

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

RYAN and NICOLE LEE, and SCOTT and  
SHELBY LEE,

PETITIONERS,

v.

CHRIS, BILL, and DESIREE BURKE

RESPONDENTS.

Agency Case No. CC-2023-NAV-10-001

OAH Case No. 23-320-09

**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 § 58-1303. 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 August 28, 2023, IDL received an encroachment permit application for a single family dock and two boat lifts on Priest Lake in Bonner County. A hearing was held on October 18, 2023. Bryan Nickels served as duly appointed hearing officer. On November 8, 2023, the

hearing officer issued his Recommended Order, which contains the following sections: Background, Findings of Fact, and Conclusions of Law.

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

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

## **IV. ORDER**

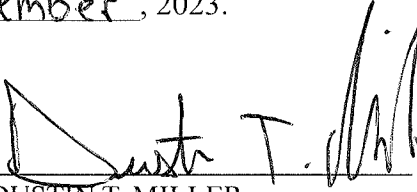
I conclude that the hearing officer's Recommended Order is based on substantial evidence in the record, and I adopt the Recommended Order's Findings of Fact and Conclusion of Law as my decision in this matter. I hereby incorporate by reference the Recommended Order's Background, Findings of Fact, and 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-97-S-1219C is APPROVED.

This is a final order of the agency. Pursuant to Idaho Code § 58-1305(c) and IDAPA 20.03.04.025.08, the Applicant or any aggrieved party who appeared at the hearing has a right to have the proceedings and Final Order reviewed by the district court in the county where the encroachment is proposed by filing a notice of appeal within thirty (30) days from the date of the

final decision. Pursuant to Idaho Code § 58-1305(c) and IDAPA 20.03.04.025.08, an adjacent littoral owner or other aggrieved party shall be required to deposit an appeal bond with the court in an amount to be determined by the court but not less than five hundred dollars (\$500) insuring payment to the Applicant of damages caused by delay and costs and expenses, including reasonable attorney fees, incurred on the appeal in the event the district court sustains the Final Order. The Applicant does not need to post a bond with the district court for an appeal. The filing of the petition for review to the district court does not itself stay the effectiveness or enforcement of the order under appeal, Idaho Code § 67-5274.

DATED this 4<sup>th</sup> day of December, 2023.

  
DUSTIN T. MILLER  
Director, Idaho Department of Lands

## CERTIFICATE OF MAILING

I hereby certify that on this 4th day of December 2023, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ryan and Nicole Lee  
Scott and Shelby Lee  
304 W. Ballard Rd.  
Colbert, WA 99005  
*Petitioners*

- U.S. Mail, postage prepaid
- Email: [ryanrdlee@gmail.com](mailto:ryanrdlee@gmail.com)

Chris, Bill, and Desiree Burke  
710 N. 66th St.  
Seattle, WA 98103  
*Respondents*

- U.S. Mail, postage prepaid
- Email: [christopherburke3@gmail.com](mailto:christopherburke3@gmail.com)

Marde Mensinger  
Idaho Department of Lands  
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*IDL Program Manager, Navigable Waters*


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Kourtney Romine, Workflow Coordinator

**BEFORE THE IDAHO DEPARTMENT OF LANDS**

RYAN and NICOLE LEE, and SCOTT AND SHELBY LEE,	)	
	)	AGENCY Case No. CC-2023-NAV-10-001
	)	
Petitioners,	)	OAH Case No. 23-320-09
	)	
v.	)	<b>FINDINGS OF FACT, CONCLUSIONS</b>
	)	<b>OF LAW, AND RECOMMENDED</b>
CHRIS, BILL, and DESIREE BURKE,	)	<b>ORDER</b>
	)	
Respondents.	)	
	)	

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This matter was assigned to Hearing Officer Bryan Nickels on September 19, 2023. A remote prehearing conference was held on October 3, 2023, via Zoom.

The evidentiary hearing was thereafter held on October 18, 2023. Appearing at the evidentiary hearing were: Scott Lee, for the Petitioners; Chris Burke, for the Respondents; and Deputy Attorney General J.J. Winters as counsel for the Idaho Department of Lands (“IDL”). The evidentiary hearing was recorded via Zoom, and was also reported by a court reporter from Associated Reporting & Video of Boise, Idaho. A transcript of the evidentiary hearing was prepared at the Hearing Officer’s request.

The Hearing Officer, having considered the evidence and arguments offered at the evidentiary hearing, the documents in the administrative record, and the other papers and pleadings on file, makes the following Findings of Fact and Conclusions of Law, and makes the following Recommended Order, pursuant to Idaho Code §58-1305 and IDAPA 04.11.01.413.01.d and 20.01.01.413.01.d.

**EVIDENTIARY MATTERS**

A. Witnesses at hearing.

At the time of the hearing, the following witnesses were offered by the parties:

- Lees:
  - Scott Lee, applicant – Mr. Lee testified.
  - Kim Holman, Copper Bay Construction – Ms. Holman testified.
  - Sam Holman, Copper Bay Construction – Mr. Holman was excluded, based on the Lees’ failure to disclose Mr. Holman in their prehearing witness disclosure submitted September 11, 2023.
- Burkes:
  - Christopher Burke, objector – Mr. Burke testified.
- IDL:
  - Mike Ahmer, Resource Supervisor for the Mica Supervisory Area Office of IDL – Mr. Ahmer testified.

B. Non-testifying participants.

The following individuals also attended the hearing, but had no speaking role and were not otherwise called as witnesses:

- Lees:
  - Ryan Lee, applicant – Mr. Lee declined to testify, and did not have any other speaking role.
- Burkes:
  - Bill Burke, objector – Mr. Burke’s testimony was not offered, and he did not have any other speaking role.
- IDL:
  - Ryan Zandhuisen, Lands Resource Specialist – Mr. Zandhuisen’s testimony was not offered, and he did not have any other speaking role.

- Alli Olson, Deputy Attorney General – Ms. Olson did not have any speaking role.

C. Exhibits

1. Lees' exhibits.

The Lees offered exhibits L-1 through L-9, all of which were admitted.

2. Burkes' exhibits.

The Burkes offered exhibits B-1 through B-21, all of which were admitted, except for the top portion of exhibit B-12 (inclusive of the first bullet point and related two pictures), which was excluded following relevance objection. (Transcript at ll. 75:5-77:20).

3. IDL's exhibits.

IDL offered exhibits IDL-1 and IDL-2, both of which were admitted.

4. Additional exhibits.

Additionally, as not otherwise offered by any of the parties, the Hearing Officer admitted the following exhibits into the hearing record, which documents were previously provided to the parties and which were already part of the agency record:

- H-1 – The Lees' application.
- H-2 – The Burkes' objection.

### **FINDINGS OF FACT**

1. On August 28, 2023, IDL received a Joint Application for Permits from the Petitioners for a single-family dock and 2 boat lifts at their property on Priest Lake. (Exhibit H-1).

2. The proposed dock would be located at Parcel RP000870000250A, Diamond Park Lot 25 in Bonner County, which has a physical address of 112 South Diamond Park Road, Coolin, ID 83821. (Exhibit H-1, p. 11).

3. The property is located adjacent to the eastern shore of Priest Lake. (*See generally* Exhibit IDL-2). No party disputed whether Priest Lake is a navigable lake.

4. Pursuant to Idaho Code section 58-1305(b), notice of Petitioners' application was sent to adjacent property owners on August 31, 2023. (Exhibit IDL-1, p. 1). On September 9, 2023, IDL received Respondent Christopher Burke's objection to Petitioners' application (hereinafter "Burke Objection"). (Exhibit IDL-1, p. 1 *and* H-2). That same day, IDL received an email from Respondent Christopher Burke "stating they were not able to come to an agreement and that they still requested a Contested Case Hearing." (Exhibit IDL-1, p. 1).

5. Respondent Christopher Burke, as well as co-owner Deidre Cole, own the property adjacent to and north of the Petitioners' property. (Exhibit H-1, p. 11).

6. William & Sandra Dodge and the Dodge Trust (collectively, "Dodges") own the property adjacent to and south of the Petitioners' property. (Exhibit H-1, p. 11). Bill and Sandra Dodge executed an Attachment for Encroachment, which contained a signed Consent of Adjacent Riparian or Littoral Property Owners. (Exhibit L-8, p. 1).

7. Petitioners' application proposes a single-family dock, which would consist of a 540 square feet L-shaped dock, as well as a 4'x5' aluminum ramp with a 4'x33' timber framed pier, for a total decking area of 692 square feet overall. (Exhibits IDL-1, p. 1 & H-1, p. 8).

8. The water depth at the end of Petitioners' proposed dock would be 6' at high water. (Exhibits H-1, p. 8 & IDL-1, p. 7).

9. In advance of the evidentiary hearing in this matter, IDL submitted a Hearing Statement from Mike Ahmer, IDL Resource Manager for the Mica Supervisory Area Office. (Exhibit IDL-1).

10. Based upon its review of the Petitioners' application and the Burke Objection, IDL



determined that:

- a. “[T]he proposed dock meets the rules and requirements as it pertains to size (less than 700 square feet and no portion of the dock is wider than ten feet) and location (provides more than the required setback from littoral lines).” (Exhibit IDL-1, p. 7).
- b. “There is no doubt that the proposed dock is longer than the neighboring adjacent docks.” (Exhibit IDL-1, p. 7).
- c. “[A]erial imagery clearly shows a shallow area extending out past the existing dock with numerous large rocks.” (Exhibit IDL-1, p. 7).
- d. “The adjacent docks appear to be primarily older docks with smaller than average boats moored to them.” (Exhibit IDL-1, p. 7).
- e. “It is not uncommon for docks on Priest Lake to extend 78 feet or more from the ordinary high-water mark.” (Exhibit IDL-1, p. 7).
- f. “[T]he proposed design will put the floating dock out beyond the low water mark to minimize damage during low water and will provide 6’ water depth at the end of the dock when the lake is at ordinary high water. IDL believe this is a reasonable request within the line of navigability.” (Exhibit IDL-1, p. 7).

11. IDL’s Hearing Statement provided analysis on the following issues:

- a. Petitioners are littoral owners. (Exhibit IDL-1, p. 6).
- b. The requested encroachment permit is for a single-family boat dock and boat lift, which application type would be considered a navigational encroachment. (Exhibit IDL-1, p. 6).
- c. Petitioners own sufficient water frontage for a single-family dock

navigational encroachment.<sup>1</sup> (Exhibit IDL-1, p. 6).

d. Petitioners' proposed dock complies with IDAPA 20.03.04.015.01.b's square footage limit (700 square feet), because it would be 692 square feet in size. (Exhibit IDL-1, p. 6).

e. Petitioners' proposed dock "is 10 feet longer than the existing 68-foot dock, but appears to be within the line of navigability based on the water depths." (Exhibit IDL-1, p. 6).

f. Petitioners' proposed dock "appears to provide an eighty (80) foot buffer to the south and approximately a forty-five (45) foot buffer to the north, which meets the minimum recommended" under IDAPA 20.03.04.015.13.e, which provides a rebuttable presumption that a navigational encroachment "will have an adverse effect on adjacent littoral rights if located closer than ten (10) feet from adjacent littoral right lines". (Exhibit IDL-1, p. 7),

g. Petitioner "has not granted permission for anyone else to permit a dock" from Petitioner's parcel. (Exhibit IDL-1, p. 7).

h. Petitioner's existing dock is in the IDL database (although no file or copy of the permit for that dock could be located), but Petitioners' current application superseded any prior permit that was or may have been issued. (Exhibit IDL-1, p. 7).

12. Based upon its analysis, IDL recommended approval of Petitioner's Application as follows:

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<sup>1</sup> IDL's Hearing Statement asserts that "Applicant owns over one hundred (100) feet of water frontage on the parcel," which contention was objected to by Respondents at hearing. (*See* IDL-1, p. 6 *and* Transcript at ll. 112:20-113:21). IDL corrected this statement to clarify that Petitioners own 100 feet of water frontage. (*Id.*) This correction is adopted by the Hearing Officer with respect to all references in the record to Petitioner's water frontage. In doing so, however, the Hearing Officer notes that only a minimum twenty-five (25) feet of water frontage is required for single family docks. (*See* IDAPA 20.03.04.010.36).

Based on the Application provided and IDL's evaluation of the Application in light of the LPA and IDAPA, the Applicant's proposed dock meets the legal requirements for single-family docks. IDL has determined that the proposal to modify the existing dock is not a violation of the LON [line of navigability] due to the water depths below the ordinary high-water mark (as cited in 58-1302). Additionally, the extra length does not pose a navigational hazard or threat to the public or adjacent neighbors. Therefore, IDL recommends approval of the Application.

(Exhibit IDL-1, p. 8).

13. On October 17, 2023, an on-site inspection of Petitioner's property was conducted by Ryan Zandhuisen, IDL Lands Resources Specialist; a written report was completed that same day. (Exhibit IDL-2). The written report of the on-site inspection does not reflect any change in IDL's position as set forth in its Hearing Statement. (*Compare* Exhibit IDL-1 with IDL-2).

#### Respondents' Concerns with the Proposed Dock

14. Respondents generally identified their concerns with respect to the Petitioners' application as follows: first, that the proposed dock "has no navigational necessity, nor further benefit of reasonable justification"; and second, that the Petitioners' application "does not provide an accurate/scaled representation of the intended increase in overall encroachment length,"<sup>2</sup> such that "the encroachment ... would exceed the established, local line of navigability by an additional 18' waterward" and that "[t]his exceedance would result in detriment to the aesthetic beauty of the lake, as well as, the value and utilization of adjacent properties." (Respondents' Pre-Hearing Statement; *accord*, Transcript at ll. 122:15-123:3 and Exhibits B-16 through B-21).

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<sup>2</sup> Respondents particularly note discrepancies within Petitioners' application as initially filed with IDL, including, for example, the anticipated dock placement (Exhibit H-1, p. 11) and anticipated length compared to other nearby docks. (Exhibit H-1, p. 5). Some of this information does appear to conflict with other information presented in the application (*e.g.*, Exhibit H-1, pp. 8 & 16, respectively). However, pursuant to IDL's own rules regarding application processing, discrepancies within an application does not appear to form the basis for rejection of an application. (*See* IDAPA 20.03.04.020.07.j). Rather, it appears the remedy for an encroachment build which deviates from application information would instead be a cease and desist order and/or a permit revocation. (*See generally*, IDAPA 20.03.04.080). In any event, any discrepancies within the Petitioners' initial application submission have not only been clarified through this objection process, but have also been scrutinized and clarified through IDL's own processes: here, as reflected in the Hearing Statement analysis, and the on-site inspection. (Exhibits IDL-1 & IDL-2.)

15. At the hearing, Respondents also argued that the Petitioner’s proposed dock would “result in detriment to the aesthetic beauty of the lake” as well as potentially impair the value of Respondents’ property<sup>3</sup> as it would “cut off our southern lake views” and “access to the southern side of our property.” (Transcript at ll. 31:20-22 & 32:1-3; Exhibit B-19).

### CONCLUSIONS OF LAW

1. The Idaho Legislature enacted the Lake Protection Act (“LPA”), Title 58, Chapter 13, Idaho Code, in 1974 stating, in Idaho Code §58-1301, that:

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.

2. The board of land commissioners, through IDL, “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”. Idaho Code §58-1303; *see also* Idaho Code §58-119(1) *and* Newton v. MJK/BJK, LLC, 167 Idaho 236, 242 (2020).

3. Through its statutory authority, IDL has promulgated Rules for the Regulation of Beds, Waters and Airspace Over Navigable Lakes in the State of Idaho. *See* IDAPA 20.03.04.

4. Priest Lake is a navigable lake and is within IDL’s authority to regulate encroachment permits. Byrd v. Idaho State Bd. of Land Comm’rs, 169 Idaho 922, 929 (2022).

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<sup>3</sup> Respondents also argued that the proposed dock would “result in detriment to my family and the adjacent property owner’s property.” (Transcript at ll. 32:1-2). However, as noted above, the other adjacent property owners provided a signed Consent of Adjacent Riparian or Littoral Property Owners (Exhibit L-8), and otherwise did not testify at the evidentiary hearing in this matter. Thus, any arguments and/or testimony regarding potential detriments to the Dodges’ property are speculative and unsupported by the record.

5. Petitioners are owners of property adjacent to Priest Lake, and are littoral owners as defined in Idaho Code §58-1302 and IDAPA 20.03.04.020.02, and are thereby qualified to submit Petitioners' application. (Exhibit H-1, p. 11).

6. Idaho Code §58-1305(a) provides:

Applications for construction or enlargement of navigational encroachments not extending beyond the line of navigability nor intended primarily for commercial or community use shall be processed by the board with a minimum of procedural requirements and shall not be denied nor appearance required except in the most unusual of circumstances or if the proposed encroachment infringes upon or it appears it may infringe upon the riparian or littoral rights of an adjacent property owner.

7. Petitioners' application seeks approval for construction of a single-family dock, with two boat lifts, "[f]or private recreational use & protection from seasonal & other elements that could cause unnecessary damage to the applicant's boat(s)". (Exhibit H-1, pp. 1 & 5).

8. "Generally, the Board should approve a permit application unless the proposed encroachment infringes, or may infringe, upon the littoral rights of an adjacent property owner." Byrd, 169 Idaho at 929 (2022) (cleaned up).

9. The burden of proof is on the applicant(s) to demonstrate that IDL should grant the encroachment permit. *See generally* I.C. §§58-1303 & -1305(a). The "standard of proof is akin to the preponderance of the evidence standard generally applied in administrative hearings." Northern Frontiers, Inc. v. State, 129 Idaho 437, 439 (Ct. App. 1996)(*citing* 2 Am.Jur.2d Administrative Law § 363 (1994)).

10. Relevant to this proceeding, Idaho Code §58-1302(e) and (g) provide:

(e) "Low water mark" means that line or elevation on the bed of the lake marked or located by the average low water elevations over a period of years and marks the point to which the riparian rights of adjoining landowners extend as a matter of right, in aid of their right to use the waters of the lake for purposes of navigation.

(g) "Line of navigability" means a line located at such distance waterward of the low water mark established by the length of existing legally permitted encroachments, water depths waterward of the low water mark, and by other relevant criteria determined by the board when a line has not already been established for the body of water in question.

11. Also relevant to this proceeding, IDAPA 20.03.04.010.20 and .21 provide:

**20. Line of Navigability.** A line located at such distance waterward of the low water mark established by the length of existing legally permitted encroachments, water depths waterward of the low water mark, and by other relevant criteria determined by the board when a line has not already been established for the body of water in question.

**21. Low Water Mark.** That line or elevation on the bed of a lake marked or located by the average low water elevations over a period of years, and marks the point to which the riparian rights of adjoining landowners extend as a matter of right, in aid of their right to use the waters of the lake for purposes of navigation.

12. The Hearing Officer finds IDL's Hearing Statement and analysis contained therein, as well as the testimony offered by Mr. Ahmer in further explanation and support thereof, to be credible and persuasive.

13. One ground for objection raised by Respondents is the contention that the Petitioners' proposed dock exceeds the line of navigability, which is disputed by both Petitioners and IDL. In summary, Respondents argue that the Petitioners' proposed dock – which is to be 78' long – would be longer than five other nearby docks, the end of which docks the Respondents argue establish the line of navigability. However, the Hearing Officer finds that the evidence, on the whole, demonstrates that Petitioners' proposed dock would be within the line of navigability:

a. Respondents note, and IDL concedes, that the Petitioners' existing 68' dock does not appear to have a readily-identifiable permit. (*See* Exhibit B-13 & IDL Pre-Hearing Statement at 6 ("The existing dock did appear in the IDL database, but no file or copy of the permit could be located. It is possible that this was a permit issued

for a pre-LPA dock.”)). While nothing in the instant proceeding would result in any impact to the existing dock, the lack of evidence regarding whether the existing dock is “legally permitted” means that information salient to that dock – e.g., length and water depth – should not inform any analysis of the line of navigability, per I.C. §58-1302(20). Instead, other information – including information regarding other docks – will inform that analysis.

b. Of the docks generally adjacent to Petitioners’ existing, and proposed, dock, the longest dock is the so-called “Hunter Dock,” a dock of 75’ in length and recently permitted by IDL, the end of which reflects a water-depth of 73” at “summer pool”.<sup>4</sup> (Exhibits B-14 and B-15 & Transcript at ll. 71:20-21 & 101:11-22.) None of the parties disputed, and the Hearing Officer finds, that the Hunter Dock is within the line of navigability and informs the determination of the line of navigability applicable to the Petitioners’ proposed dock. (Transcript at ll. 101:11-20, 114:15-115:13, 115:16-116:2).

c. While the Petitioners’ proposed dock would be slightly longer than the Hunter Dock, the undisputed anticipated water depth at the end of the Petitioners’ proposed dock would be approximately 6’ (72”), shallower than the 73” at the Hunter Dock.<sup>5</sup> (Exhibits H-1, p. 6 & B-15). Moreover, the Petitioners’ proposed dock would not extend beyond the existing “shelf” visible in aerial photos, consistent with the

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<sup>4</sup> In this matter, as relates to Priest Lake, the parties utilize the terms “summer pool” and “winter pool” to broadly refer to the artificial high water level and the low water level of the lake, which levels are maintained by a dam. (*See generally* Byrd v. Idaho State Bd. of Land Commissioners, 169 Idaho at 929). The “winter pool” (low water level) is approximately 3 feet lower than summer pool. (Exhibit H-1, p. 6; *accord*, Exhibit B-20). Based upon this, and given no contrary evidence from any of the parties, the Hearing Officer finds it reasonable to conclude that, as the summer pool depth is 73” at the end of the Hunter Dock, the winter pool depth would be, in turn, 37” (that is, 3 feet – 36” – lower than the summer pool depth).

<sup>5</sup> Or, as discussed above, 36” at winter pool as compared to 37” for the Hunter Dock (again, 3 feet – 36” – lower than the summer pool depth).

placement of the Hunter Dock and other nearby docks.<sup>6</sup> (*See, e.g.*, Exhibits L-2, L-5, B-10, B-14, & B-15).

d. Nothing in governing statute or regulation indicates that a static, point-to-point drawing of a line between the ends of existing docks establishes the line of navigability. (*Accord*, Transcript at ll. 111:25-112:1). Instead, the determination of the line of navigability (as mandated by statute and related regulation) expressly contemplates the evaluation of several factors, suggesting an on-going, dynamic analysis of what an applicable line of navigability might be, with focus on the particular conditions related to the application and the site where the proposed encroachment will be built. (*See* I.C. §58-1302(g): “‘Line of navigability’ means a line located at such distance waterward of the low water mark established by the length of existing legally permitted encroachments, water depths waterward of the low water mark, and by other relevant criteria determined by the board when a line has not already been established for the body of water in question.”).

e. While the parties have extensively addressed the overall length Petitioners’ proposed dock as well as other adjacent docks, the distances identified appear to be made from the high-water mark.<sup>7</sup> (*See generally* L-2, B-14, and IDL-1 p. 7). However, the governing statutory definition of “line of navigability” is squarely framed to address the low water mark. (I.C. §58-1302(g): “‘Line of navigability’ means

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<sup>6</sup> Given this comparable placement and water depth as between the Hunter Dock and the proposed dock, the proposed dock would appear to also satisfy the application’s demand that “[e]ncroachments shall not extend beyond a water depth necessary for customary navigation[.]” (Exhibits B-5 *and compare with* H-1, p. 7 (“Encroachment not to extend beyond a depth necessary for customary navigation[.]”).

<sup>7</sup> There are references to this high water mark being an “ordinary” high-water mark. (*See, e.g.*, H-1, p. 8). However, given governing statutory definitions and the fact that Priest Lake is dam-controlled, any such references should be to the “artificial” high water mark. (*See* Idaho Code §58-1302(c) and (d)). However, for the purposes of the analysis salient to this instant matter, this distinction ultimately does not impact the determination, and instead is only noted for clarification of the record.



a line located at such distance **waterward of the low water mark** established by the length of existing legally permitted encroachments, water depths **waterward of the low water mark, ...**” (emphases added)).

f. The Idaho Supreme Court has previously remarked on the necessity of use of the low water mark for determination of the line of navigability:

The IDL's conclusion that the line of navigability lies fifty-five feet waterward of the *AHWM* is contrary to the plain language of the statute and the IDL's own regulations. The line of navigability must be measured from the low water mark. It is not measured from the AHWM. The error is particularly egregious in this case because the low water mark is approximately 105 feet waterward of the AHWM. In other words, the IDL believes that the line of navigability is approximately fifty feet *landward*, rather than *waterward*, of the low water mark.

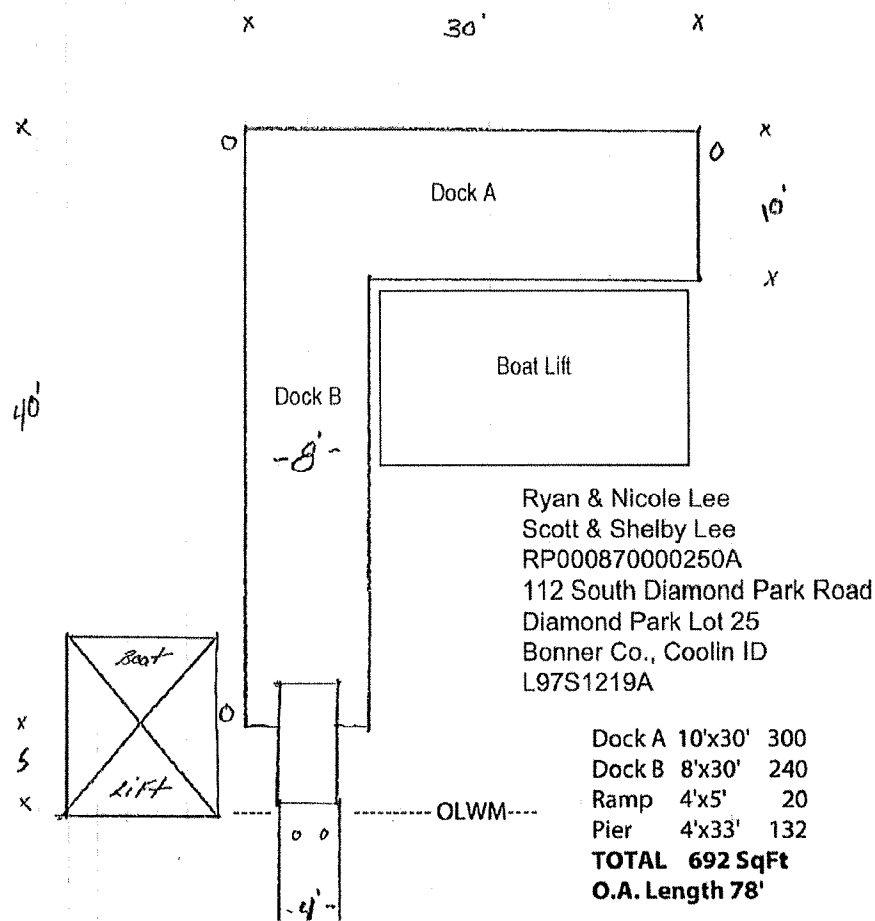
Moreover, the IDL's interpretation that the line of navigability lies fifty-five feet waterward of the AHWM is not based on substantial evidence. The record shows only that littoral owners on the Bay *believed* that “IDL guidelines” require docks to extend “no more than 55 feet out from summer pool,” and that Bringhurst had previously constructed a dock in accordance with that belief. And, although the IDL's letter to Kaseburg denying Application 219–C states that “all other single family docks for miles up and down the shoreline are typically no more than fifty five feet (55') into the lake,” there is no evidence in the agency record supporting this conclusion. At oral argument, counsel for the IDL was unable to specify when, or by whom, the line of navigability was established.

The IDL's improper determination of the line of navigability was in violation of a statutory provision and was not supported by substantial evidence. It also prejudiced Kaseburg's substantial rights by depriving him of a more lenient standard for the consideration of Application 219–C to which he may be entitled if it is later determined that his proposed encroachment actually falls within the line of navigability. Therefore, the IDL's denial of Application 219–C was properly set aside.

Kaseburg v. State. Bd. of Land Comm'rs, 154 Idaho 570, 579 (2013) (emphases in original).

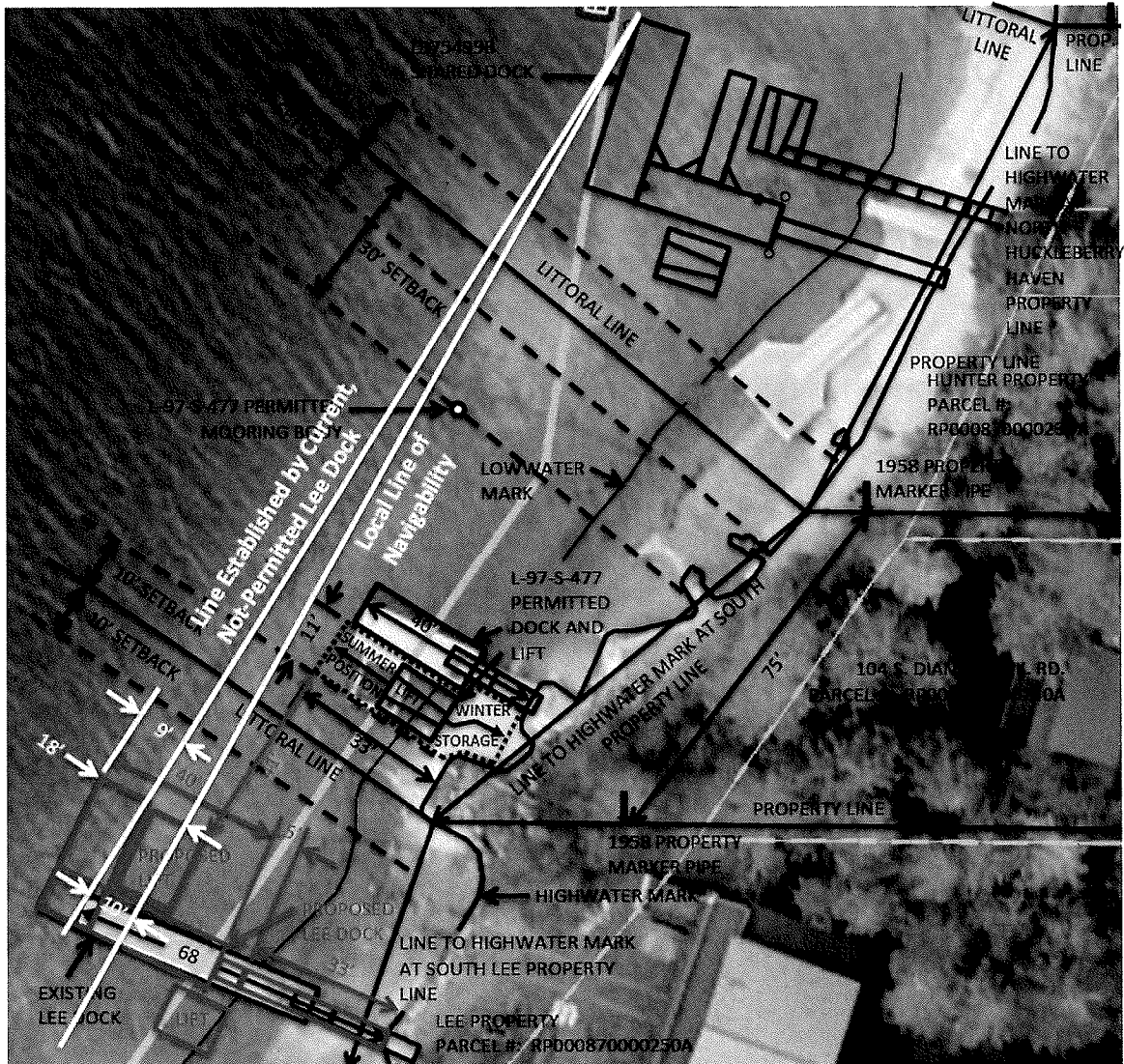
g. There is scant evidence regarding the low water mark in this matter, and the extent to which legally permitted encroachments extend therefrom. However, there is sufficient uncontested evidence existing in the record to extrapolate that information. Critically, reference to the low water mark exist in two key places within the record: Petitioners' application, in a drawing depicting the anticipated dock, and Respondents' "Proposed Lee Dock Scaled Drawing" exhibit. (See Exhibits H-1, p. 8 and B-13.)

h. With respect to Petitioners' application, the drawing reflects that the proposed dock structure will extend forty-five (45) feet from the 'ordinary' low water mark, comprised of a 40' dock length and a 5' ramp length:



(Exhibit H-1, p. 8). No party has offered evidence contesting this figure..

i. This 45' figure is also adopted, in part, by Respondents' Exhibit B-13, which includes measurements of the proposed dock in relation to the "low water mark" as drawn on an aerial photo:



(Exhibit B-13). Again, no party contested any of the information and/or depictions in this photo. Additionally – and critical to this analysis – no party objected to, or otherwise disputed, the characterization of the marked-up aerial photo as “scaled.” Given this, a comparison of the dock lengths (the proposed dock versus the Hunter Dock) demonstrates

that the Hunter Dock is depicted as extending further from the low water mark than Petitioners' proposed dock.<sup>8</sup> Accepting, then, the parties' collective reference to the Hunter Dock as a key measure of the line of navigability applicable to the Petitioners' proposed dock,<sup>9</sup> the Petitioners' proposed dock – as measured from the low water mark – is within the line of navigability. (*See* Transcript at ll. 80:14-81:18, 101:11-20, 106:3-107:24, 114:15-21,<sup>10</sup> & 115:23-116:2).

j. This is not to say, however, that the length of the dock (as measured as to how far it extends into the lake from the high water mark) is irrelevant. Indeed, the application itself requests this information. (Exhibit H-1, p. 5 (“How Many Feet Does the Proposed Encroachment Extend Beyond the Ordinary (or Artificial) High Water Mark?”)). As IDL is empowered to consider “other relevant criteria” in determining the line of navigability per I.C. §58-1302(g), evaluation as to how far an encroachment might reach during high water appears to be a reasonable consideration, as, for example, the public trust doctrine is predicated on the high-water mark, expressly including Priest Lake by statute. *See In re Sanders Beach*, 143 Idaho 443, 453 (2006) *and* Idaho Code §67-4305. Here, as explained by Mr. Ahmer, the length of Petitioners' proposed dock (78' from the high water mark) only exceeds the Hunter Dock by three feet. (Transcript at ll. 111:13-16).<sup>11</sup>

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<sup>8</sup> Specifically, at its longest, the longest distance from the denoted low water mark to the end of Petitioners' proposed dock is 4.2 cm as measured on the Hearing Officer's paper copy of the exhibit – in comparison, as to the Hunter Dock, the longest measurable distance from dock-end to the low water line would be 4.5 cm.

<sup>9</sup> While Respondents' argument focuses on other docks in the area – including the Bryant, Dodge, and Moffit docks, as well as their own – the record lacks any meaningful way to assess their lengths relative to the low water line. (*See, e.g.*, Exhibit B-13). Moreover, Respondents themselves exclude consideration of their own dock from a line of navigability “due to relatively short length.” (Exhibit B-10). Thus, the Hunter Dock provides the primary benchmark for assessing distance from the low water mark as a component of a line of navigability analysis in this matter.

<sup>10</sup> Mr. Ahmer: “Well, given that there was a very contentious issue with the Hunter dock. And that nearly went to hearing. And that seemed to be resolved. I believe the line of navigability is set by that encroachment.” (Transcript at ll. 114:18-21).

<sup>11</sup> Mr. Ahmer also noted that Petitioners' proposed dock only constituted a ten-foot increase in length versus the existing dock, “the width of a boat,” such that “we are not talking something that is [a] hazard to navigation.” (Transcript at ll. 110:20-23).

Accordingly, as suggested by IDL that this is a relatively small increase as compared to the Hunter Dock, this factor appears to have been appropriately assessed and considered by IDL.

k. Accordingly, given that 1) the “distance waterward of the low water mark established by the length of existing legally permitted encroachments” (to wit, the Hunter Dock) of Petitioners’ proposed dock is less than that of the existing Hunter Dock, 2) the water depth at the end of the proposed dock is less than that at the existing Hunter Dock, and 3) the length of the proposed dock at the high water mark represents only a minor increase beyond that of the existing Hunter Dock, the Petitioners have met their burden in demonstrating that the proposed dock does not exceed the line of navigability. (*Accord*, Transcript at ll. 115:24-116:2 (Mr. Ahmer: “And I would say that based on my ten years['] experience in this job, our statutes, the water depth, and that Hunter dock, I would say that this proposed dock does not impact the line of navigation.”)).<sup>12</sup>

14. The Hearing Officer finds Respondents’ other concerns to be sincere, but Respondents have failed to establish that Petitioner’s Application “infringe[s] upon the riparian or littoral rights” of Respondents as adjacent property owners or that Petitioners’ application falls within a “most unusual of circumstances” scenario warranting denial:

a. With respect to Respondents’ contention that the proposed dock “has no navigational necessity, nor further benefit of reasonable justification,” considerable argument was made between Petitioners and the Respondents as to the particular need for the dock, including, most prominently, a need to improve boat access and safety for

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<sup>12</sup> As an aside, the Hearing Officer finds that the line of navigability suggested by construction company Copper Bay (*see, e.g.*, Exhibit L-5, p.2) is not predicated on any of the applicable law or facts in this matter; as such, the Hearing Officer gives no weight to that exhibit.

jumping/diving off of the dock in light of proximity to the existing rock shelf. (*See, e.g.*, Transcript at ll. 58:11-59:11 *and compare with* Exhibits B-16, B-17, and B-18). However, validity of proposed usage does not appear to be a particular consideration in weighing the potential approval of a single-family dock encroachment. *See* Idaho Code §58-1305(a) (“Applications for construction or enlargement of navigational encroachments not extending beyond the line of navigability nor intended primarily for commercial or community use shall be processed by the board with a minimum of procedural requirements and shall not be denied nor appearance required except in the most unusual of circumstances or if the proposed encroachment infringes upon or it appears it may infringe upon the riparian or littoral rights of an adjacent property owner.”) & IDAPA 20.03.04.025.01 (“Applications for single-family and two-family navigational encroachments not extending beyond the line of navigability will be processed with a minimum of procedural requirements and shall not be denied except in the most unusual of circumstances.”). Here, the parties simply debate the precise necessity for what appears to be customary and routine usage of any single-family lakeside dock. As none of the evidence presented by the parties implicated “the most unusual of circumstances,” this evidence is afforded no weight in the determination of whether to grant Petitioners’ application. *Compare with, e.g., Dupont v. Idaho State Bd. of Com’rs*, 134 Idaho 618 (2000) (affirming revocation of dock permit on “most unusual of circumstances” grounds, where permit sought to build encroachment within 40 year-old designated swimming area which had prohibited boats, and no other prior encroachment permit for the placement of a dock within a designated swimming area had been requested or issued).

b. As to Respondents’ concerns about reduced property value, neither Idaho

Code §58-1305 nor IDAPA 20.03.04.025.01 mentions this as a factor, nor does the governing caselaw otherwise suggest that anything other than impact on littoral rights be considered (as contrasted with, e.g., impact to values of upland property, as argued here). Even were the Hearing Officer to consider this evidence, it is worth noting that Respondents failed to adduce any particular evidence supporting any contention regarding a loss of value to their property. Given this, Respondents' argument on this point does not support a denial of the requested encroachment permit.

c. In a similar vein, Respondents' arguments regarding impairment as to aesthetics and/or sightlines in the southerly direction also lack support as a definitive factor for consideration within Idaho Code §58-1305 and/or IDAPA 20.03.04.025.01, absent some showing that the concerns implicate "the most unusual of circumstances." Here, the Respondents' evidence on this point is primarily presented via Exhibit B-19, which suggests anticipated views of the future proposed docks, which the exhibit contends would "significantly limit Burke property water views," albeit only in the southerly direction. However, the exhibit suggests nothing more than what might be reasonably be expected with the construction of a larger dock; there is no suggestion of, for example, a complete obstruction of a view of the horizon, the mountains, or other key "aesthetics" of the water view. *See generally* Newton v. MJK/BJK, LLC, 167 Idaho 236, 245 (2020) ("Thus, littoral rights solely concern the use of lakeside property, not the preservation of property's scenic view."). Accordingly, Respondents' arguments on this do not support a denial of the Petitioners' application.

d. Finally, as to Respondents' suggestion that the proposed dock would impair "access to the southern side of [the Burke's] property," the Hearing Officer notes that no

specific evidence was presented on this point by Respondents in support of this argument. Nevertheless, the Hearing Officer notes that a rebuttable presumption of adverse effect upon adjacent littoral rights only arises, by rule, where the encroachment is located closer than ten (10) feet from the adjacent littoral line. (IDAPA 20.03.04.15.13.e). IDL has determined that the edge of the proposed dock will maintain a 45-foot buffer to the north (towards the Burkes' property); likewise, Respondents' own mapping reflects that the proposed dock will be well outside the littoral buffer. (See Exhibits IDL-1, p. 7 & B-13.) As such, Respondents' argument on this do not support a denial of the Petitioners' application.

15. Based on the above, Petitioners' application complies with IDL's rules for single-family docks.

16. Thereby, based on the entirety of the record, this Hearing Officer finds that Petitioners have carried their burden of demonstrating that the encroachment permit should be approved.

### **RECOMMENDED ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends that the Petitioners' request for an encroachment permit be **GRANTED**.

### **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 forty-five (45) days of the hearing in this case, which was held October 18, 2023. See I.C. § 58-1305(c). The agency head's final order in this case must be issued **no later than December 4, 2023.**



Pursuant to Idaho Code §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 not later than **November 14, 2023**. 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 §58-1306(c)-(d), and IDAPA 20.03.04.025.08.

IT IS SO ORDERED.

DATED November 8, 2023.

OFFICE OF ADMINISTRATIVE HEARINGS

/s/ Bryan A. Nickels

Bryan A. Nickels

Chief Administrative Hearing Officer

## CERTIFICATE OF SERVICE

I hereby certify that on this 8<sup>th</sup> day of November, 2023, I caused to be served a true and correct copy of the foregoing by the following method to:

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