or close to the actual OHWM of the lake.<sup>6</sup>

3. The Application is For a Nonnavigational Encroachment. The stated purpose of the proposed encroachment is to reduce shoreline erosion and prevent sand from eroding away. AR, p. 1; Rec 27:09. In response to Dr. Faloon’s objections, the Applicants’ added a reason for the proposed encroachment as being an aid in launching vessels from the beach. AR, p. 340. Regarding the proposed encroachment and the sand it would protect, Mr. Wilson stated, “In terms of navigability it helps protect that southern beach area for launching stand up paddle boards . . . It provides protection or safe harbor so to speak for people to launch stand up paddle boards, kayaks, canoes, sail boats, wave runners . . . There is a huge navigation function, but for personal watercraft as opposed to a dock which you might launch a boat.” Rec. 19:26. Mr. Wilson went on to state, “Bonner County actually assesses an additional property value for sandy beaches and if you own property on Priest Lake, you’ll easily see sandy beaches command a huge premium.” Rec. 20:25.

a. Navigational encroachments that IDL can issue a permit for do not include sand on a beach, whether the result of man-made works or natural processes. Navigational encroachments “means and includes docks, piers, floats, pilings, breakwaters, boat ramps, channels or basins, and such other aids to navigability of the lake, on, in or above the beds or waters of a navigable lake.” I.C. § 58-102(h).

b. Whereas, a nonnavigational encroachment, or encroachments not in aid of navigation, is defined to mean and include, the following:

[A]ll other encroachments on, in or above the beds or waters of a navigable lake, **including landfills** or other structures not constructed **primarily** for use in aid of the navigability of the lake. The term ‘encroachments not in aid of navigation’ may be used

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<sup>6</sup> *Id.*

interchangeably herein with the term ‘nonnavigational encroachments.’

I.C. § 58-1302(i) (emphasis added). As stated in the Application, the primary purpose of the proposed encroachment is to retain accumulated sand rather than aid navigation. While there may be some navigational benefit from the unnatural accumulation of sand which the jetty seeks to protect, the primary purpose of the jetty itself is not to aid in navigation. Therefore, I find the proposed jetty to be an encroachment not in aid of navigation.

c. IDAPA 20.03.04.030.02. states, in part, that:

Encroachments not in aid of navigation in navigable lakes will normally not be approved by the Department and will be considered only in cases involving major environmental, economic, or social benefits to the general public. Approval under these circumstances is authorized only when consistent with the public trust doctrine and when there is no other feasible alternative with less impact on public trust values.

There is no evidence in the record that the proposed nonnavigational encroachment would involve major environmental, economic, or social benefit to the general public. The Application does not satisfy IDAPA 20.03.04.030.02.

4. The Application Does Not Rebut the Presumption of Adverse Impact. IDAPA 20.03.04.015.13.e states, in applicable part, as follows:

It will be presumed, subject to rebuttal, that . . . nonnavigational encroachments will have [an] 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.

No encroachment may be permitted “in a manner that infringes upon an adjacent landowners’ littoral right.” *Lovitt v. Robideaux*, 139 Idaho 322, 326, 78 P. 3d 389, 393 (2003). Here, the location of the upland property boundary line and the littoral right line between the Applicants’ property and Dr. Faloon’s property is not disputed. Mr. Wilson stated that the proposed

encroachment would be located about one (1) foot from the littoral right line on the upland side, and two (2) to three (3) feet from the littoral right line in the water. Rec. 31:39. Dr. Faloon has not consented to the requested nonnavigational encroachment being located less than twenty-five (25) feet from the shared littoral right line. Instead, Dr. Faloon has objected and presented evidence that the existing unpermitted additional fill has either caused, or at least contributed to, the adverse effect of shoreline erosion along Dr. Faloon's adjacent littoral property. AR, pp. 108-315; Rec. 52:17 and 1:12:00.

a. The evidence of record shows erosion of the shoreline south of the Applicants' jetty; which, has increased over time as the jetty was built-up on top of the pre-existing crib. This adverse effect is not surprising given that, in this location, the lake deposits sediment to the north of perpendicular structures. *See* ¶ III.D.1. However, the record also plainly shows that as the Applicants' built up the jetty, the erosion to the south of the jetty began and increased. AR, pp. 192-202 and 300. Both parties agree that erosion at this location has increased since Dr. Faloon removed the concrete pier in 2018. Rec. 21:21 and 51:18. However, the Applicants' attempt to blame Dr. Faloon's removal of the concrete pier as being the sole cause of the erosion of his shoreline is misplaced. The totality of the record supports the findings herein that perpendicular structures built west, into the lake, cause accumulation of sediment to the north of the structure – thereby prohibiting otherwise natural deposition of sediment south of the structure and, likely, contributing to erosion south of the structure.

b. It is the Applicants' burden to show that the proposed jetty would not have an adverse effect upon Dr. Faloon's littoral rights. The Applicants have not rebutted the presumption of adverse effect upon Dr. Faloon's adjacent littoral rights resulting from the proposed nonnavigational encroachment being located closer than twenty-five (25) feet to adjacent littoral

right line. Indeed, as discussed above, the record shows the impacts to the shoreline caused by encroachments like the existing jetty. I find that there is a presumed adverse impact to the Objector's littoral rights associated with the Applicants' proposed encroachments; which, in and of itself, is grounds for denial of the Application.

5. I conclude that based on legal requirements and administrative standards discussed, above, the Application must be denied.

6. The Applicants are not required to dig out or remove the pre-existing crib – as it existed prior to fill being added to and on top of the pre-existing crib. It is recommended that the Applicants submit a permit application for the pre-existing crib, which appears to be a pre-LPA encroachment pursuant to I.C. § 58-1312(1).

7. In addition, the Applicants must work with IDL staff on a timeline to remove all fill, whether natural or man-made, that they have placed on top of the lakebed. The removal is subject to inspection by and direction from IDL.

#### **IV. ORDER**

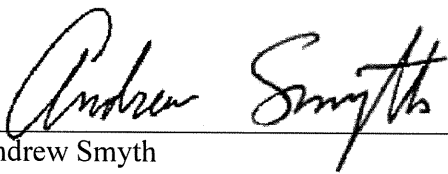
Based upon the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that Encroachment Permit Application No. L-97-S-1081B is DENIED, subject to any conditions imposed by the Director of the Department of Lands.

This order issued herein is a Preliminary Order, pursuant to Idaho Code §§ 58-1306(c), 67-5270 and 67-5272, and the Notice of Appointment of Hearing Officer issued on November 10, 2020, which states, “[i]n accordance with Idaho Code § 67-5245, 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.” The Preliminary Order can and will become

final without further action of the agency if the Director does not issue a Final Order within thirty (30) days of the close of the hearing.

If this Preliminary Order becomes final, or if the Director issues a Final Order, pursuant to Idaho Code § 58-1306(c), any applicant or other aggrieved party has the right to have this decision reviewed by the district court in the county where the encroachment is proposed by filing notice of appeal within thirty (30) days from the date of the final decision. Idaho Code § 58-1306(c). The filing of an appeal to the district court does not itself stay the effectiveness or enforcement of the order under appeal. Idaho Code § 67-5274.

DATED this 23 day of December, 2020.

  
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Andrew Smyth  
Hearing Coordinator