

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

In the Matter of

Application for Permit for Community  
Marina

The Idaho Club North Lake, PUD Marina,  
Valiant Idaho, LLC,

Applicant

Agency Case No. PH-2023-NAV-20-003

OAH Case No. 23-320-07

**FINAL ORDER**

**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, 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 § 58-103. 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 June 14, 2023, IDL received an encroachment permit application for a one hundred five-slip community dock system filed by William Haberman, Managing Member of Valiant Idaho, LLC, Valiant Idaho II, LLC and Brian Kramer, member of Rock Chalk Lenders,

LLC. A hearing was held on September 6, 2023. Leslie Hayes served as duly appointed hearing officer. On October 19, 2023, the hearing officer issued her Recommended Order, which contains the following sections: Background, Preliminary Evidentiary Rulings, Findings of Fact and Conclusions of Law. On October 23, 2023, I received a letter from the Idaho Conservation League asking the Idaho Department of Lands to file an exception to the Hearing Officer's Recommended Order. The Idaho Department of Lands did not file an exception.

As Director of IDL, my responsibility is to render a decision pursuant to Idaho Code § 58-1306 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 available record for this matter, including examining the hearing officer's Recommended Order in light of the entire available record in this matter.

## **II. FINDINGS OF FACT**

I adopt the Recommended Order's Findings of Fact as my Findings of Fact.

## **III. EVIDENTIARY RULINGS**

I adopt the Recommended Order's Evidentiary Rulings as my Evidentiary Rulings.

## **IV. CONCLUSIONS OF LAW**

I adopt the Recommended Order's Conclusion of Law as my Conclusions of Law.

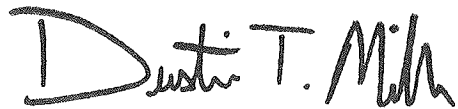
## **V. ORDER**

I conclude that the hearing officer's Recommended Order is based on substantial evidence in the record, and I adopt the Recommended Order's Findings of Fact, Evidentiary Rulings and Conclusion of Law as my decision in this matter. I hereby incorporate by reference the Recommended Order's Background, Findings of Fact, Evidentiary Rulings and Conclusions of Law into this Final Order. I have enclosed and served the Recommended Order along with this Final Order.

Based on the adopted Findings of Fact and Conclusions of Law, I HEREBY ORDER that the Encroachment Permit Application L-96-S-2798 is APPROVED.

This is a final order of the agency. Pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.030.09, the Applicant or any aggrieved party who appeared at the hearing has a right to have the proceedings and Final Order reviewed by the district court in the county where the encroachment is proposed by filing a notice of appeal within thirty (30) days from the date of the final decision. Pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.030.09, 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 27<sup>th</sup> day of October, 2023.



DUSTIN T. MILLER  
Director, Idaho Department of Lands

## CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October 2023, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Valiant Idaho, LLC  
William Haberman/Brian Kramer  
151 Clubhouse Way  
Sandpoint, ID 83864  
*Applicant*

- U.S. Mail, postage prepaid
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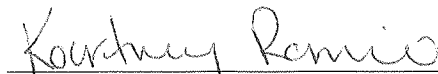
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Walla Walla District  
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\_\_\_\_\_  
Kourtney Romine, Workflow Coordinator

**BEFORE THE IDAHO DEPARTMENT OF LANDS**

In the Matter of	)	
	)	AGENCY Case No. PH-2023-NAV-20-003
Application for Permit for Community	)	
Marina,	)	OAH Case No. 23-320-07
	)	
The Idaho Club North Lake, PUD Marina,	)	<b>FINDINGS OF FACT, CONCLUSIONS</b>
Valiant Idaho, LLC,	)	<b>OF LAW AND RECOMMENDED</b>
	)	<b>ORDER</b>
Applicant.	)	
_____	)	

This matter was assigned to Hearing Officer Leslie Hayes on July 5, 2023. A public, in-person administrative hearing was set for September 6, 2023. A prehearing conference was held on August 28, 2023. This prehearing conference was recorded and addressed the general rules of procedure, stipulations/objections to any prehearing filings, time constraints associated with this hearing, and how to be address the orderly and efficient presentation of evidence and public comment in these proceedings, including how long after the completion of the in-person hearing public comment would continue to be accepted. It was decided that public comment would be accepted through September 15, 2023.

The hearing was held on September 6, 2023, in Sandpoint, Idaho, at the Sandpoint High School Auditorium, commencing at 5:00 p.m. Pacific Time. Present at the hearing were Hearing Officer Leslie Hayes and party representatives Deputy Attorney General J.J. Winters, counsel for Idaho Department of Lands (“IDL”), Mike Ahmer, IDL Lands Resource Supervisor, and William Haberman, Jeremy Grimm, and Brian Kramer for Valiant Idaho, LLC, Valiant Idaho II, LLC, and Rock Chalk Lenders, LLC, (“Applicants”).<sup>1</sup> Also present were IDL representatives Andy Fusion,

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<sup>1</sup> The parties and this Hearing Officer have interchangeably throughout the record referred to Applicants as Valiant, Valiant II, and the Idaho Club. Any reference to one specific entity should be interpreted as a reference to “Applicants” unless otherwise noted.

Jennifer Barker, Erick Sjoquist, and Gwen Victorson. A Zoom link was provided to those individuals who could not attend in-person. This hearing was open to the public and at the conclusion of the parties' presentations, public comment was allowed. An audio recording of the hearing was made available to the public on the IDL website (<https://www.idl.idaho.gov/lakes-rivers/administrative-hearings/>). Following the hearing, Brian Kramer, Registered Agent for Rock Chalk Lenders, LLC, provided written testimony in lieu of oral testimony.

On September 11, 2023, Valiant agreed via email to extend these proceedings by one week in order to ensure time for an in-person onsite inspection of the property. That extension extended the deadline for a final order from October 23, 2023, to October 29, 2023.

An onsite inspection of the property occurred on September 25, 2023, with this Hearing Officer, William Haberman and Brian Kramer for Applicants, and Deputy Attorney General J.J. Winters for IDL. This onsite inspection was recorded via the Hearing Officer's iPad, and pictures were taken during the inspection by the Hearing Officer. The information provided by Mr. Haberman and Mr. Kramer was not taken under oath and, while part of the record, cannot be considered sworn testimony as part of these proceedings, but is provided for informational purposes only.

The Hearing Officer, having considered the matter herein, including documents contained in the Administrative Record as well as the verbal and written public comment, makes the following Findings of Fact and Conclusions of Law pursuant to Idaho Code section 58-1306.

#### **PRELIMINARY EVIDENTIARY RULINGS**

While the parties stipulated to admission of each other's exhibits, certain testimony related to the exhibits received additional objections following the conclusion of the September 6, 2023, public proceedings, which are addressed below. The objections do not impact the admissibility,

but instead go to the weight of testimony provided in conjunction with the exhibits. The following exhibits are admitted: Valiant Exhibits 1-7 labeled in the Agency Record (“AR”) as “V-01,” *et. seq.*; IDL Exhibits 1-7, labeled in the AR as “IDL-1” *et. seq.*; all Public Comments, labeled in the AR as PC 1-1853, including three voicemails received; Agency Comments, labeled as IDL 1-232; and 119 photographs and 1-hour video taken during the onsite inspection held on September 25, 2023.

Following the conclusion of the hearing, Mr. Kramer with Rock Chalk Lenders provided the following objections, which were joined by William Haberman on behalf of Valiant and Valiant II. Each objection is addressed below.

1. The request to take judicial notice of the docket sheet for *Center for Biological Diversity et. al. v. U.S. Fish and Wildlife Services et. al.*, U.S. District Court for the District of Idaho, 2:22-cv-371, is **DENIED** as unnecessary. The docket sheet was previously entered as AR Exhibit V-04 in these proceedings.

2. The request to take judicial notice of the U.S. Fish and Wildlife Service’s Biological Opinion dated August 12, 2022, is **DENIED** as unnecessary. The Biological Opinion has been admitted as AR Exhibit V-03.

3. The request to strike all unsubstantiated and speculative testimony proffered by opponents of the Application is **DENIED**. The Idaho Rules of Administrative Procedure (“IRAP,” found at IDAPA 04.11.01) state that “[e]vidence should be taken by the agency to assist the parties’ development of the record, not excluded to frustrate that development.” IRAP 600. The Rule further provides that “[t]he presiding officer, with or without objection, may exclude evidence that is irrelevant [or] unduly repetitious.” Idaho Code section 58-1306(c) provides, in part, that “[a]ny resident of the state of Idaho, or a nonresident owner or lessee of real property adjacent to the lake,

or any state or federal agency may, . . . file with the board an objection to the proposed encroachment and a request for a hearing on the application.” In total 1639 written comments were received by IDL and over 200 individuals attended the public hearing. Of those 1639 public comments, 341 were duplicates (same commenter, same comment), 1130 were stock emails generated by advocacy groups, 94 were independent comments opposed to the project, and 74 were independent emails in support of the project. While there is great community interest in this Application, not all of the comments submitted by the public were necessarily relevant to IDL’s statutory authority. Further, the duplication of comments both in favor of and against the Application, is unduly repetitious. Despite that, this Hearing Officer will exercise her discretion and admit the testimony received in these proceedings for consideration by the IDL Director prior to issuing a final order. The public testimony provided related to revocation of the Biological Opinion and the unlawful taking of the bull trout habitat will be given the appropriate weight and relevance in these proceedings.

4. The objection for “lack of due process due to failure to call Brian J. Kramer to testify at the hearing” is **OVERRULED**. Mr. Kramer was not disclosed as a witness on Applicants’ Witness List. AR 08- Idaho Club – North Trestle – IDL Prehearing Statement & Witness List, p. 15. Both sides agreed to a 30-minute limit on the presentation of evidence at the prehearing conference held on August 28, 2023. AR – Zoom Recording 8.28.23, at 16:30. Valiant’s time was exhausted during Mr. Grimm’s presentation. Tr. 47:15. Finally, Valiant’s presentation was done by Mr. Grimm representing all the joint Applicants as well confirming that no other witnesses were going to be called. Tr. 4:9-11 (By the Hearing Officer “Representing The Idaho Club is Mr. Jeremy Grimm. He will be doing a presentation on behalf of their application.”) 23:11-13 (By Jeremy Grimm: “I’m here tonight representing Valiant Idaho, Rock Chalk Lenders



and Valiant Idaho 2 on this application.”) 47:15-18 (“HEARING OFFICER: Okay. Mr. Grimm, you are out of time. Did you have any other witnesses that you intended to call? MR. GRIMM: No.”) Despite that, Mr. Kramer was provided with an opportunity to submit a written position statement and permitted to attend the onsite inspection on September 25, 2023, and provide commentary during that onsite inspection. The Hearing Officer finds that due process was provided to Mr. Kramer to meaningfully participate in these proceedings.

5. The objection for “lack of due process due to the tribunal’s failure to enforce the time limit rule” is **OVERRULED**. Applicants have been provided the opportunity to rebut all submitted written comments and closing briefing was scheduled to provide an opportunity for Applicants to respond to later submitted written comments along with any public comment received at the public hearing held on September 6, 2023. The one-minute limit was set in the Hearing Officer’s discretion and enforced in the Hearing Officer’s discretion. This did not deprive Applicants of due process, but instead, ensured full public participation in these proceedings.

6. The objection for “lack of due process due to failure to allow for cross examination by Rock Chalk and/or Applicants” is **OVERRULED**. As stated above, Applicants’ presentation was done by Mr. Grimm representing all the joint Applicants and Mr. Grimm was asked if he had any questions for Mr. Ahmer following IDL’s presentation, which he did not. Tr. 15:10-13 (“HEARING OFFICER: Mr. Grimm, did you have any questions based on that position statement for Mr. Ahmer to answer here tonight? MR. GRIMM: No.”) To the extent this request is to cross-examine the public witnesses, no request was made at the hearing and this objection is untimely. While this Hearing Officer did permit objections to be submitted after the public hearing, requesting process changes through an objection after the public hearing does not create a due

process violation. The request needed to be made at the time of the public hearing, not following its conclusion.

7. The objection to exclude certain testimony as “non-qualified expert testimony” is **OVERRULED**. This objection is based both on public comment related to the impact of the Application on the bull trout population and to IDL’s similar concerns. As to the statements from the general public, the Rules of Evidence do not apply to these proceedings and the comments received will be given the appropriate weight, including whether the individual has any specialized or technical knowledge relating to bull trout. *See* IRAP 600. As to IDL’s concerns about impact on the bull trout population, the Rules governing these proceedings state that “[t]he agency’s experience, technical competence and specialized knowledge may be used in [the] evaluation of evidence.” IRAP 600. IDL is charged with investigating encroachment applications and “considering the economics of navigational necessity, justification or benefit, public or private, of such proposed encroachment as well as its detrimental effects, if any, upon adjacent real property and lake value factors[.]” I.C. § 58-1306(d). The lake value factors include “navigation, fish and wildlife habitat, aquatic life, creation, aesthetic beauty and water quality.” *Kootenai Env’t All., Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 632 (1983) (emphasis added). Based on the statutory charge, Mr. Ahmer’s years of experience, and his knowledge of the sensitive nature of the bull trout population, his testimony is admissible.

8. The objection to exclude testimony about the biological report and whether it has been revoked, retracted, or rescinded based on a “lack of foundation and speculation” is **OVERRULED**. The testimony is admissible because the biological report is the basis of Applicants’ position that the application should be approved. The public is entitled to challenge the reliance on this report. Despite the admission of the testimony, the testimony has been rebutted

by other evidence in the record and beyond the hearsay statements from the public, there is no evidence to make a finding that the biological report has been revoked, retracted, or rescinded.

9. The objection to exclude the public comment of Fred Palmer based on “hearsay” is **OVERRULED**. The Rules of Evidence do not apply to these proceedings, including the rules related to hearsay. *See* IRAP 600. A finding of fact cannot be based solely on hearsay; however, if there is substantial and competent evidence in the record, the admission of hearsay alone is not in error. *See Application of Citizens Utilities Co.*, 82 Idaho 208, 213-14 (1960).

10. Finally, this Hearing Officer finds a need to address Rock Chalk’s comments in footnote one of the filing “12 Letter to Leslie Hayes 9-22-23.” While not raising formal objections, it does touch on issues that need to be addressed. It reads as follows:

Rock Chalk has concurrently filed objections to evidence and some of the unconventional procedures that have been adopted here by IDL in these proceedings. The procedural oddities have included, but not been limited to, tallying the number of form letters that have been solicited from activist environmental groups campaigning against the Project, not allowing cross-examination of non-qualified and non-expert witnesses and the arbitrary refusal to enforce self-imposed time rules at a public hearing, and allowing cumulative and non-expert testimony to be proffered by the opponents of the Project.

AR - 12 Letter to Leslie Hayes 9-22-23, p. 8, n.1. Most of these objections have been addressed above with the exception of (1) “unconventional procedures;” (2) “tallying the number of form letters that have been solicited from activist environmental groups campaigning against the Project;” and (3) “not allowing cross-examination of non-qualified and non-expert witnesses.”

- a. Unconventional Procedures: “The presiding officer may determine the order of presentation of witnesses and examination of witnesses.” IRAP 558.

At the hearing, the presiding officer: (a) Shall regulate the course of the proceedings to assure that there is a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary. . . . [The presiding officer may give nonparties an

opportunity to present oral or written statements. If the presiding officer proposes to consider a statement by a nonparty, the presiding officer shall give all parties an opportunity to challenge or rebut it and, on motion of any party, the presiding officer shall require the statement to be given under oath or affirmation.

I.C. § 67-5242(3)(a), (c). In this instance, the public interest in participating in these proceedings was vast and the Hearing Officer exercised her discretion in determining the best method to conduct an orderly proceeding that took into account the Applicants' position, IDL's position, other agency statements, and the public's comment. Further, the Hearing Officer required that the public only provide comment after being placed under oath and closed public comment two weeks before Applicants' closing position statement was due. The Hearing Officer was the individual granted with the authority to determine how best to proceed, and did so while acknowledging Applicants' interest in responding or challenging statements from nonparties.

- b. Tallying All Public Comments: This Hearing Officer requested that a summary of all written comments be prepared as an exhibit that would be helpful to the Hearing Officer in the interest of avoiding duplication. AR – 8.28.23 - Valiant Prehearing Conf., at 14:05. *See* IRAP 560; *see also* Tr. 5:18-8:2 (explaining Rules 355 and 560 to the public at the hearing and potential need to limit testimony to avoid duplication). No objection to this process was made at the prehearing conference, and therefore, any such objection is hereby waived. Given the volume of public comment in these proceedings, an exhibit that reduced duplication is in aid of understanding Applicants' position in these proceedings along with the public's various positions in these proceedings.

- c. Not Allowing Cross-Examination of Public Comments: The public comments were provided through public witnesses pursuant to IRAP 355. While “[p]ublic witnesses’ written or oral statements and exhibits are subject to examination and objection by parties[,]” objecting only to “groups campaigning against the Project” is akin to simply objecting to evidence that is unfavorable to a party’s case. Further, no party requested to cross-examine the public during the public hearing, and now requesting that process be added after the close of the public proceeding is untimely.

### **FINDINGS OF FACT**

1. On June 14, 2023, Applicants, William Haberman, Managing Member of Valiant Idaho, LLC, Valiant Idaho II, LLC, and Brian Kramer, member of Rock Chalk Lenders, LLC applied (Application L-96-S-2798) for a permit for a one hundred five-slip community dock system in an existing basin on Lake Pend Oreille. AR – 05 Valiant Hearing Statement final, p. 1; AR - 07 IDL – 7 - Application, p. 1.
2. The Application was completed on June 22, 2023. AR – 05 Valiant Hearing Statement final, p. 1.
3. The Application also seeks to dredge, excavate, and fill an existing boat basin, and add riprap to the shoreline. AR – 07 IDL – Application, p. 7.
4. The project would occur on private submerged lands between the Artificial High Water Mark and the Ordinary High Water Mark on Lake Pend Oreille. AR 05 – Valiant Hearing Statement final, p. 1.
5. No party disputed whether Lake Pend Oreille is a navigable lake.

6. The property previously held a community marina, which is now abandoned and dilapidated. AR – 05 – Valiant Hearing Statement final, p. 1.

7. Applicants own three lots, parcel RP031740000010A, RP031740000020A, and RP03170000030A. AR – IDL – 7 – Application, pp. 1-3.

8. The proposed community dock would be located at Parcel RP031740000020A, Lot 2, The Idaho Club North Lake PUD, which has a physical address of 88 N. Park Road, Hope, Idaho 83836. AR 07 – IDL – Application, p. 12 (showing the proposed project entirely on Lot 2).

9. The project proposes excavating an existing man-made island totaling 13,600 cubic yards, filling in a slack channel<sup>2</sup> with the excavated material for a total of 8,820 cubic yards, and installing approximately 1,100 cubic yards of riprap along 1,220 lineal feet of shoreline. AR – 05 Valiant Hearing Statement final, p. 1.

10. Upland development has been planned for Lot 1. AR – 07- IDL – Application, p. 4 (“Uplands development will include: five residential home sites, each with a legal setback for vertical improvements to prohibit building within the area designated as a slack water channel to be filled; landscaped area to be used as a private park and beach; parking; and road access to the North part of The Idaho Club North Lake PUD to be located within the designated access parcel, but prohibited within the area designated as a slack water channel to be filled.”)

11. Lot 3 has been charitably donated to the Kalispel Tribe with title in fee simple to transfer no later than December 31, 2023. AR – 12 Letter to Leslie Hayes 9-22-23 (verified and attested to at page 20 by Brian Kramer of Rock Chalk and owner of Lot 3); *see also* AR – 07 IDL – Application, p. 3.

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<sup>2</sup> The slack channel is the rerouted portion of Trestle Creek that is referenced in this order.

12. The mouth of Trestle Creek is to the north of Lot 3. AR – IDL – 7 Application, p. 12.

13. Lot 2 is to the south of Lot 3. *Id.*

14. Trestle Creek has been “designated as critical habitat for bull trout” by the United States Fish and Wildlife Service. AR – IDL – 3 REFERENCE L-96-S-2798 – Idaho Club North Lake Marina PUD.pdf, p. 2. “Bull trout have been listed as threatened under the Endangered Species Act[.]” AR – IDL – 3 REFERENCE L-96-S-2798 – Idaho Club North Lake Marina PUD.pdf, p. 2.

15. There is great community interest in this project. IDL received 1639 public comments, 221 people attended the public hearing, and 41 individuals testified at the public hearing held on September 6, 2023.

**Concerns Raised by the Public Opposed to the Project<sup>3</sup>**

16. At the public hearing and in the public comment, individuals asked that the Application be denied for the following reasons:

- a. Concerns about impact on the bull trout population, including the rerouting of Trestle Creek;
- b. Concerns about trash, spillage, human footprint, and water quality (including compliance with the Clean Water Act);
- c. Concerns about private entity blocking access to public lands;
- d. Concerns about property setback requirements from the County;
- e. The public will no longer be able to recreate in the former marina;
- f. The island that is planned to be removed currently has an eagle nest;

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<sup>3</sup> Concerns not addressed in the Findings of Fact, namely, concerns that are not within IDL’s jurisdiction or statutory authority, will be addressed in the Conclusions of Law.

- g. There are two beaver dams in the area where the docks are planned to be built;
- h. The project is not in the public's best interest;
- i. Destruction of an archeological site with importance to the Kootenai Tribe;
- j. Concerns about the introduction of aquatic invasive species;
- k. Applicants bypassed marina regulations by framing this as a "community dock" when in reality it is a marina;
- l. Questions about who is going to enforce any conditions on the permit (example: no wake zone);
- m. Concerns that Applicants have not gotten appropriate approvals from other permitting agencies (example: health district and DEQ); and
- n. The biological opinion (AR – V- 02 – Biological Opinion) relied upon by Applicants as to the impact on the bull trout population has been withdrawn/invalidated by the Federal Court litigation. AR – Public Comments 1-1853; Tr. 51:4-113:7.

17. Of the public comments, including the public testimony, 1674 people were in favor of denial. Of the written public comments, 341 were duplicates (same person, same comment) and 1130 were stock emails from advocacy organizations. The unique/individual testimony and emails came from 129 individuals.

18. As to concerns about impact on the bull trout population, the Hearing Officer finds that the project is unlikely to negatively impact the bull trout population because of the sale of Lot 3 to the Kalispel Tribe, the mitigation partnership with Avista and Idaho Fish and Game, and the mitigation efforts on Lot 2 to redirect the man-made north branch of Trestle Creek<sup>4</sup> and to also

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<sup>4</sup> There appears to be a significant misunderstanding about Applicants' proposal to "redirect Trestle Creek," which was addressed during the onsite inspection. The redirection is for a man-made channel that originally redirected



redirect water flow into the main channel of Trestle Creek. These findings are based on the following evidence:

- a. According to Idaho Fish and Game “[t]he realignment of the North Branch of Trestle Creek will enhance connectivity for downstream migrating salmonids, including post-spawn adults and out-migrating juvenile salmonids. Creating a vegetative buffer along the north branch will enhance terrestrial benefits as well. This mitigation effort should provide a net conservation benefit to the area’s wildlife and fisheries.” AR – IDL - REFERENCE L-96-S-2798 – Idaho Club North Lake Marina PUD.pdf, p. 3.
- b. The Hearing Officer finds Idaho Fish and Game’s position credible as to the impact on the bull trout population and supported by the biological opinion conducted by U.S. Fish and Wildlife Service. *See* V-03 Biological Opinion, pp. 49-50 (“it is the Service’s biological opinion that the proposed action is not likely to jeopardize the continued existence of bull trout.”)
- c. The sale of Lot 3 to the tribe appears to be in conjunction with a plan from Idaho Fish and Game and Avista to “address future connectivity issues at or near the mouth, provide a buffer to future development, have access to provide habitat enhancement, and maintain an adequate riparian buffer.” AR – IDL - REFERENCE L-96-S-2798 – Idaho Club North Lake Marina PUD.pdf, p. 3.

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Trestle Creek into the submerged lands on Lot 2. That channel is shallow, flows through cement culverts that will be removed by Applicants, and puts bull trout into a shallow warm portion of water on Lot 2. By filling in this channel, bull trout will have only a single path to Lake Pend Orielle, and that would be through the original and main channel of Trestle Creek. Some of the public testimony indicated that Trestle Creek itself was being redirected as part of this project, which is not the case. Instead, the planned “redirection” will keep bull trout from utilizing a channel that should not have been built by previous owners, and which potentially puts bull trout at risk to predators.

19. As to concerns about a private entity blocking access to public lands and concerns that the public will no longer be able to recreate in the former marina, Applicants provided proof of ownership of the property, and this is not public land, and the public does not have a right to trespass in the former marina owned by Applicants. AR – 07 – Application, p. 9.

20. There is an eagle nest on the man-made island that is proposed to be excavated. Applicants have received a permit from the Federal Government to remove the eagle nest. AR V-07 Permit Eagle Nest – Single Nest – Alternative Nest.

21. There are two beaver dams in the area where the docks are planned to be built. While the public raised concerns about their removal, Idaho Fish and Game did not. Therefore, the Hearing Officer finds that the beavers will not be harmed by the deconstruction and relocation of the beaver dams.

22. As to the concerns that this project will destroy an upland archeological site, there is no evidence in the record that would support such a finding.

23. As to concerns about the introduction of aquatic invasive species, there is no evidence in the record that would support such a finding.

24. The public raised concerns about Applicants obtaining all appropriate permits from all governmental entities that may have regulations related to this project. There is no evidence that Applicants intend to evade the permitting process and it is Applicants' responsibility to comply with the law. Further, it is Applicants' decision which permits they seek, in what order, and when. *See* AR – 08- Idaho Club – North Trestle – IDL Prehearing Statement & Witness List, p. 3 (acknowledging the need for additional permits); *See also* IDL Post-Hearing Closing Statement, p. 19 (“upland concerns and potential impacts to bull trout will be left to the USACE

and the USFSW to address within their statutory authority. Applicants will also need to obtain a water quality certification of the 404 permit from DEQ.”)

25. There is no evidence that the biological opinion (AR – V – 02 Biological Opinion) has been withdrawn other than the unsubstantiated statements by the public. Following the conclusion of the hearing, this Hearing Officer requested a copy of the Federal Court litigation, which shows that the case was filed on August 25, 2022, and voluntarily dismissed by plaintiffs on December 8, 2022. AR – V – 04 – Federal case docket. No orders were issued by the Court that support the public concerns raised about the validity of the biological opinion. Instead, it appears that the public testimony about the rescission of a prior permit from the U.S. Army Corps of Engineers is being interpreted as a rescission of the biological opinion, which is not supported by the evidence in this case.

**Comments by the Public in Favor of the Project**

26. At the public hearing and in the public comment received, individuals testified that the Application be approved for the following reasons:

- a. The thoughtfulness of the project and mitigation factors;
- b. Scarcity of boat slips available;
- c. Current condition of the property is a danger;
- d. North channel of Trestle Creek needs to be fixed; and
- e. Change is inevitable and the community should support a project owner that cares about the community.

27. Of the public comments, including the public testimony, 80 people were in favor of approval.

28. It is unnecessary to make a finding as to the thoughtfulness of the project, whether change is inevitable, or whether Applicants care about the community because these are not factors within IDL's statutory charge.

29. The mitigation factors, including the north channel of Trestle Creek, are addressed above in paragraph 18.

30. The evidence demonstrates that there is a shortage of boat slips on Lake Pend Oreille.

### **CONCLUSIONS OF LAW**

1. The Idaho legislature enacted the Lake Protection Act ("LPA"), Title 58, Chapter 13, Idaho Code, in 1974 stating:

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 of 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 weighted 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.

2. IDL, through 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 of waters of navigable lakes[.]" I.C. § 58-1303; I.C. § 58-119(1); *see also Newton v. MJK/BJK, LLC*, 167 Idaho 236, 242 (2020).

3. IDL is without statutory authority to regulate water quality. Jurisdiction under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 lies with the U.S. Army Corps of Engineers and Idaho Department of Environmental Quality. Applicants will be required to obtain additional permits through USACE and IDEQ.

4. Through its statutory authority, IDL has promulgated Rules for the Regulation of Beds, Waters and Airspace Over Navigable Lakes in the State of Idaho located at IDAPA 20.03.04.000 *et. seq.*

5. Lake Pend Oreille is a navigable lake and is within IDL's authority to regulate encroachment permits. *See Kaseburg v. Bd. of Land Comm'rs*, 154 Idaho 570 (2012) (applying the Lake Protection Act to Lake Pend Oreille encroachment permits).

#### **Proposed Dredge and Fill**

6. Because the community dock will exist where the man-made island is currently, the requirements for dredge and fill will be addressed first.

7. Excavating, dredging, or redredging requires an encroachment permit. IDAPA 20.03.04.015.11.a.

8. "An excavated or dredged channel or basin to provide access to navigable waters must have a clear environmental, economic, or social benefit to the people of the state, and must not result in any appreciable environmental degradation. A channel or basin will not be approved if the cumulative effects of these features in the same navigable lake would be adverse to fisheries or water quality." IDAPA 20.03.04.015.11.b.

9. Applicants seek to excavate an existing man-made island, dredge an existing man-made boat basin, and fill an existing man-made slack channel.

10. Applicants state the following as to the need for the excavation and dredging:

(1) Eliminating a substantial safety hazard, and related potential legal liability to the Applicant[s], by removing dilapidated and dangerous old docks, board walks, bridges and other man-made features that prevent the safe and reasonable use of Applicant[s'] property; (2) protecting and stabilizing the existing banks for the safe and reasonable use of Applicant[s'] property; (3) removing a handling culvert and man-made rock feature that is a safety hazard as well as detrimental to migrating fish, including bull trout; (4) restoring the North Branch of Trestle Creek to its natural configuration to improve the aquatic habitat for bull trout; and, (5) removing

a dilapidated, unsafe and unsecure existing boat ramp that is located in close proximity to the mouth of Trestle Creek.

AR - IDL – 7 Application, p. 35.

11. The need for some excavation and dredging was confirmed during the onsite inspection as the property in its current condition presents many hazards, shallow warm water, and the slack channel presents a hazard for migrating bull trout.

12. All excavation and fill below the ordinary high water mark will be done after the lake has been drawn down to 2055' or lower and will occur in the fall of 2023 and winter 2023/2024. AR - IDL – 7 Application, p. 55.

13. Fill of the slack channel will be done between August and October of 2024 when the creek is dry or mostly dry. AR - IDL – 7 Application, p. 15.

14. The fill of the slack channel has a clear environmental impact to the state of Idaho. Idaho Fish and Game has confirmed that redirecting migrating bull trout to the main channel of Trestle Creek will benefit the bull trout population.

15. The excavation of the man-made island provides a clear economic and social benefit to the state of Idaho by building 105 additional boat slips when there is a shortage of boat slips available on Lake Pend Orielle.

16. It is recommended to that Applicants' request to dredge and fill be approved.

**Proposed Community Dock**

17. Idaho Code section 58-1306 addresses non-navigational or commercial navigational encroachments, community navigational encroachments, and navigational encroachments beyond the line of navigability.

18. Applicant seeks a community navigational encroachment pursuant to Idaho Code section 58-1306.

19. Encroachments in aid of navigation include community docks. I.C. § 58-1302(h).

20. IDL's authority in this matter is limited to the encroachment "on, in or above the beds or waters" of Lake Pend Orielle. *See* I.C. § 58-1301; *see also* *Byrd v. Idaho State Bd. of Land Commissioners*, 169 Idaho 922, 929 (2022).

21. Beds of navigable lakes "means the lands lying under or below the 'natural or ordinary high water mark' of a navigable lake and, for purposes of this act only, the lands lying between the natural or ordinary high water mark and the artificial high water mark, if there be one." I.C. § 58-1302(b).

22. "[A] littoral owner on a navigable lake takes title down to the ordinary high water mark as it existed in 1890 when the State was admitted into the union, and the title to the lakebed below the ordinary high water mark is held by the State in trust for the use and benefit of the public." *Lake CDA Investments, LLC v. Idaho Dept. of Lands*, 149 Idaho 274, 278 (2010).

23. The natural or ordinary high water mark "means 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." I.C. § 58-1302 (c).

24. The natural or ordinary high water mark is different than the artificial high water mark, which "means the high water elevation above the natural or ordinary high water mark resulting from construction of man-made dams or control works and impressing a new and higher vegetation line." I.C. § 58-1302(d); *see also* *Byrd*, 169 Idaho at 929.

25. Idaho Code section 58-1306(e) provides:

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 community navigational encroachment not extending below the natural or ordinary high water mark. If . . . following a hearing, the board determines that the benefits, whether public or private, to be derived from allowing such encroachment exceed its detrimental effects, it shall grant the permit.

(Emphasis added).

26. Applicants have a private property interest in the lakebed between the natural or ordinary high-water mark and the artificial high-water mark. This is privately owned submerged land that belongs to Applicants; the State's ownership of the lakebed begins at natural or ordinary high-water mark. *See* I.C. §§ 58-1202(1), (4).

27. There is no evidence in the record of "adverse effect upon adjacent property." The entire project is to occur on Lot 2. Applicants currently owns Lot 1 and Lot 3. Lot 3 will be gifted to the Kalispel Tribe, who provided comment previously, but does not address the impact once it becomes the owner of Lot 3. *See* AR – IDL 6 – Kalispel Tribe Comment Letter.

28. There is no evidence in the record of "undue interference with navigation."

29. The project does not seek to extend below the natural or ordinary high water mark. AR 07 – IDL – Application, p. 12 (demonstrating the natural or ordinary high water mark and the distance from the proposed project).

30. The proposed community dock meets all the standards outlined in IDAPA 20.03.04.015.02. AR 05 – Valiant Hearing Statement final, pp. 12-13.

31. IDAPA 20.03.01.015 provides:

b. No part of the structure waterward of the natural or ordinary high water mark or artificial high water mark may exceed ten (10) feet in width . . .

c. A community dock may not have less than fifty (50) feet combined shoreline frontage. Moorage facilities will be limited in size as a function of the length of shoreline dedicated to the community dock. The surface decking area of the community dock is limited to the product of the length of shoreline multiplied by seven (7) square feet per lineal feet or a minimum of seven hundred (700) square feet. However, the Department, at its discretion, may limit the ultimate size when evaluating the proposal and public trust values.



32. Applicants own approximately 5,076 feet of water frontage. AR 05 – Valiant Hearing Statement final, p. 11. If excavated, the shoreline would be 2,514 lineal feet. AR 05 – Valiant Hearing Statement final, p. 11. This is more than the 50 feet required for a community dock.

33. Community docks are allowed 7 square feet of dock size per lineal foot of littoral ownership. The proposed dock system is 15,550 square feet, which meets the 7:1 requirement for both the proposed and existing shoreline lengths. AR 05 – Valiant Hearing Statement final, p. 11-12.

34. There is a presumed adverse effect if a community dock is located closer than 25 feet to adjacent littoral rights. IDAPA 20.03.04.015.13.e. Given that Lot 2 is between Lot 1 and 3, Applicants are the north and south littoral owners. However, even if that were not the case, the proposed dock is over 150 feet from the southern littoral line and 431 feet from the littoral line to the north. AR 05 – Valiant Hearing Statement final, p. 12.

35. Based on Idaho Code section 58-1306(e), and compliance with IDAPA 20.03.04.015, it is recommended that the proposed community dock be approved.

**Proposed Riprap**

36. IDAPA 20.03.04.015.08.a provides:

Riprap used to stabilize shorelines will consist of rock that is appropriately sized to resist movement from anticipated wave heights or tractive forces of the water flow. The rock must be sound, dense, durable, and angular rock resistant to weathering and free of fines. The riprap must overlie a distinct filter layer which consists of sand, gravel, or nonwoven geotextile fabric. The riprap and filter layer must be keyed into the bed below the ordinary or artificial high water mark, as applicable.

37. Applicants’ proposal meets the requirements for riprap. AR - IDL – 7 Application, p. 26.

38. It is recommended that IDL grant Applicants' request for riprap, including the condition requested by IDL's counsel "that woody debris and vegetation be added to the plans at the Artificial High Water Mark for Type 2 shoreline protection as shown on page 26 of the application."

**Additional Considerations**

39. IDL has no authority to regulate the upland development of Lot 1.

40. While the eagle nest is not within IDL's jurisdiction, IDL is required in its investigation to consider the lake value factors, which includes fish and wildlife habitat. *Kootenai Env't All., Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 632 (1983). Applicants have received a permit from the Federal Government to remove the eagle nest. AR V-07 Permit Eagle Nest – Single Nest – Alternative Nest. Therefore, the eagle nest is not a concern or basis for denying the requested permit.

41. As to concerns that this project is not in the public's best interest, the community dock will provide benefit to the public given the number of slips that are requested. While these slips may only be available to members of the Idaho Club, this Hearing Officer cannot find that those individuals are not members of the public. There is no evidence that the 105 slips are being built for one single person with 105 boats; however, even if it was, the statute permits private benefit as long as the "the benefits . . . derived from allowing such encroachment exceed its detrimental effects[.]" *See* I.C. § 58-1306(e).

42. As to the concerns that this community dock is really a marina to bypass stricter regulations, such a finding cannot be made. A community dock is defined as "[a] structure that provides private moorage for more than two (2) adjacent littoral owners, or other littoral owners possessing a littoral common area with littoral rights including, but not limited to homeowner's

associations. No public access is required for a community dock.” IDAPA 20.03.04.010.11. A commercial marina is defined as an “encroachment whose primary purpose is to provide moorage for rental or for free to the general public.” IDAPA 20.03.04.010.09. While commercial marinas and community docks have different standards, the largest distinction is whether moorage is available for use by the general public and access to parking. See IDAPA 20.03.04.015.02, .03. These differences cannot be described as more or less “strict” and instead can be described as just different standards.

43. As to the concerns about property setback requirements by the County, trash, spillage, the impact of the human footprint, compliance with the Clean Water Act, and enforcement of conditions placed on the permit (no wake zone), these are all things outside the authority of IDL, but within the authority of other governmental agencies that may require permits for this project.

### **RECOMMENDED ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends that Applicants’ request for an encroachment permit be **GRANTED** subject to the following conditions requested by IDL: (1) spill containment kits are required during construction and operation; (2) woody vegetation at the artificial high water mark must be incorporated into the Type 2 shoreline protection; (3) testing protocols for dredged materials must follow the 2018 Sediment Evaluation Framework; (4) dirt and topsoil should be placed in the filled areas above the artificial high water mark or used somewhere else as fill where it is not likely to erode back into Lake Pend Orielle; and (5) the North Branch of Trestle Creek should be diverted out of the main dredge and fill work area before dredging and filling of the basin begins.

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## RECOMMENDED ORDER NOTICE

**This is a recommended order of the hearing officer. It will not become final without action of the agency head.** By law, the agency head must issue a final order within thirty (30) days of the close of the evidentiary portion in this case, which occurred on September 29, 2023. *See* I.C. § 58-1306(c). The agency head's final order in this case must be issued **no later than October 30, 2023.**

Pursuant to Idaho Code section 67-5244, the **parties** may file an exception to this recommended order with the agency head. Any such exception must be filed within three (3) business days after the service date of this recommended order or **no later than October 24, 2023.** Public witnesses under Idaho's Administrative Procedure Act are not considered parties and, therefore, exceptions from the public cannot be accepted. *See* IRAP Rules 5.13, 150, 158, and 355 (found at IDAPA 04.11.01). Written briefs in support of or taking exception to the recommended order shall be filed with the agency head. If time permits, the agency head may schedule oral argument in the matter before issuing a final order. Following the agency head's issuance of a final order, the parties' rights to seek reconsideration of or appeal that order are prescribed by Idaho Code section 58-1306(c), (d), and IDAPA 20.03.04.025.08.

IT IS SO ORDERED.

DATED October 19, 2023.

OFFICE OF ADMINISTRATIVE HEARINGS

/s/ Leslie M. Hayes  
Leslie M. Hayes  
Administrative Hearing Officer

## CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 2023, I caused to be served a true and correct copy of the foregoing by the following method to:

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