

From: [Angela Kaufmann](#)
To: [Kourtney Romine](#); [Hearing Officer Mailbox](#); [Gregory M. Wilson](#); mischelle@fulghamlawpllc.com; billofspok@aol.com
Cc: [Mike Ahmer](#); [Marde Mensinger](#); [Eric Wilson](#); [Rebecca Wills](#)
Subject: Case No. PH-2022-NAV-10-001
Date: Monday, December 12, 2022 04:58:55 PM
Attachments: [image001.png](#)
[NOF and exhibits.pdf](#)

Dear Ms. Romine and Parties:

In accordance with the Hearing Coordinator's Notice of Public Hearing, please find the Idaho Department of Lands' Notice of Filing and Hearing Exhibit, attached.

Please let me know if you encounter any difficulties in opening the attachment.

Sincerely,

Angela



Angela Schaer Kaufmann | Lead Deputy Attorney General

Idaho Department of Lands | Natural Resources Division

Office of the Attorney General | State of Idaho

O: 208-334-2400 | D: 208-334-4120 | W: ag.idaho.gov

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LAWRENCE G. WASDEN
ATTORNEY GENERAL

GARRICK L. BAXTER
Acting Chief,
Natural Resources Division

ANGELA SCHAER KAUFMANN, ISB #5436
Deputy Attorney General
700 W. State Street, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Fax: (208) 854-8072
Email: angela.kaufmann@ag.idaho.gov

Attorneys for Idaho Department of Lands

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of:)	
)	Case No. PH-2022-NAV-10-001
Encroachment Permit Application)	
No. L-97-S-1081C)	NOTICE OF FILING – IDL’S
)	EXHIBITS
Gregory M. Wilson,)	
<u>Applicant.</u>)	

The Idaho Department of Lands (“IDL”), by and through its counsel the Idaho Office of the Attorney General, and in accordance with the Hearing Coordinator’s *Notice of Public Hearing*, hereby files and serves its Exhibit in the above-captioned matter.

DATED this 12th day of December 2022.

/s/ Angela Schaer Kaufmann
Angela Schaer Kaufmann
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December, 2022, I caused to be served a true and correct copy of the foregoing by electronic mail, at the indicated email addresses:

Kourtney Romine
kromine@idl.idaho.gov

Hearing Officer Mailbox
Hearing.officer@ag.idaho.gov

Gregory M. Wilson
greg@wilsonlaw.us

William Faloon
billlofspok@aol.com

Mischelle Fulgham
mischelle@fulghamlawpllc.com

/s/ Angela Schaer Kaufmann
Angela Schaer Kaufmann
Deputy Attorney General

IDAHO DEPARTMENT OF LANDS

HEARING STATEMENT

CASE NO. PH-2022-NAV-10-001

GREG WILSON

ENCROACHMENT PERMIT APPLICATION

L-97-S-1081C

Good morning, my name is Mike Ahmer and I am the Lands Resource Supervisor for the Mica Supervisory Area Office of the Idaho Department of Lands (“IDL”). My purpose in being here today is to provide you with information regarding IDL’s assessment of Application for Encroachment Permit No. L-97-S-1081C (“Application”), filed by Greg Wilson, who owns property identified as RP0008700017A0A on Priest Lake in Coolin, Idaho (“Applicant”).

I.

BACKGROUND

A. Application

Applicant is seeking to permit an existing log structure on the southern boundary of his property that is both above and below the Ordinary High-Water Mark (OHWM). Applicant claims that the log structure is a pre-LPA Encroachment and that it remains unmodified and in place since Lake Protection Act (LPA) rules came into effect on January 1, 1975. This parcel is described as Parcel ID RP0008700017A0A, Lot 17A of the Diamond Park Replat subdivision on the north-eastern shoreline of Priest Lake. Applicant was denied encroachment permit L-97-S-1081B via the Director’s Final Order on January 4, 2021 (PH-2020-PUB-10-001). Applicant was issued encroachment permit L-97-S-1081A on April 17, 2006 for a water intake line, 4’x20’ fixed pier, 4’x7’ ramp, 8’x45’ approach and 10’x12’ extension dock, along with a boat lift and a launch rail system.

B. Timeline

- 06/15/2021 – IDL received an application for the existing log structure.
- 02/22/2022 – IDL received a supplemental letter to be added to the Application.
- 07/08/2022 – IDL sends a letter to Applicant informing him of IDL’s decision to deny the pre-LPA Encroachment Application.
- 08/08/2022 – Applicant submits a letter stating his wish to appeal the denial of the pre-LPA Encroachment Application.
- 10/03/2022 – IDL’s Director issued a Notice of Appointment of Hearing Coordinator and Scheduling Conference to be held on October 17, 2022.
- 10/17/2022 – IDL holds Scheduling Conference with Applicant and Hearing Coordinator and it is decided that the Hearing will take place on December 19, 2022.
- 10/21/2022 – IDL submits a Response to Request For Information.

IDAHO DEPARTMENT OF LANDS’ HEARING STATEMENT

CASE NO. PH-2022-NAV-10-001 – GREG WILSON

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- 10/25/2022 - IDL's Director issued a Notice of Appointment of Hearing Officer and Public Hearing.
- 10/27/2022 – Hearing coordinator files an Amended Notice of Scheduling Conference.
- 11/08/2022 – Via email Applicant files objections to matters related to the Hearing.
- 12/03/2022 & 12/10/2022–Advertisement for the Public Hearing is run in the Bonner County Daily Bee.

I would like to note that Applicant had numerous phone calls and met with me several times regarding the Application following the June 15, 2021 submittal. I informed him that IDL was working on how to process and handle the Application and that IDL did not think sufficient proof was provided to confirm the existing log structure had been in place and unmodified since January 1, 1975. The February 22, 2022 supplemental letters were submitted in an attempt to provide sufficient proof.

II. APPLICABLE LEGAL PROVISIONS

A. Lake Protection Act, Title 58, Chapter 13, Idaho Code

The following provisions of the Lake Protection Act, Title 58, Chapter 13, Idaho Code (“LPA”) are particularly applicable to the Application, and helpful to understanding IDL’s analysis of the Application:

I.C. § 58-1301 (*see also* IDAPA 20.03.04.012):

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. § 58-1302:

(f) "Riparian or littoral rights" means only 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 or 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. (*See also* IDAPA 20.03.04.010.32).

(g) "Line of navigability" means 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. (*See also* IDAPA 20.03.04.010.20).

(h) "Encroachments in aid of navigation" means and includes docks, piers, floats, pilings, breakwaters, boat ramps, channels or basins, and other such aids to the navigability of the lake, on, in or above the beds or waters of a navigable lake. The term "encroachments in aid of navigation" may be used interchangeably herein with the term "navigational encroachments." (*See also* IDAPA 20.03.04.010.15).

(i) "Encroachments not in aid of navigation" means and includes all 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 interchangeably herein with the term "nonnavigational encroachments." (*See also* IDAPA 20.03.04.010.16).

(k) "Plans" means 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. § 58-1312:

PERMITTING OF EXISTING ENCROACHMENTS. (1) Unless otherwise prohibited, every person seeking a permit for a navigational or nonnavigational encroachment constructed prior to January 1, 1975, shall provide the board with substantive documentation of the age of the encroachment and documentation that the encroachment has not been modified since 1974. Persons providing such documentation shall receive an encroachment permit and shall not be required to pay the application and publication fees established in this chapter. Such substantive documentation shall include dated aerial photographs, tax records, or other historical information deemed reliable by the board.

(2) Every person seeking a permit for a navigational or nonnavigational encroachment constructed, replaced or modified on or after January 1, 1975, shall submit a permit application and enter the same permitting process as required for new encroachments.

B. Applicable IDAPA Rules Pertaining to Subject Application

The following provisions of the Rules For the Regulation of Beds, Waters and Airspace Over Navigable Lakes in the State of Idaho, IDAPA 20.03.04 ("LPA Rules") are particularly applicable to this Application, and helpful in understanding IDL's analysis of the Application.

IDAPA 20.03.04.010 DEFINITIONS

15. Encroachments in Aid of Navigation. Includes 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.”

16. Encroachments Not in Aid of Navigation. Includes all other encroachments on, in, or above the beds or waters of a navigable lake, including landfills, bridges, utility and power lines, or other structures not constructed primarily for use in aid of navigation, such as float homes and boat garages. The term “encroachments not in aid of navigation” is used interchangeably with the term “nonnavigational encroachments.”

23. Natural or Ordinary High Water Mark. 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.

33. Riparian or Littoral Owner. The fee owner of land immediately adjacent to a navigable lake, or his lessee, or the owner of riparian or littoral rights that have been segregated from the fee specifically by deed, lease, or other grant.

34. Riparian or Littoral Right Lines. Lines that extend waterward of the intersection between the artificial or ordinary high water mark and an upland ownership boundary to the line of navigation. Riparian or littoral right lines will generally be at right angles to the shoreline.

IDAPA 20.03.04.012 POLICY

02. No Encroachments Without Permit. No encroachment on, in or above the beds or waters of any navigable lake in the state may be made unless approval has been given as provided in these rules. An encroachment permit does not guarantee the use of public trust lands without appropriate compensation to the state of Idaho.

03. Permitting of Existing Encroachments. a. *The provisions of Title 58, Chapter 13, Section 58-1312, Idaho Code, apply.* b. Any new encroachments, or any unpermitted encroachments constructed after January 1, 1975, are subject to these rules. (Emphasis added).

IDAPA 20.03.04.015.13.e PRESUMED ADVERSE EFFECTS

It will be presumed, subject to rebuttal, that single-family and two-family navigational encroachments will have an adverse effect upon adjacent littoral rights if located closer than ten (10) feet from adjacent littoral right lines, and that commercial navigational encroachments, community docks or nonnavigational

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. All boat lifts and other structures attached to the encroachments are subject to the above presumptions of adverse affects [sic].

IDAPA 20.03.04.020. APPLICATIONS

01. Encroachment Applications. No person shall hereafter make or cause to be made any encroachment on, in or above the beds or waters of any navigable lake in the state of Idaho without first making application to and receiving written approval from the department. The placing of dredged or fill material, refuse or waste matter intended as or becoming fill material, on or in the beds or waters of any navigable lake in the state of Idaho shall be considered an encroachment and written approval by the department is required. If demolition is required prior to construction of the proposed encroachment, then the application must describe the demolition activities and the steps that will be taken to protect water quality and other public trust values. No demolition activities may proceed until the permit is issued.

02. Signature Requirement. Only persons who are littoral owners or lessees of a littoral owner shall be eligible to apply for encroachment permits. A person who has been specifically granted littoral rights or dock rights from a littoral owner shall also be eligible for an encroachment permit; the grantor of such littoral rights, however, shall no longer be eligible to apply for an encroachment permit. Except for waterlines or utility lines, the possession of an easement to the shoreline does not qualify a person to be eligible for an encroachment permit.

III.

IDL'S ANALYSIS OF THE APPLICATION'S COMPLIANCE WITH THE LPA

A. Littoral Ownership.

Applicant owns property on Priest Lake identified as Parcel ID RP0008700017A0A, Lot 17A of the Diamond Park Replat subdivision.

B. Type of Encroachment.

Applicant is seeking an encroachment permit for a Pre-LPA log structure. The log structure itself would be considered a non-navigational encroachment, but due to the fact Applicant is trying to claim it pre-dates the LPA, it would also be a Pre-LPA Encroachment.

C. Shoreline Length.

Applicant owns approximately 115 feet of water frontage.

D. Line of Navigability.

The existing log structure extends out beyond the OHWM, however, it does not extend beyond the single-family dock on the property. The existing log structure is within the Line of Navigability.

E. Distance from Littoral Lines.

IDAPA 20.03.04.015.13.e states in part that it will be presumed, subject to rebuttal, that single-family and two-family navigational encroachments will have an adverse effect upon adjacent littoral rights if located closer than ten (10) feet from adjacent littoral right lines, and that commercial navigational encroachments, community docks or nonnavigational encroachments will have a like adverse effect upon adjacent littoral rights if located closer than twenty-five (25) feet to adjacent littoral right lines. The existing log structure is located immediately adjacent to the southern property boundary and littoral line. It does not provide a ten (10) or twenty-five (25) foot buffer, although the exact distance is not known and has not been measured. It should be noted that pre-LPA Encroachments, or encroachments that have not been modified and have been in place pre-1975, would not need to meet the required setbacks as they were in place before any rules were enacted.

F. Signature Requirement.

IDAPA 20.03.04.020.02 states that “[o]nly persons who are littoral owners or lessees of a littoral owner shall be eligible to apply for encroachment permits.” Applicant is the littoral owner. “A person who has been specifically granted littoral rights or dock rights from a littoral owner shall also be eligible for an encroachment permit; the grantor of such littoral rights, however, shall no longer be eligible to apply for an encroachment permit.” Applicant has not granted permission for anyone else to permit a dock from this parcel. At this time, Applicant has a single family dock, boat rail system, and domestic water intake line permitted on this parcel, but no encroachments are permitted on Applicant’s southern property boundary.

**IV.
CONCLUSION**

Applicant is appealing IDL’s decision to deny an application for a pre-LPA Encroachment. Applicant claims the existing log structure has been in place and not been modified since before January 1, 1975.

Applicant previously applied for a rock jetty in the same location as the existing log structure and that application was ultimately denied via a Final Order from the Director (PH-2020-PUB-10-001, AR381-401). That previous application was denied primarily because the rock jetty is considered a non-navigational encroachment that must provide a public benefit through economic, environmental or social factors. Additionally, the proposed rock jetty application was denied because it was shown to be perpendicular to the general shoreline, as opposed to running parallel to the shoreline like all other bank stabilization projects (riprap and seawalls). *Id.*

Similarly to the previously proposed rock jetty, the existing log structure could also be considered a non-navigational encroachment type that must provide a public benefit and it also extends perpendicular to shore into the lake. Through numerous meetings and phone calls, Applicant was aware that IDL would not permit the existing log structure under our current rules and that the only path forward would be to obtain a Pre-LPA Encroachment Permit. As such, the Application for the existing log structure is not subject to the same timelines and procedures provided in Sections 58-1305 and 58-1306, Idaho Code, and Sections 025 and 030 of IDAPA 20.03.04.

IDAPA 20.03.04.012.03 and Section 58-1312 of Idaho Code both state that “every person seeking a permit for a navigational or nonnavigational encroachment constructed prior to January 1, 1975 shall provide the board with **substantive documentation** of the age of the encroachment and documentation that the encroachment has not been modified since 1974. Persons providing such documentation shall receive an encroachment permit and shall not be required to pay the application and publication fees established in this chapter. Such substantive documentation shall include dated aerial photographs, tax records, or other historical information deemed reliable by the board.” (Emphasis added).

When IDL has historically processed Pre-LPA Encroachment applications, it has almost always involved a dock. IDL has some historic aerial imagery that we can use to try and determine if a dock was present on the property, as well as determine if the overall size and configuration of the dock remains the same. The existing log structure does not show up on the aerial imagery that IDL has for this particular area due to the scale of the photo, the size of the existing log structure, and lack of clarity. However, Idaho Code § 58-1312 provides that the *applicant* shall provide the documentation; the burden of proof is on the applicant and it is not up to IDL to try and prove or disprove that the encroachment in question pre-dates the LPA.

The only documentation submitted by Applicant to prove the existing log structure has been in place and not been modified after January 1, 1975 were two letters written by existing or previous adjacent waterfront neighbors (Pat Phillips and Gary Fievez). No historic photos, construction diagrams, detailed description of the existing logs, or other substantive evidence, as required by Idaho Code § 58-1312, has been provided. Mr. Fievez specifically stated that only logs were placed ***on the beach***. He does not mention rocks or any other structures, and Mr. Phillips does not mention rocks or any other structures. The letters also do not mention “dimensional lumber joining the logs by steel spikes” as described in the Application. Applicant has provided no evidence that “dimensional lumber joining the logs by steel spikes” ever existed before 1975.

Without any evidence that supports the size, building materials, and construction of a pre-LPA Encroachment, no permit for it can be granted. Additionally, based on photographs provided by adjacent neighbor Mr. Faloon, IDL believes the existing log structure has been modified since 2005. Photos show that rocks had been added to the lakebed and log structure sometime in 2006-2007. AR, Doc. 6, pp. 0124-0133. Mr. Fievez’s letter only describes logs on the beach and states: “However, there was no rock barrier or rock structure that extended from the beach into the lake.” Since Applicant has modified what remained of the log structure, the existing log structure can no longer be permitted as a pre-LPA Encroachment.

The Application does not state a purpose for the logs, but they are located where the prior application covered by PH-2020-PUB-10-001 sought an encroachment permit for a rock jetty. As noted in items III.D.2.c, 2.d, and 4.a of the Preliminary Order for PH-2020-PUB-10-001, the purpose of the jetty was to capture sand on the north side of the jetty. AR Doc 6, Pages 396, 397, and 400. While beneficial to Applicant, this interruption of sand movement appears to be harming the neighbor's beach to the south. AR Doc 6, Pages 399-401, item III.D.4. It is possible that this interruption in sand movement is affecting other properties to the south. The Preliminary Order for PH-2020-PUB-10-001 determined that the application for essentially the same jetty was an encroachment not in aid of navigation (AR Doc 6, Pages 398-399, item III.D.3.), and it did not rebut the presumption of adverse impact. AR Doc 6, Pages 399-401, item III.D.4. These determinations were instrumental in denying that application, and are still applicable to the alleged pre-LPA Encroachments structure.

Summary

Applicant only provided two letters attesting to the age of the existing log structure. No historic aerial images or any personal photos were provided that would show the extent and construction date of the existing log structure. The letters do not mention any rocks as being part of the structure, the letters do not make it clear what the logs were originally a part of, and the letters do not mention that the structure remains the same today as it did back in the early 1970's. IDL does not have any aerial photographs or tax records to prove the structure has existed in the same location, without being modified after January 1, 1975, as required by Idaho Code § 58-1312. IDL does have photo proof that the log structure has been modified after 2005 by the addition of rocks and cobbles to the structure. Although the rocks and cobbles have been removed, they were added to the structure at one point, thus altering the allegedly pre-LPA structure. Additionally, the current Application states the logs are connected by dimensional lumber via steel spikes, and there is no proof or evidence of the lumber and spikes existing before January 1, 1975. Based on all of these reasons IDL recommends upholding the decision to deny the Pre-LPA Encroachment. IDL further recommends that the portion of the logs that are below the OHWM be removed prior to June 1, 2023.