

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of Encroachment Permit Application No.))	Case No. CC-2021-PUB-10-001
ERL-97-S-0477C,)	
)	FINAL ORDER
Desiree Burke,)	
)	
Applicant.)	
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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 15, 2021, IDL received an encroachment permit application filed by Desiree Burke. A hearing was held on January 5, 2022. Andrew Smyth served as duly appointed hearing officer. On February 1, 2022, the hearing officer issued his Preliminary Order, which contains a Procedural Background, Findings of Fact, and Conclusions of Law.

As Director of IDL, my responsibility is to render a decision pursuant to Idaho Code § 58-1305 and IDAPA 20.03.04.025 on behalf of the State Board of Land Commissioners and based on the record, which I have reviewed in the context of my personal expertise gained

through education, training, and experience. I relied on the record for this matter, including examining the hearing officer's Preliminary Order in light of the entire record in this matter.

II. FINDINGS OF FACT

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

III. CONCLUSIONS OF LAW

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

On page 6, in the paragraph under the heading "1. The mooring buoy is a navigational encroachment," I amend the citation to IDAPA 20.03.04.010.05 to instead read "IDAPA 20.03.04.010.15."

IV. ORDER

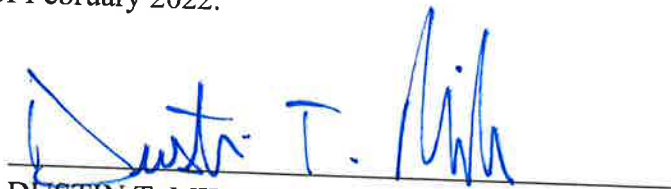
I conclude that the hearing officer's Preliminary Order is based on substantial evidence in the record, and I adopt the Preliminary Order's Procedural Background, Findings of Fact, and Conclusions of Law with the amendments set forth herein as my decision in this matter. I hereby incorporate by reference the Preliminary Order's Procedural Background, Findings of Fact, and Conclusions of Law into this Final Order except as specifically set forth herein. I have enclosed and served the Preliminary Order along with this Final Order.

Based on the adopted Findings of Fact and Conclusions of Law, I HEREBY ORDER that Encroachment Permit Application ERL-97-S-0477C is APPROVED.

This is a final order of the agency. Pursuant to Idaho Code § 58-1305(c), Idaho Code § 58-1306(c), and IDAPA 20.03.04.25.08, 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. Pursuant to Idaho Code § 58-1305(c), Idaho Code § 58-1306(c), and IDAPA 20.03.04.25.08, an adjacent littoral owner or other aggrieved party 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 17th day of February 2022.



DUSTIN T. MILLER
Director, Idaho Department of Lands

CERTIFICATE OF MAILING

I hereby certify that on this 17th day of February 2022, 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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Andrew Smyth, Hearing Officer

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Kourtney Romine
Workflow Coordinator

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of Encroachment Permit)	
Application No. ERL-97-S-0477C)	Case No. CC-2021-PUB-10-001
)	
Desiree Burke,)	
Applicant.)	PRELIMINARY ORDER
)	
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I. PROCEDURAL BACKGROUND

On or around October 15, 2021, the Idaho Department of Lands (“IDL”) received a complete encroachment permit application (“Application”) filed by Desiree Burke (“Ms. Burke”). Agency Record (“AR”) pp. Burke 00001 – 00010.¹ IDL assigned application number ERL-97-S-0477C to the Application. In the Application, Ms. Burke seeks authorization to place a mooring buoy on Priest Lake, adjacent to her property in Bonner County, Idaho.

IDL processed the Application pursuant to Idaho Code § 58-1305 and IDAPA 20.03.04.025, which resulted in the following timeline of activities:

1. On October 19, 2021, IDL provided written notice of the Application to the adjacent littoral owners on each side of the Applicant’s property – Bryan Wallis Friel and A Ray & Carolyn A Hunter (“Hunters”). AR, pp. 11 – 14.
2. On or around November 8, 2021, IDL received a letter from the Hunters objecting to the Application. AR, p. 17.

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

3. On November 10, 2021, Christopher Burke, as an agent for Ms. Burke, submitted a revised drawing of the proposed mooring buoy to supplement the Application. AR, pp. 18 – 20.

4. On November 12, 2021, IDL provided an updated notice of application to the Hunters. AR, pp. 21 – 22.

5. On December 9, 2021, IDL received an email from Mr. Burke waiving the 60-day requirement to allow IDL additional time to schedule the hearing. AR, pp. 23 – 24.

6. On December 16, 2021, Mr. Dustin T. Miller, IDL Director, issued a Notice of Appointment of Hearing Officer and Hearing, in which he appointed Mr. Andrew Smyth as the Hearing Officer and scheduled the hearing to be at held at 2:00 p.m. Pacific Time on Wednesday, January 5, 2022, via video teleconference. AR, pp. 25 – 28.

7. On January 5, 2022, a hearing regarding the Application was held pursuant to Idaho Code § 58-1305(c). The participants appearing and offering evidence at the hearing were:

- a. Chris Burke, Applicant's son and representative
- b. Bill Burke, Applicant's husband
- c. Ray Hunter, Objector
- d. Cathryn Kuhn, Objectors' daughter
- e. Angela Kaufmann, Deputy Attorney General and legal counsel for IDL
- f. Mike Ahmer, Resource Supervisor for IDL

Hearing Recording.²

² The hearing was recorded pursuant to IDAPA 20.01.01.651. A hearing transcript has not been prepared. The agency or any party may have a transcript prepared at its own expense. All references to the hearing recording in this Preliminary Order will be described by reference to the recording number and the minute(s) and second(s) location on that recording. For example: Rec. #, mm:ss.

8. Evidence admitted into the administrative record during the hearing consisted of witness testimony from Chris Burke, Ray Hunter, Cathy Kuhn, and Mike Ahmer along with Applicant's exhibits A – JJ³, Objectors' exhibits A – C, and a written copy of IDL's statement. AR, pp. 29 – 91; Rec. 12:40, 13:27, and 14:30.

II. FINDINGS OF FACT

1. Ms. Burke owns Bonner County parcel RP000870000240A, located at 104 S. Diamond Park Road, Coolin, ID, 83821. AR, pp. 1 and 90. Rec. 46:32.
2. Ms. Burke's property is located adjacent to the Priest Lake with approximately 75 feet of shoreline. AR, pp. 5 and 90; Rec. 46:39.
3. Ms. Burke's property is located between littoral property owned by the Hunters to the north and Bryan Friel to the south. AR, pp. 4, 9, and 10.
4. Ms. Burke currently has a dock that extends forty-seven feet from the ordinary high water mark ("OHWM"). AR, p. 20; Rec. 47:31.
5. The Hunters currently have a dock that extends seventy-five (75) feet from the OHWM. AR, pp. 20 and 90.
6. Mr. Friel currently has a dock that extends approximately seventy (70) feet from the OHWM. AR, p. 90; Rec. 47:35.
7. If the Application is approved, Ms. Burke would be authorized to place one mooring buoy sixty-two (62) feet from the ordinary OHWM, forty-one (41) feet from her dock, thirty (30) feet from the littoral right line shared with the Hunters, fifty-two (52) feet from the Hunters'

³ To prevent confusion with exhibit labels, Applicant did not label exhibits using letters I, O, S, and II. Rec. 10:58.

existing dock⁴, and over forty-one (41) feet from the littoral right line shared with Mr. Friel⁵. AR, pp. 20, 90, and 91; Rec. 47:26, 47:57, and 50:12.

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 Officer is authorized by the Director to issue this Preliminary Order. AR, p. 25; I.C. § 67-5245. The hearing in this matter began at approximately 2:04 p.m. Pacific Time and concluded at approximately 3:09 p.m. Pacific Time on January 5, 2022. With all evidence submitted, the matter is fully before the Hearing Officer.

4. In accordance with Idaho Code § 67-5206 and the LPA, IDL has promulgated rules for encroachment permits on navigable lakes – the Rules for the Regulation of Beds, Waters and Airspace Over Navigable Lakes in the State of Idaho (“Rules”). IDAPA 20.03.04.000 *et seq.*

5. In enacting the LPA, the Idaho Legislature declared its intent that:

[T]he public health, interest, safety and welfare requires that all encroachments upon, in or above the beds or waters of navigable

⁴ On or around November 30, 2021, the Hunters submitted an application to modify and/or replace their dock. IDL has deemed the submission to be incomplete as the plans are being finalized. Rec. 41:04 and 58:31.

⁵ The exact distance the buoy would be located to the littoral right line shared with Mr. Friel is not known. The record shows that the Applicant’s existing dock is located some distance north of Mr. Friel’s littoral right line and the buoy would be located forty-one (41) feet north of their dock, causing the buoy to be located at least forty-one (41) feet from the Friel littoral right line.

lakes of the state be regulated in order that the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment. No encroachment on, in or above the beds or waters of any navigable lake in the state shall hereafter be made unless approval therefor has been given as provided in this act.

I.C. § 58-1301. “IDL is required to balance the competing interests involved while determining whether to approve permits for navigational encroachments.” *Brett v. Eleventh St. Dockowner’s Ass’n Inc.*, 141 Idaho 517, 523, 112 P.3d 805, 810 (2005); IDAPA 20.03.04.012.

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

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

I.C. § 58-1302(a); IDAPA 20.03.04.010.024. 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. Ms. Burke is qualified to make application.

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

C. The burden of proof is with Ms. Burke.

1. The Applicant generally bears the burden of proof in this matter. “The customary common law rule that the moving party has the burden of proof – including not only the burden of

going forward but also the burden of persuasion – is generally observed in administrative hearings.” *Intermountain Health Care, Inc. v. Bd. of County Comm’rs of Blaine County*, 107 Idaho 248, 251, 688 P.2d 260, 263 (Ct. App. 1984) *rev’d on other grounds* 109 Idaho 299, 707 P.2d 410 (1985).

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

D. The Application is Approved.

IDL processed the Application pursuant to I.C. § 58-1305 and IDAPA 20.03.04.025. AR, pp. 25 and 86. This section of statute and rule relate to how “applications for construction or enlargement of navigational encroachments not extending beyond the line of navigability nor intended primarily for commercial or community use” are processed.

1. The mooring buoy is a navigational encroachment.

IDAPA 20.03.04.010.05 defines encroachments in aid of navigation as “[i]ncludes docks, piers, jet ski and boat lifts, buoys, pilings, breakwaters, boat ramps, channels or basins, and other facilities used to support water craft and moorage on, in, or above the beds or waters of a navigable lake. The term ‘encroachments in aid of navigation’ is used interchangeably with the term ‘navigational encroachments.’” See also I.C. § 58-1302(h). Mr. Burke testified that the intended purpose of the proposed buoy is to provide watercraft moorage. AR, p. 1; Rec. 37:31. IDL’s forms and testimony also identify the proposed mooring buoy as a navigational encroachment. AR, pp. 5, 90; Rec. 47:04. I find that the proposed mooring buoy is a navigational encroachment.

2. The mooring buoy does not extend beyond the line of navigability.

Line of navigability is defined as “a line located at such distance waterward of the low water mark established by the length of existing legally permitted encroachments, water depths waterward of the low water mark, and by other relevant criteria determined by the board when a line has not already been established for the body of water in question.” I.C. § 58-1302(g) and IDAPA 20.03.04.010.20. The proposed buoy would be located sixty-two (62) feet from the ordinary OHWM. AR, pp. 20 and 90; Rec. 47:26. The length of the existing legally permitted encroachments on either side of Ms. Burke’s property are seventy (70) and seventy-five (75) feet from the OHWM. AR, pp. 20 and 90; Rec. 47:35. Mr. Ahmer testified that the proposed mooring buoy would be located within the line of navigability at this location. AR, pp. 90-91; Rec. 47:29. There was no evidence in the record supporting that the buoy would be located beyond the line of navigability. I find that the proposed mooring buoy would be located within the line of navigability.

3. The mooring buoy is not intended primarily for commercial or community use.

Mr. Burke stated that the primary use of the buoy will be to moor their fourteen-and-a-half (14.5) foot Lund boat. No evidence was presented that indicates the buoy is intended for commercial use. I find that the proposed mooring buoy is not intended primarily for commercial or community use.

Based on the above, I find that I.C. § 58-1305 and IDAPA 20.03.04.025 are the appropriate sections of statute and rule under which to process the Application.

D. The Proposed Encroachment Complies with Applicable Rules.

IDAPA 20.03.04.015.09 Mooring Buoys states, “Buoys must be installed a minimum of thirty (30) feet away from littoral right lines of adjacent littoral owners. One (1) mooring buoy per

littoral owner may be allowed.” The drawing submitted by Ms. Burke shows that the proposed mooring buoy would be located thirty (30) feet away from the Hunters’ littoral right line and over forty-one (41) feet from Mr. Friel’s littoral right line. AR, pp. 20, 90, and 91. If approved, this would be the only mooring buoy adjacent to the Applicant’s property. AR, pp. 20 and 91; Rec. 50:12. I find that the proposed mooring buoy meets the requirements of this rule.

E. The Proposed Encroachment Passes the Balancing Test

The littoral rights of an upland owner adjacent to navigable waters include the right “to maintain their adjacency to the lake and make use of their rights” as littoral owners by “building or using aids to navigation.” I.C. § 58-1302(f). However, the proposed encroachments must be weighed against the other Lake Values itemized in Idaho Code § 58-1301, as follows:

[A]ll encroachments upon, in or above the beds or waters of navigable lakes of the state be regulated in order that the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment. No encroachment on, in or above the beds or waters of any navigable lake in the state shall hereafter be made unless approval therefor has been given as provided in this act.

The record shows that Ms. Burke is looking to exercise her littoral rights to moor her fourteen-and-a-half (14.5) foot Lund boat and to protect it from storms. As to the navigational or economic necessity, justification for, or benefit derived from the proposed encroachment, Mr. Burke explained that their boat gets damaged during storms if it is moored either on the south side of their dock or in the lift to the north of their dock. Rec. 37:31.

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

1. Protection of property and navigation.

Ms. Burke's encroachment will be located thirty feet away from the littoral line shared with the Hunters. The Hunters argue that the proposed encroachment will present a hazard to navigation as the buoy, line, and a moored boat reduces their access to the lake from the shore between Ms. Burke's dock and the Hunters' dock. AR, p. 17; Rec, 23:36. The exact impact will vary based on the location of the vessel moored to the buoy and as Mr. Hunter testified "depends on the length of the line and boat moored to the buoy." Rec. 26:10. The Hunters' Exhibit A demonstrates that a twenty (20) foot boat tied to the buoy with a ten (10) foot line would cross the littoral right line and leave less than twenty-one (21) feet between Ms. Burke's boat and Hunters' proposed dock. Mr. Hunter's argument is speculative as no evidence was presented that Ms. Burke owns a twenty (20) foot boat.

Based on Mr. Burke's testimony and revised drawing, a fourteen-and-a-half (14.5) foot boat moored to the buoy would be at most fifteen-and-a-half (15.5) feet from the littoral right line and thirty-seven-and-a-half (37.5) from the Hunters' existing dock. Regardless, the setback requirement refers to the encroachment—the mooring buoy—not the vessels that Ms. Burke may or may not moor to the buoy.

In addition, Mr. Hunter stated, "at night, there won't be any lights on that or the moored boat and we consider that to be a hazard to navigating back and forth from the beach and we do run watercraft off the beach." Rec. 24:30. No evidence or further discussion was presented regarding this subject.

2. Protection of recreation.

The Hunters testified they have swum in the location of the proposed buoy for fifty (50) years and view the proposed buoy as a severe hazard to swimmers. Rec. 28:30. While the

proposed buoy and moored boat may impact swimming in this area to a certain extent, the fact remains that Ms. Burke, and the public as a whole, have the right to navigate over the beds of navigable lakes, including the area between Ms. Burke's and the Hunters' docks. The placement of a buoy at this location may even deter other boat traffic from entering this location, potentially offering a little more protection to people recreating near shore.

3. Protection of aesthetic beauty, property, fish and wildlife habitat, aquatic life and water quality.

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

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

IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED that Encroachment Permit Application No. L97S0477C is APPROVED, subject to any conditions imposed by the Director of the Idaho Department of Lands.

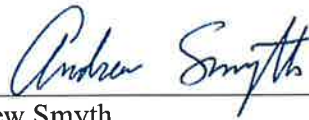
This order is a Preliminary Order, pursuant to Idaho Code §§ 58-1305(c), 67-5270 and 67-5272, and the Notice of Appointment of Hearing Officer and Hearing issued on December 16, 2021, which states as follows:

The Hearing Officer shall submit a preliminary order to the Director of the Idaho Department of Lands within thirty (30) days after the close of the hearing. After receiving the preliminary order, the Director shall issue a Final Order no more than forty-five (45) days after the conclusion of the hearing, or allow the preliminary order to become final forty-five (45) days after the conclusion of the hearing.

The Preliminary Order can and will become final without further action of the agency if the Director does not issue a Final Order within forty-five (45) days of the close of the hearing.

If this Preliminary Order becomes final, or if the Director issues a Final Order, pursuant to Idaho Code § 58-1305(c), the Applicant or other aggrieved party has the right to have this decision reviewed by the district court in the county where the encroachment is proposed by filing notice of appeal within thirty (30) days from the date of the final decision. Idaho Code § 58-1306(c). The filing of an appeal to the district court does not itself stay the effectiveness or enforcement of the order under appeal. Idaho Code § 67-5274.

DATED this 1st day of February, 2022.



Andrew Smyth
Hearing Officer