

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of
Pack River Delta Restoration Project,
Idaho Department of Fish and Game,
Applicant.

Agency Case No. PH-2023-NAV-20-004

OAH Case No. 23-320-08

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 June 27, 2023, IDL received an encroachment permit application for a permit to complete Phase II of the Pack River Delta Habitat Restoration. Leslie Hayes served as duly appointed hearing officer. On December 20, 2023, the hearing officer issued her Recommended

Order, which contains the following sections: Preliminary Evidentiary Ruling, Findings of Fact and Conclusions of Law.

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. PRELIMINARY EVIDENTIARY RULINGS

I adopt the Preliminary Evidentiary Rulings.

III. FINDINGS OF FACT

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

IV. CONCLUSIONS OF LAW

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

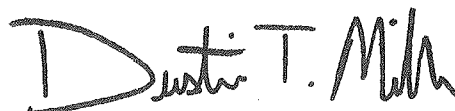
V. ORDER

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 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 L96S2022A 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 2nd day of January, 2024.

A handwritten signature in black ink that reads "Dustin T. Miller". The signature is written in a cursive style with a large initial "D".

DUSTIN T. MILLER

Director, Idaho Department of Lands

CERTIFICATE OF MAILING

I hereby certify that on this 2nd day of January 2024, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Idaho Department of Fish and Game
Pete Rust
Owen Moroney
Kathleen Trever
2885 W. Kathleen Ave.
Coeur d'Alene, ID 83814
Applicant

- U.S. Mail, postage prepaid
- Email: pete.rust@idfg.idaho.gov
owen.moroney@idfg.idaho.gov
kathleen.trever@idfg.idaho.gov

William Powell/Britt Wagner
130 Delta View Road,
Hope, ID 83836
Objectors

- U.S. Mail, postage prepaid
- Email: brittnbill@yahoo.com

Todd/Lori Scott
174 Delta View Road
Hope, ID 83836
Objectors

- U.S. Mail, postage prepaid
- Email: twoscotts99@hotmail.com

Idaho Department of Lands
Marde Mensinger
IDL Program Manager, Navigable Waters
300 N. 6th Street
Boise, ID 83720
IDL Program Manager

- Hand Delivery
- Email: mmensinger@idl.idaho.gov

JJ Winters
Deputy Attorney General
P.O. Box 83720
Boise, ID 83720-0010
Counsel for IDL

- Statehouse Mail
- Email: jj.winters@ag.idaho.gov

Office of Administrative Hearings
816 W. Bannock St., Suite 203
P.O. Box 83720
Boise, ID 83720-0104

- Statehouse Mail
- Email: filings@oah.idaho.gov
elaine.maneck@oah.idaho.gov
leslie.hayes@oah.idaho.gov



Kourtney Romine, Workflow Coordinator

BEFORE THE IDAHO DEPARTMENT OF LANDS

In the Matter of)
) AGENCY Case No. PH-2023-NAV-20-004
Pack River Delta Restoration Project,)
) OAH Case No. 23-320-08
Idaho Department of Fish and Game,)
)
Applicant.)
_____)

This matter was assigned to Hearing Officer Leslie Hayes on September 18, 2023. The deadline for a hearing on this matter was November 3, 2023. A scheduling conference was held on October 5, 2023, where Idaho Department of Fish and Game (“IDFG”) waived the November 3, 2023, deadline and extended the deadline to December 1, 2023, to explore with Objectors whether resolution could be reached. A continued scheduling conference was held on November 2, 2023, and, at the time, a public, in-person administrative hearing was set for November 30, 2023. A prehearing conference was held on November 16, 2023. This prehearing conference was recorded and addressed the general rules of procedure, objections to any prehearing filings and exhibits, the scope of the hearing, time constraints associated with this hearing, and how to address the orderly and efficient presentation of evidence and public comment in these proceedings. The Hearing Officer clarified at the prehearing conference that the scope of the objection is not to the restoration project, but to the staging area remaining at completion of the project and open to public use, including building the parking lot for the public to access the staging area.

The hearing was held on November 30, 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 Attorneys General J.J. Winters and Allison Olson, counsel for Idaho Department of Lands (“IDL”), Mike Ahmer, IDL Lands Resource

Supervisor, Deputy Attorney General Owen Moroney, counsel for IDFG, Pete Rust, Mitigation Staff Biologist at IDFG, and Objectors William Powell, Britt Wagner, and Todd Scott.¹ 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. Following the hearing the parties were allowed to give oral closing arguments in lieu of written briefs.

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

The parties stipulated at the prehearing conference that all exhibits be admitted including IDFG's application for a permit to complete Phase II of the Pack River Delta Habitat Restoration. Idaho Fish and Game reserved objection pursuant to Idaho Rule of Evidence 408 which, excludes certain evidence when parties engage in settlement negotiations. The following exhibits have been admitted without objection:

1. IDL Exhibits: IDL Exhibit A; IDL Exhibits IDL 1-14.
2. IDFG Exhibits: IDFG 1-11.
3. Objector Exhibits: Objectors 1-9.

In addition to the exhibits, Objectors provided testimony related to the negotiations between IDFG and Objectors prior to the public hearing. While the Rules of Evidence do not apply to these proceedings, "[t]he presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds,

¹ Lori Scott was unable to attend the hearing for personal reasons. Mr. Scott provided testimony on her behalf.

or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho.” IDAPA 04.11.01.600. During the prehearing conference, IDFG’s counsel reserved objections on Idaho Rule of Evidence 408, but did not assert any during the hearing. Idaho Rule of Evidence 408(a) provides:

Evidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: . . . (1) furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or a statement made during compromise negotiations about the claim. . . .

I.R.E. 408(a).

This Hearing Officer finds that there is important social value to attempts to settle a dispute and for parties to be able to speak freely in these attempts. For that reason, even without objection by IDFG, the Hearing Officer will exclude all evidence of those discussions in this decision with the exception of the dispute as to summer pool versus winter pool related to the boat ramp/staging area.² Both IDFG and Objectors provided testimony as to the boat ramp/staging area and whether it should be accessible at 2062.5 feet (summer pool) or only at 2060 feet (winter pool). For that reason, any assertion that this testimony is inadmissible pursuant to Rule 408 has been waived and is admissible in these proceedings.

FINDINGS OF FACT

1. On June 27, 2023, Applicant IDFG applied for a permit to permit to complete Phase II of the Pack River Delta Habitat Restoration (“The Application”). IDL Exhibit 1, p. 4. Phase I of the restoration project was completed pursuant to an encroachment permit, which was granted in November 2008. IDL Exhibit A, p. 1.
2. The Application seeks to:

² These terms will be discussed in more detail below.

[i]mprove existing ITD turnout (at milepost 40.5 on Idaho State Highway 200 milepost east of Sandpoint -48.305664, -116.369966) and create access road off of existing ITD turnout down to Pack River delta floor. Materials for the access road will be various sized rock and gravel and will come from local pits off site. After access road to delta floor is complete, a staging area for construction materials, equipment, and operations will be built. After construction is complete in spring 2024, the staging area will be left as primitive public access site to the new project. Access site will be built above ordinary high water mark, and will only interface with the Pack River delta while lake is inundated during summer period. This encroachment will not [a]ffect Pack River stream flows.

IDL Exhibit 1, p. 2.

3. The project would occur on property owned by the U.S. Army Corps of Engineers.

IDL Exhibit A, pp. 1, 9.

4. Applicant has approval from the U.S. Army Corps of Engineers. IDL Exhibit A, p. 9. The project consists of three parcels (RP57N01E061340A, RP57N01E070001A, and RP57N01E083150A). IDL Exhibit A, p. 9; IDL Exhibit 1, p. 2.

5. The staging area is necessary as “[t]here are no alternatives to accessing the delta floor for construction because the “[a]lternative would be not doing the project.” IDL Exhibit 1, p. 2.

6. The Application seeks both a navigational encroachment and a nonnavigational encroachment. IDL Exhibit A, p. 9.

7. The navigational encroachment is “[t]he excavation of the lakebed and the boat ramp at the staging area[.]” IDL Exhibit A, p. 9.

8. The nonnavigational encroachment is “[t]he fill for the staging area, the fill for the island enhancement/creation, and the riprap[.]” IDL Exhibit A, p. 9.

9. The “[p]roject area consists of approximately 5 miles of water frontage.” IDL Exhibit A, p. 9.

10. The closest littoral owner to the project is 800 feet away. IDL Exhibit A, p. 9.

11. On August 8, 2023, IDL sent adjacent neighbor notices to thirty-one adjacent property owners surrounding the Project area. IDL also sent a copy of the Application to applicable federal, state, and local resource agencies and organizations. IDL Exhibit A, p. 1.

12. An advertisement for the Application was run in the Bonner County Daily Bee on August 8 and 15, 2023. IDL Exhibit A, p. 1.

13. On September 7, 2023, IDL received an objection to the Application from William Powell, Britt Wagner, and Todd and Lori Scott. IDL Exhibit A, p. 1.

14. Objectors live in the vicinity of the proposed staging area, however there is no evidence as to whether they are “adjacent” property owners. Testimony at hearing.

15. There is no evidence that Objectors are littoral owners with littoral rights.

16. William Powell and Britt Wagner’s written objection states: “Adverse [e]ffects on Hwy 200; Enforcement of wake limits; hours of use/misuse; motor boat size; possibility of porta potty and dumpster; negative [e]ffects on property value; [and] more to be cited at public hearing.” IDL Exhibit 9.

17. Todd and Lori Scott’s objection simply requested a public hearing. IDL Exhibit 10.

18. At the hearing, Ms. Wagner testified that she had concerns about safety related to the traffic on Highway 200 and the lack of a left-turn lane; that there were multiple access points around this area, including the Idaho Club’s encroachment and Trestle Creek; that IDL should consider upland issues when determining whether to grant encroachments; that IDFG has a history of projects that are experimental in nature; and that the boat launch should be accessible only when the lake elevation is at 2060 feet.

19. Mr. Powell provided similar testimony to Ms. Wagner and added that the parking area was too large compared to other boat ramps in the area.

20. Mr. Scott testified that his concerns related to garbage in the area from use of the boat ramp after the project is complete; that the size of the parking lot would distract from the beauty of the delta; and that a boat ramp should only be accessible below “full pool” (summer water levels) where it would still be accessible to hunters/fishers. He further expressed concerns that a lack of enforcement of a “no wake zone” would lead to further erosion of the delta.

21. Two members of the public testified as follows against the boat ramp, but not the restoration project: there are other boat ramps in the area; the parking lot will create issues with fire pits, parties, and trash; IDFG purchased a marshmaster and concerns as to why they are not using that to complete the project; concerns about sediment being stirred up from lack of enforceable “no wake zone;” concerns about water quality; concerns about increased traffic being contrary to wildlife preservation and this restoration project; and a request that the ramp be limited to nonmotorized boats only.

22. One member of the public testified in favor of the project stating that the boat ramp is a “gift” from IDFG to the community as a whole granting better access for fishing and recreation.

23. No member of the public testified against the restoration project itself.

24. The Objection from Objectors and members of the public are only to the navigational encroachment (the “staging area and boat ramp”) and only inasmuch as the staging area remains after construction. *See* IDL Exhibit A, p. 10 (“the Staging Area will be turned into an area for car/truck/boat trailer parking, as well as a boat ramp/launch for the public.”)

25. While building the staging area is part of the nonnavigational encroachment, leaving the staging area, namely, the boat ramp, in place following completion of the project is the

basis for the objection. Therefore, only the navigational encroachment (the boat ramp) is at issue here.³

26. Objectors do not object to the boat ramp in total, but merely that the boat ramp would be accessible during summer water (2062.5 feet) where their preference is for the boat ramp to be inaccessible during summer water with a preferred accessible lake level of 2060 feet.

27. IDFG testified that access at 2060 feet would not work because mud would flood the staging area; there was no evidence offered to contradict this.

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 Objectors also take issue with the parking lot for the public to access the staging area; however, the parking lot is not within IDL’s jurisdictional authority as it deals with issues that are not “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).

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 located at IDAPA 20.03.04.000 *et. seq.*

4. 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).

5. 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).

6. The boat ramp is “on, in or above the beds or waters” of Lake Pend Orielle.

7. Encroachments in aid of navigation include boat ramps. IDAPA 20.03.04.010.15.

8. The boat ramp is a “community navigational encroachment.” Testimony of Mike Ahmer.

9. In considering an application for an encroachment, the following facts apply:

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. . . . [After a hearing, if] 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.

I.C. § 58-1306(e).

10. There is no evidence that this project will have any impact on adjacent property owners. The closest property with littoral rights is 800 feet from the project and that individual is not one of the Objectors. While Objectors testified sincerely and credibly that this project will

impact their homes, the testimony all relates to the impact on their property outside of IDL's jurisdiction.

11. There is no evidence that this project will have undue interference with navigation.

12. While Objectors provided evidence that this will impact them because of lack of enforcement of wake zones, garbage in the parking lot, motorized boats utilizing the ramp, impacts on traffic on Highway 200, individuals utilizing the parking lot for things other than boating,⁴ and impacts on property values, those are all issues that do not address IDL's jurisdiction, which is limited to encroachments "on, in or above the beds or waters" of Lake Pend Orielle. *See* I.C. § 58-1301; *see also* *Byrd*, 169 Idaho at 929.

13. None of the criteria exist that demonstrate this permit should be denied.

14. Further, as stated in the paragraphs below, the public benefit derived from this encroachment exceeds any detriment and for that reason, IDL "shall grant the permit." I.C. § 58-1306(e).

15. While Objectors only object to the Application related to a navigational encroachment, even if the Objection was to the nonnavigational encroachment of the staging area, this project has an environmental, economic, and social benefit to the general public.

16. "Encroachments not in aid of navigation in navigable lakes will normally not be approved by the Department and will be considered only in cases involving major environmental, economic, or social benefits to the general public." IDAPA 20.03.04.030.02.

17. The staging area is necessary for the restoration project of the Pack River Delta as the undisputed evidence demonstrates that there are no other alternatives to accessing the delta.

⁴ The example provided at the hearing was parties with drinking, fire pits, and trash in the parking lot.

See IDL Exhibit 1, p. 2 (“No alternatives for accessing the delta floor for construction. Alternative would be not doing the project.”). As stated by IDL:

The Applicant has proposed to transform the staging area into a small parking lot and boat launch/ramp for the public upon completion of the Project. The addition of a boat launch/ramp and public access spot to the lakefront provides a major benefit to the public through all three of the factors listed above. Having a new boat launch in the area could result in an increase in sales of fishing licenses, fishing equipment, boats, boat equipment, paddle[]craft like SUPs [standup paddleboards] and kayaks/canoes, and expenses at nearby businesses like gas stations and restaurants; which would be an economic benefit to the general public. Offering a new location for the public to recreate on and along the lake, through a boat launch/ramp and parking area is a major social benefit to the general public. The creation of the Staging Area allows for access to the Pack River Delta so that the restoration work can take place. The wetland enhancement is a major environmental benefit to the general public.

IDL Exhibit A, p. 10. This Hearing Officer agrees with the reasoning of IDL and adopts it in total that this project and the staging area has “major environmental, economic, or social benefits to the general public.” IDAPA 20.03.04.030.02.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends that Applicant’s request 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 thirty (30) days of the close of the evidentiary portion in this case, which occurred on November 30, 2023. See I.C. § 58-1306(c). The agency head’s final order in this case must be issued by January 2, 2024.

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 two (2) business days after the service date of this recommended order or **December 22, 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 section 58-1306(c), (d), and IDAPA 20.03.04.025.08.

IT IS SO ORDERED.

DATED December 20, 2023.

OFFICE OF ADMINISTRATIVE HEARINGS

/s/ Leslie M. Hayes

Leslie M. Hayes
Administrative Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2023, I caused to be served a true and correct copy of the foregoing by the following method to:

Idaho Department of Fish and Game
Pete Rust
Owen Moroney
Kathleen Trever
2885 W. Kathleen Ave.
Coeur d'Alene, ID 83814
(208) 769-1414
Applicant

U.S. Mail
 Email:
pete.rust@idfg.idaho.gov
owen.moroney@idfg.idaho.gov
kathleen.trever@idfg.idaho.gov

William Powell/Britt Wagner
130 Delta View Road,
Hope, ID 83836
(208) 597-1718

U.S. Mail
 Email:
brittnbill@yahoo.com

Todd/Lori Scott
174 Delta View Road
Hope, ID 83836
(702) 768-2875
Objectors

U.S. Mail
 Email:
twoscotts99@hotmail.com

Idaho Department of Lands
Marde Mensinger
300 N. 6th Street
Boise, ID 83720
(208) 334-0248
IDL Program Manager for Navigable Waters

U.S. Mail
 Email:
mmensinger@idl.idaho.gov

J.J. Winters
Deputy Attorney General
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400
Counsel for IDL

U.S. Mail
 Email:
jj.winters@ag.idaho.gov

Kourtney Romine
Service Contact for IDL

U.S. Mail
 Email:
kromine@idl.idaho.gov

OAH
P.O. Box 83720
Boise, ID 83720-0104
Located at: 816 W. Bannock St., Suite 203
(208) 605-4300

Email:
filings@oah.idaho.gov

/s/ Leslie M. Hayes
Leslie M. Hayes