

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE  
OF IDAHO, IN AND FOR THE COUNTY OF BONNER

BONNER COUNTY,

Petitioner,

vs.

THE STATE OF IDAHO, IDAHO STATE  
BOARD OF LAND COMMISSIONERS,  
IDAHO DEPARTMENT OF LANDS and  
DUSTIN MILLER, in his capacity as the  
Director of the IDAHO DEPARTMENT OF  
LANDS, OUTLET BAY OWNERS  
ASSOCIATION, INC.,

Respondents.

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OUTLET BAY OWNERS ASSOCIATION,  
INC.,

Cross-Petitioner,

vs.

BONNER COUNTY; THE STATE OF  
IDAHO; IDAHO STATE BOARD OF  
LAND COMMISSIONERS; IDAHO  
DEPARTMENT OF LANDS and DUSTIN  
MILLER, in his capacity as the Director of  
the IDAHO DEPARTMENT OF LANDS,

Cross-Respondents

Case No. CV09-22-0320

**JUDGMENT**

JUDGMENT IS ENTERED AS FOLLOWS:

1. The Final Order entered before the Idaho State Board of Land Commissioners in Case No. PH-2021-PUB-10-001 (In the Matter of Encroachment Permit Application No. L-97-S-1210), is modified in accordance with the terms of this Judgment.

2. The conditions stated in the first full paragraph at Page 3 of the Final Order (dated February 9, 2022) are vacated.


3. Those portions of the boat launch and the concrete pier that are located on the property of Outlet Bay Owners Association, Inc. ("OBOA") or on the littoral rights associated with OBOA's real property, shall be included in a permit to be issued to Bonner County on remand, in accordance with the terms of the Final Order, as amended hereby, based upon the Lessee's rights of Bonner County under the Lease Agreement identified in Paragraph 13 of the parties' Stipulation on file herein.

4. The Lease Agreement between OBOA and Bonner County, as identified in Paragraph 13 of the parties' Stipulation on file herein, may be relied upon by IDL in issuing the subject encroachment permit on remand pursuant to the terms of the Final Order as amended herein.

5. The littoral rights and improvements leased by OBOA to Bonner County under the terms of the parties' Lease Agreement attached as Exhibit D to the parties' Stipulation shall be considered by IDL for purposes of issuing the requested permit on remand pursuant to the Final Order as amended herein. This matter is remanded to the Idaho Department of Lands for further administrative proceedings consistent with the terms of this Judgment.

6. The parties shall each bear their own attorney fees and costs.

DATED: 10/24/2022 3:21:15 PM

  
LAMONT BERECZ  
District Judge

**CLERK'S CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on 10/24/2022 3:51:45 PM, I caused a true and correct copy of the foregoing document to be filed and electronically transmitted via the iCourt Efiling System:

Angela Schaer Kaufmann  
Deputy Attorney General  
Attorney General's Office  
P.O. Box 83720  
Boise, ID 83720-0010

[angela.kaufmann@ag.idaho.gov](mailto:angela.kaufmann@ag.idaho.gov)

Mauricio Cardona  
Davillier Law Group LLC  
414 Church Street, Ste. 308  
Sandpoint, ID 83864

[mcardona@davillierlawgroup.com](mailto:mcardona@davillierlawgroup.com)

Darrin L. Murphey  
Murphey Law Office, PLLC  
7752 N. Valley Street  
Dalton Gardens, ID 83815

[dmurphey@murphey.com](mailto:dmurphey@murphey.com)

John F. Magnuson  
Attorney at Law  
P.O. Box 2350  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83814

[john@magnusononline.com](mailto:john@magnusononline.com)

Michael W. Rosedale  
Clerk of Court

By:  \_\_\_\_\_  
Deputy Clerk

OUTLET BAY.JDG.wpd

BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of Encroachment Permit Application No. ) Case No. PH-2021-PUB-10-001  
L-97-S-1210 )  
 ) **FINAL ORDER**  
Jeff Connolly – Bonner County Parks and Waterways, )  
 )  
Applicant. )  
 )  
\_\_\_\_\_ )

**I. NATURE OF PROCEEDINGS**

The Idaho Department of Lands (“IDL”), through the State Board of Land Commissioners, “shall regulate, control and may permit encroachments in aid of navigation or not in aid of navigation on, in or above the beds or waters of navigable lakes” as provided in the Lake Protection Act, title 58, chapter 13, Idaho Code. Idaho Code § 58-1303. The corresponding administrative rules promulgated by the State Board of Land Commissioners are IDAPA 20.03.04, “Rules for the Regulation of Beds, Waters, and Airspace over Navigable Lakes in the State of Idaho.”

On or around November 2, 2021, IDL received an encroachment permit application filed by Jeff Connolly with Bonner County Parks and Waterways and Pete Hughes with Bonner County Parks and Recreation (“Application”). A public hearing was held on January 10, 2022. Chris Bromley served as duly appointed hearing coordinator. On February 2, 2022, the hearing coordinator issued his Preliminary Order, which contains 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.

## **III. CONCLUSIONS OF LAW**

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

I add the following paragraph 9a to page 12 after paragraph 9:

9a. Mr. Magnuson attempted to distinguish the concrete pier and water hydrant from the boat ramp, arguing they are outside of the littoral rights as determined by the district court. Other than his oral argument, Mr. Magnuson merely referred to the Application's exhibit map. However, the Application's exhibit map does not depict littoral right lines, and no evidence was introduced into the record showing those two encroachments to be outside of Bonner County's littoral rights. Further, IDL's hearing statement and testimony recommended that the boat ramp and concrete pier be approved together because Bonner County owns the littoral rights for the land adjacent to the boat launch and Outlet Bay Road, which is approximately thirty (30) feet wide.

I delete paragraph 30 on page 18.

## **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.

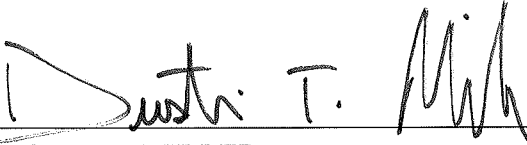
Based on the Findings of Fact and Conclusions of Law, I HEREBY ORDER that Encroachment Permit Application L-97-S-1210 is APPROVED. Approval is subject to the following conditions:

- Signage shall be designed by the Applicant, in consultation with OBOA and the owners of the 11 Cabins, subject to approval by the Department.
- Signage shall be installed at the intersection of Lake Street and Outlet Bay Road, as well as at the boat launch itself, explaining the following:
  - (1) The boat launch is limited to daylight hours only, with two exceptions:
    - (a) for the owners of the 11 Cabins; and
    - (b) for emergency use;
  - (2) Vehicles with trailers must only back into the boat launch;
  - (3) Parking on Outlet Bay Road east of the intersection with Lake Street is prohibited; and
  - (4) The water hydrant is restricted to emergency use only.

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 9<sup>th</sup> day of February 2022.

  
DUSTIN T. MILLER

Director, Idaho Department of Lands

## CERTIFICATE OF MAILING

I hereby certify that on this 9<sup>th</sup> 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:

Jeff Connolly  
Bonner County Parks and Waterways  
1500 Hwy 2, Suite 101  
Sandpoint, ID 83864  
*Applicant*

U.S. Mail, postage prepaid  
 Hand Delivery  
 Email:  
[jeff.connolly@bonnercountyid.gov](mailto:jeff.connolly@bonnercountyid.gov)

Pete Hughes  
Bonner County Parks and Recreation  
1500 Hwy 2, Suite 101  
Sandpoint, ID 83864  
*Agent for applicant*

U.S. Mail, postage prepaid  
 Hand Delivery  
 Email:  
[pete.hughes@bonnercountyid.gov](mailto:pete.hughes@bonnercountyid.gov)

Mauricio Cardona  
414 Church Street, Suite 308  
Sandpoint, Idaho 83864  
*Counsel for applicant*

U.S. Mail, postage prepaid  
 Hand Delivery  
 Email:  
[mcardona@davillierlawgroup.com](mailto:mcardona@davillierlawgroup.com)

John F. Magnuson  
1250 Northwood Center Court, Suite A  
Coeur d'Alene, ID 83816  
*Counsel for objector (Outlet Bay HOA)*

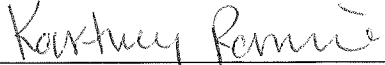
U.S. Mail, postage prepaid  
 Hand Delivery  
 Email: [john@magnusononline.com](mailto:john@magnusononline.com)

Angela Schaer Kaufmann  
Office of the Attorney General  
P.O. Box 83720  
Boise, ID 83720-0010  
*Counsel for IDL*

Statehouse Mail  
 Hand Delivery  
 Email:  
[angela.kaufmann@ag.idaho.gov](mailto:angela.kaufmann@ag.idaho.gov)

Kourtney Romine *on behalf of*  
Chris Bromley, Hearing Coordinator

U.S. Mail, postage prepaid  
 Hand Delivery  
 Email: [kromine@idl.idaho.gov](mailto:kromine@idl.idaho.gov)

  
\_\_\_\_\_  
Kourtney Romine, Workflow Coordinator

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

Jack and Peggy Kelly  
[jack-peg-kelly@comcast.net](mailto:jack-peg-kelly@comcast.net)

Rod Near  
543 Outlet Bay Rd  
Priest Lake, ID  
[rodnear@icloud.com](mailto:rodnear@icloud.com)



Pamila McVey Richardson  
[mcveypamila@comcast.net](mailto:mcveypamila@comcast.net)

Karen & John Marshall  
1521 S Walnut Street  
Spokane, WA 99203  
[johkarche@hotmail.com](mailto:johkarche@hotmail.com)

Ron & Pat Hardin  
35 Pawnee Point  
Priest Lake, Idaho  
[rah0505@comcast.net](mailto:rah0505@comcast.net)

Dan Stowe  
[dan.stowe@hubinternational.com](mailto:dan.stowe@hubinternational.com)

Ron McInerney  
15402 N McKinnon Rd  
Mead, WA 99021  
[ron@burtonconstruction.net](mailto:ron@burtonconstruction.net)

Lynn Wolfe  
[lynn@awebteam.com](mailto:lynn@awebteam.com)  
[raepaul007@gmail.com](mailto:raepaul007@gmail.com)

Brad Hubbs  
1527 W. Priest Lake Shore  
Priest Lake, ID  
[hubbs.brad@gmail.com](mailto:hubbs.brad@gmail.com)

Bill McInerney  
272 Outlet Bay Rd  
Priest Lake, ID 83856  
[billmcpriestlake@sisna.com](mailto:billmcpriestlake@sisna.com)

Allan McEachern  
[allan@mailstream.com](mailto:allan@mailstream.com)

John Allison  
2208 W. Second Ave.  
Spokane, WA 99201  
[jdallison@eahjlaw.com](mailto:jdallison@eahjlaw.com)

Christie Hoffpauer  
[christie.hoffpauer@comcast.net](mailto:christie.hoffpauer@comcast.net)

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

In the Matter of:

Encroachment Permit Application  
No. L-97-S-1210

Jeff Connolly – Bonner County Parks and  
Waterways

Applicant.

Case No. PH-2021-PUB-10-001

**PRELIMINARY ORDER**

**FINDINGS OF FACT**

1. On November 3, 2021, Jeff Connolly with Bonner County Parks and Waterways (“BCPW”) and Pete Hughes with Bonner County Parks and Recreation (“BCPR”) filed a *Joint Application for Permit*, numbered L-97-S-1210 (“Application”) with the Idaho Department of Lands (“Department” or “IDL”) to permit an existing boat launch, concrete pier, and water hydrant at Outlet Bay on Priest Lake. BCPW and BCPR may be collectively referred to herein as the “Applicant.”

2. According to the Application, Bonner County is the littoral owner of the Outlet Bay boat launch as decided on July 14, 2021 by the Bonner County district court: “Bonner County is requesting to acquire an encroachment permit for the Outlet Bay boat ramp, concrete pier, and water hydrant.” *Application* at 1, line 15. *See also Commercial/Community/Non-Navigational Encroachment Permit Application* (identifying Bonner County as the owner of littoral rights in fee simple).

3. The boat launch is “approximately 87 linear feet, with 34 ft below OHWM and a width of 15 feet. The concrete pier is approximately 32 linear feet from the OHWM (Ordinary High-Water Mark) and a width of 8 feet. The water hydrant sits just below the OWHM on the south side of the boat ramp. Two sections of the ramp have been recently fixed to correct safety issues of the degrading ramp. Bonner County requests to acquire a permit to maintain existing structure and adjacent erosion protection materials.” *Id.* at 2, ln. 16.

4. Applicant proposes to mitigate the encroachments through routine inspections, maintenance of soil and erosion protection, removal of debris from concrete surfaces, and placement of signage “outlining proper boat launch usage.” *Id.* at 2, ln. 18.

5. The Application identified the Outlet Bay Owners Association (“OBOA”) as an adjacent property. *Id.* at 4, ln. 29.

6. An exhibit map and diagram were included with the Application.

7. On November 9, 2021, the Department sent notice of the Application to OBOA.

8. On November 9, 2021, the Department sent a copy of the Application to agencies and entities for comment.

9. On November 10, 2021, the Department of sent notice of the Application for publication in the Bonner County Daily Bee.

10. Notice of the Application was published in the Bonner County Daily Bee for two consecutive weeks on November 13, 2021 and again on November 20, 2021.

11. On November 29, 2021, the Department received an objection (“Objection”) to the Application from counsel for OBOA:

The encroachment which is proposed to be permitted is located within the 25 foot setback of the common littoral property line between the Association’s property and the property that is identified in the application. It is presumed under the Idaho Administrative Code that the encroachment, if permitted in the name of the

applicant, will adversely impact the rights of the Association as the immediately adjacent property owner.

The Association recognizes the decision in Outlet Bay Owners Association, Inc. v. Bonner County (Bonner County Case No. CV09-20-0969). The Association also recognizes, as must IDL and Bonner County, that based on that decision, there was no prior permit for this encroachment. The Association further recognizes, as must IDL and Bonner County, that the boat launch which is the subject of this permit was installed at private expense on property believed to be private (i.e. property of the Association), and that Bonner County on numerous prior occasions, through its Board of County Commissioners, acknowledged that the boat launch was private and belonged to the Association. Notwithstanding the Court's decision, those facts remain relevant as to the issue of adverse impact upon the Association and the preservation and protection of the Association's private property.

. . . .

The application also seeks IDL approval to permit a "water hydrant," which, by necessity is on upland property outside the jurisdiction of IDL.

Bonner County also seeks approval for "signage outlining property boat usage." All such signage will by necessity be upland of the OHWM and, unless [sic] located in the middle of Outlet Bay Road, on property owned by the Association. The Association does not consent to the same, as part of Bonner County's requested permit. The Association may consent to signage separate and apart from this application if the terms of the signage and the location of the same are agreed to in writing by the Association.

Protection of property also mandates that IDL impose reasonable restrictions on any permit issued notwithstanding the adverse impacts on the Association's adjacent littoral rights. . . . [A]ny terms of the permit, if issued notwithstanding the Association's objection, should require limited hours of usage so as not to create a nuisance or impairment of the property rights of the Association as the immediately adjacent neighbor.

*Objection at 1-2.*

12. On December 16, 2021, the Director 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 January 10, 2022:

13. Notice of the January 10, 2022 hearing was published in the Bonner County Daily Bee on December 30, 2021 and January 6, 2022.

14. On January 3, 2022, the Department received a *Statement of Historical Facts* and set of exhibits from OBOA, numbered M-1 through M-10, which include a series of photographs of the site, and the *Declaration of Drew C. Dittman, P.E. RE: Motions for Summary Judgment* (“Dittman Declaration”).

15. On January 3, 2022, the Department issued its *Hearing Statement* (“IDL Hearing Statement”), explaining how it views the Application.

16. On January 4, 2022, the Department received a hearing exhibit from the Applicant, consisting of the Bonner County district court’s July 14, 2021 *Memorandum Order and Decision on Motions for Summary Judgment in Outlet Bay Owners Association, Inc. v. Bonner County*, Case No. CV09-20-0969 (hereinafter *Outlet Bay*).

17. The Department received numerous comments opposing the Application from residents of OBOA, that may be summarized as follows: Outlet Bay Road is too narrow with private property on both sides; Outlet Bay Road does not have turnaround access for cars or trailers; vehicles ignore private property signs; vehicles turn around on private property; boats are pulled from the Lake late at night or after dark; vehicles seldom back down the road to launch; OBOA docks are used for picking up and dropping off; inadequate lighting; lack of restrooms; and garbage and debris are left behind on private and public property.

18. A more unique comment to the Application came from Jack and Peggy Kelly, homeowners in OBOA, who are opposed to the Application, but asked if the Application is approved that Bonner County “promote and manage the Boat Launch” with a list of restrictions: (1) boats must be backed into the launch; (2) only one boat may launch at a time; (3) vehicles must park elsewhere; and (4) no parking on private property.

19. A more unique comment in opposition to the Application came from Pamila C. Richardson, a homeowner in OBOA and former board member, asking for the creation of a “full size boat launch in conjunction with the forest service at Outlet Campground” instead of the present location.

20. On January 7, 2022, the Department received a comment in support of the Application from Dan Stowe, a property owner in Outlet Bay “since the 1940s. We are located across the water directly south from the Outlet Bay Boat Launch. There is no road access to our land. The only access is by water. The Outlet Bay Road Boat Launch is critical to us being able to have access to our land. We use the launch hundreds of times each year to come and go from our property.”

21. On January 7, 2022, the Department received a comment in support of the Application from Bill McInerney, who is a property owner in Outlet Bay “since the 1940’s. . . . The boat launch is of vital importance for my family and neighbors for everyday use and emergencies. It is our only reasonable means of access as we have no road to our cabin.”

22. On January 7, 2022, the Department received a comment in support of the Application from John Allison, who is “one of the 11 cabin owners along the shore of Outlet Mountain across from the Outlet Bay ramp. With no road to our properties, we depend on the ramp and concrete pier for access, though we only very occasionally use the ramp for launching watercraft. I support the permit application because it is necessary in order for the ramp and pier to be maintained in a safe condition. I also support reasonable regulation of launching activities such as turnaround and parking restrictions east of Lake Street in order to help mitigate impact on property owners.”

23. On January 8, 2022, the Department received another comment from Mr. McInerney, a resident of Outlet Bay “since 1947” who remembered when the boat launch was built in “the very early 60’s” by the Barnes family. Mr. McInerney believes some of the problems could be solved with more parking that is “a reasonable distance from the ramp . . . [and] suggest[] OBOA store their boat trailers on their property. They have plenty of space for this and it would help aid congestion.” Mr. McInerney believes the private property encroachment problem could be solved if Bonner County builds a “4’ chain link fence along both sides of the county right of way . . .” Lastly, Mr. McInerney says he “look[s] forward to Bonner County finally repairing the ramp and replacing the dock that was removed several years ago.”

24. On January 9, 2022, the Department received a comment from Brad Hubbs, a homeowner directly across from the boat launch, explaining: “The Outlet Bay boat launch has obviously been a contested topic which has created dissension between people who all want to use the lake. Access to the lake is limited, which makes this access point even more important. I understand the issues that people have in regards to why the boat launch should or should not be in this specific location. However, I think we need to work with what we have. In my opinion, simply providing properly posted, well identified signage noting the issues that many OBOA homeowners have, especially the Kelly’s noted concerns with the use of the boat launch, will help immensely.”

25. The hearing was held on January 10, 2022, starting at approximately 6:00 p.m. Pacific time. The first person to provide comment was Mauricio Cardona, counsel for the Applicant, stating his client is in agreement with the IDL Hearing Statement. Mr. Cardona explained the water hydrant is used as a filtration system for firefighting, but he did not know

when the hydrant was installed, other than it may have been twenty years ago. As to mitigation, and in the interest of being a good neighbor, Mr. Cardona explained the Applicant possesses a right-of-way with room for signage to educate the public as to how to use the boat launch.

26. The next comment was given by Mr. Magnuson, counsel for OBOA. Mr. Magnuson explained the boat launch was installed in 1962 and agreed that Bonner County owns the littoral rights. Mr. Magnuson stated that if the encroachments were to be built today, no permit would issue by IDL due to the requirements of IDAPA. In order to orient the Hearing Coordinator, Mr. Magnuson explained the photos that make up Exhibit A to the Dittman Declaration and Exhibits M-6 through M-10. Mr. Magnuson closed his remarks with a set of six conditions that OBOA would like to see included on any permit that issues: (1) limit the time of use to daylight hours; (2) install a gate to limit access to daylight hours; (3) no parking signs on Outlet Bay Road; (4) requirement that boat trailers are backed in; (5) signage should be subject to approval by OBOA and IDL; and (6) the concrete pier and water hydrant should not be permitted.

27. The next comment was given by Allan McEachern, confirming that the vertical pipe that can be seen in some of Mr. Magnuson's exhibits (M-7 through M-10) is the water hydrant that Bonner County is attempting to permit. Mr. McEachern agreed with Mr. Magnuson's list of conditions, also citing the need for public safety when it comes to vehicles that drive down Outlet Bay Road, as there are children who play in the yards and street.

28. The next comment was given by Christie Hoffpauer, owner of one of the eleven cabins ("11 Cabins") across from Outlet Bay that is only accessible by boat. Ms. Hoffpauer also submitted a written comment that was received by the Department on January 10, 2022, shortly before the hearing. Ms. Hoffpauer explained that the only access point for the 11 Cabins is the



boat launch. Ms. Hoffpauer explained if the boat launch is limited to daylight hours only, that it will prevent historical access to the 11 Cabins and restrict needed emergency access.

29. The next comment was given by Ms. Richardson, who summarized her written comments already in the record – preference to see a new boat launch constructed at Outlet Bay Campground.

30. The next comment was given by Mr. Ahmer on behalf of IDL. Mr. Ahmer explained the IDL Hearing Statement and answered a number of the Hearing Coordinator’s questions, including how the Department views pre-1975 encroachments and how to the Department’s authority to condition a permit that issues. Mr. Ahmer noted that the boat launch has not been shown on maps in the past. Mr. Ahmer explained the usage of the boat launch and hours of parking should mirror what has historically been allowed, with a recommendation of signage as a term of the permit. In discussing the conditions offered by Mr. Magnuson, Mr. Ahmer said the use of the encroachments during daylight hours, no parking on the street, and only backing in vehicles and trailers could be a term of the permit as mirroring the public’s expectation of the site with signage explaining the requirements. As to a gate that would prevent access, Mr. Ahmer said IDL does not typically permit gates.

31. A reply was given by Mr. Cardona, who was assisted in his reply by Mr. Connolly. In discussing the conditions offered by Mr. Magnuson, the Applicant agreed that signage could be installed at the intersection of Lake Street and Outlet Bay Road explaining the boat launch should be used during daylight hours only (with an exception for emergency use), that vehicles with trailers should only back into the boat launch, and that parking should be restricted to the right-of-way. The Applicant disagreed with installation of a gate. As to other rules and regulations, the Applicant said if there were additional requests, citizens should

approach the County Commissioners. As it related to the public's awareness of the boat launch, Mr. Connolly explained that the County agreed, in a prior lawsuit between the County and OBOA, not to publish the location of the boat launch. Lastly, Mr. Connolly explained the need to recognize access for the 11 Cabins, with Mr. Cardona explaining the desire to be a good neighbor.

32. All exhibits, written comments, oral comments, and documents 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 Title 58, Chapter 13, Idaho Code And IDAPA 20.03.04**

5. Certain requirements contained in Title 58, Chapter 13, Idaho Code 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 a map and diagram locating the encroachments, BCPW describes the Application. 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. Applicant Owns Littoral Rights**

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 BCPW and BCPR, signed by Jeff Connolly and Pete Hughes. According to the Application, the littoral rights are owned fee simple by Bonner County. 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. Proof of littoral ownership is acknowledged by OBOA and established in the Bonner County district court’s decision in *Outlet Bay*: “As the owner in fee simple, the County owns the littoral rights associated with the road and boat ramp.” *Outlet Bay* at 17.

**c. The Application was properly noticed**

10. 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 received by the Department on November 3, 2021. Notice of the Application was published in the Bonner County Daily Bee on November 13, 2021 and again on November 20, 2021. Therefore, the

Application was timely published in accordance with Idaho Code § 58-1306(b) and IDAPA 20.03.04.030.01.

11. 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. Here, IDL noticed a hearing to occur on January 10, 2022, with notice of the same occurring on December 30, 2021 and January 6, 2022, satisfying the legal notice requirements.

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

**C. The Department Possess The Authority To Regulate Priest Lake**

13. 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.

14. Applicant proposes to permit a boat launch, concrete pier, and water hydrant in and around the bed of Priest Lake. The Lake is a navigable body of water that is regulated by the Department. "Priest Lake has been a navigable lake since Idaho became a state in 1890. In approximately 1950, the State of Idaho constructed a dam on Priest lake, which has stabilized the Lake elevation at approximately 2437.64 feet from July to September since 1951." *State v. Hudson*, 162 Idaho 888, 889, 407 P.3d 202, 203 (2017). The elevation at which the Department regulates the Lake under the LPA is "the 2437.64 foot line . . . which is where the State considers the natural or ordinary high water mark to be." *Id.* "[W]hether 2437.64 feet was the OHWM or

the AHWM is not an issue of material fact because the State has the authority to regulate encroachments under both marks.” *Id.* at 893, 407 P.3d at 207.

**D. The Existing Encroachments For The Boat Launch, The Concrete Pier, and The Water Hydrant Are Approved**

15. The Application was filed in order to permit an existing boat launch, concrete pier, and water hydrant. This section will address the approvability of each encroachment.

**a. The Boat Launch predates the Lake Protection Act and is approved**

16. It is undisputed that the boat launch was installed in the early 1960s, which predates the 1974 enactment of the Lake Protection Act (“LPA”), I.C. §§ 58-1301 *et seq.*, as well as the requirements of IDAPA 20.03.04 *et seq.*

In approximately 1960 or 1961, Richard and Oliver Barnes, the then-owners of the Outlet Bay resort, constructed a boat ramp at that location. Specifically, the boat launch was constructed where Outlet Bay Road meets Priest Lake, and out over the submerged beds of Priest Lake. The boat ramp has been used by the public since its construction.

*Outlet Bay* at 4-5.

As noted earlier, the public has used Outlet Bay Road slope into Priest Lake as a public boat launch continuously since the 1950s.

*Id.* at 13.

17. Over the years, the boat launch has been maintained, but “[n]ever has an encroachment permit been issued . . . allowing for a boat ramp. Nor have the submerged land leases encompassed the boat ramp.” *Id.* at 5-6.

18. Because the boat launch was built prior to enactment of the LPA, it is grandfathered under the LPA:

(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.

I.C. § 58-1312 (emphasis added).

19. The evidence in the record establishes that the boat launch was “constructed” before January 1, 1975, yet was not permitted by the Department. *Outlet Bay* at 4-6. While the boat launch does not provide for at least 25 feet of setback from an adjacent littoral line as provided by IDAPA 20.03.04.015.13.e, it nevertheless is grandfathered pursuant to I.C. § 58-1312.

20. There is no evidence in the record, nor was any offered, to suggest that the boat launch was “replaced” or that the maintenance to the boat launch “modified” it in any way that exceeds the scope of the encroachment that was constructed prior to the LPA. Therefore, the boat launch is approved as a grandfathered encroachment pursuant to I.C. § 58-1312.

**b. The Concrete Pier is Approved as a Navigational Encroachment**

21. There is no evidence in the record establishing when the concrete pier was built, whether it was before or after passage of the LPA. While it would make sense that the concrete pier was built around the same time as the boat launch, without evidence establishing a date of construction, the Hearing Coordinator assumes the concrete pier was built on or after January 1, 1975, which requires processing under the LPA and IDAPA.

22. A “pier” is defined as an “encroachment in aid of navigation” also known as a “navigational encroachment.” I.C. § 58-1302(h); IDAPA 20.03.04.010.15. The concrete pier



does not extend beyond the line of navigability, *IDL Hearing Statement* at 10, with no evidence presented to the contrary.

23. “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.

24. As explained in the IDL Hearing Statement: “having a pier . . . adjacent to a boat ramp is of utmost importance when launching or retrieving a boat, as well as because the concrete pier is existing and allowing its use would also mirror the public’s expectations for the site.” *IDL Hearing Statement* at 11. Comments were provided at the hearing similarly saying that the concrete pier is necessary for launching and retrieving boats.

25. Not only does the concrete pier mirror the public’s expectation, but it also mirrored the expectation of OBOA and its predecessors, who previously believed they owned the concrete pier and consented to its placement through its construction, which rebuts the presumption of adverse effect:

Prior to 1989, Donald Stratton owned the property now held by the Association.

....

The boat launch was privately constructed and paid for in 1961 by Stratton’s predecessors, Richard and Oliver Barnes.

....

In 1995, Stratton and others incorporated the Association.

....

The Association previously maintained the boat launch that was built by the Barnes in 1961.

*Statement of Historical Facts on Behalf of Outlet Bay Owners Association* at 1-2.

26. Permitting the concrete pier does nothing more than authorize an existing encroachment that OBOA and its predecessors consented to when they thought they owned the encroachment and allowed the “public” – including the owners of the 11 Cabins who rely on the encroachments as the “sole ingress to cross-lake waterfront lots . . . during and around the winter months” – to use the boat launch and associated concrete pier. *Outlet Bay* at 5. “That sole public access condition has been in effect for more than seventy years.” *Id.*

**c. The Water Hydrant is Approved as a Non-Navigational Encroachment for Emergency Use Only**

27. The best evidence in the record establishing the date of construction of the water hydrant came from Mr. Cardona, who believed it may have been constructed twenty years ago, which post-dates January 1, 1975. The Hearing Coordinator will therefore analyze approval of the water hydrant consistent with the LPA and IDAPA.

28. As shown in *Exhibit M-7, M-8, and M-9*, the water hydrant is located immediately adjacent to the boat launch and across from the concrete pier. As stated in the *Application*, “The water hydrant sits just below the OHWM on the south side of the boat ramp.” *Application* at 2, ln. 16. In the *Objection* filed on behalf of OBOA, it is asserted that the “water hydrant . . . is on upland property outside the jurisdiction of IDL.” *Objection* at 2. In comparing *Exhibit M-7, M-8, and M-9* with *Exhibit A* to the *Dittman Declaration*, the water hydrant is located slightly below the dashed line in *Exhibit A* (identifying the elevation as 2437.64’ (NGVD 1929)). *See Hudson* at 893, 407 P.3d at 207 (identifying the OHWM/AHWM as “the 2437.64 foot line”). Therefore, the preponderance of the evidence supports a conclusion that the water hydrant is located below the OHWM and is within IDL’s jurisdiction.

29. The water hydrant is an “encroachment not in aid of navigation” also known as a “nonnavigational encroachment.” I.C. § 58-1302(i); IDAPA 20.03.04.010.16.

30. “In recognition of continuing private property ownership of lands lying between the natural or ordinary high water mark and the artificial high water mark, the board shall consider unreasonable adverse effect upon adjacent property and undue interference with navigation the most important factors to be considered in granting or denying an application for a nonnavigational encroachment . . . .” I.C. § 58-1306(e).

31. As explained at the hearing by Mr. Cardona, the water hydrant has a filtration system for firefighting, and is only used for firefighting. Because the water hydrant does not extend below the boat ramp or concrete pier, it does not interfere with navigation. Having a water hydrant nearby for emergency use is in the public interest, particularly for the homeowners within OBOA, and does not interfere with private property.

**E. Approval Of The Encroachments Is Consistent With The Public Trust Doctrine**

32. “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.

33. 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.

34. 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) (hereinafter *KEA*).

35. The Application proposes to permit a grandfathered boat launch and existing concrete pier and water hydrant not extending beyond the line of navigability. As explained in the record, and when examined cumulatively, there is a presence of boat ramps and docks in the vicinity. As to adverse impacts to fishing, no comments were submitted by Idaho Fish & Game, indicating that no adverse impacts will be felt by permitting the decades-old encroachments. While the boat launch was constructed prior to the LPA and *KEA* and is not required to be analyzed under those requirements, the preponderance of the evidence nevertheless supports a conclusion that permitting each of the encroachments is consistent with the public trust doctrine.

**F. Conditions Of Approval For The Permit**

36. There was consensus during the hearing that signage explaining the historic use of the encroachments was reasonable and necessary, with the Applicant explaining the need to

recognize access for the 11 Cabins Owners, and agreeing to place signage above the OHWM at the intersection of Lake Street and Outlet Bay Road.

37. The Hearing Coordinator concludes that signage should be placed at the intersection of Lake Street and Outlet Bay Road, as well as at the boat launch itself, explaining: (1) the boat launch is limited to daylight hours only, with two exceptions: (a) for the owners of the 11 Cabins whose access has been in effect for more than seventy years as discussed in *Outlet Bay* and (b) for emergency use; (2) vehicles with trailers must only back into the boat launch; (3) parking on Outlet Bay Road east of the intersection with Lake Street is prohibited; and (4) the water hydrant is restricted to emergency use only.

38. The Hearing Coordinator concludes that the signage should be designed by the Applicant, in consultation with OBOA, subject to approval by IDL as a condition of the permit.

39. The Hearing Coordinator concludes the Applicant should continue its past practice of not publishing the location of the encroachments.

40. The Hearing Coordinator disagrees with OBOA for two reasons that a gate should be a condition of the permit. First, a gate is not agreed to by the Applicant and was cautioned against by IDL. Second, a gate would be a new feature, and in order for it to be effective, the gate would need to be located above the OHWM, which is outside the jurisdiction of IDL.

### **ORDER**

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that Encroachment Permit Application No. L-97-S-1210 is APPROVED.

IT IS FURTHER ORDERED that signage shall be designed by the Applicant, in consultation with OBOA and the owners of the 11 Cabins, subject to approval by the Department, to be installed at the intersection of Lake Street and Outlet Bay Road, as well as at

the boat launch itself, explaining: (1) the boat launch is limited to daylight hours only with two exceptions: (a) for the owners of the 11 Cabins and (b) for emergency use; (2) vehicles with trailers are limited to backing into the boat launch; (3) parking on Outlet Bay Road east of the intersection with Lake Street is prohibited; and (4) the water hydrant is restricted to emergency use only.

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 January 10, 2022. 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 2<sup>nd</sup> day of February, 2022.



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CHRIS M. BROMLEY  
Hearing Coordinator

**CERTIFICATE OF SERVICE**

I certify that on this 2<sup>nd</sup> day of February 2022, 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