

BEFORE THE IDAHO DEPARTMENT OF LANDS

In the Matter of,

Encroachment Permit Application No.
L96S2798A

Valiant Idaho, LLC & Valiant Idaho II, LLC
Applicants

Agency Case No. PH-2024-NAV-20-002

OAH Case No. 24-320-05

CLOSING STATEMENT OF APPLICANTS

This Closing Statement of Applicants is hereby provided by William Haberman, Managing Member of Valiant Idaho, LLC, and, Manager of Valiant Idaho II, LLC (collectively, “Applicants”), the owners of Lot 1 and Lot 2 of The Idaho Club North Lake, according to the Plat thereof, recorded in Book 13, Page 42, Official Records of Bonner County, Idaho (“Applicants’ Properties”).

Applicants reaffirm in its entirety their Pre-Hearing Statement, and restate that the submitted plans specifically meet the required criteria for a commercial marina, as defined by Idaho Code and Idaho Department of Lands (“IDL”), and as acknowledged by IDL in IDL's Pre-Hearing Statement dated September 20, 2024 (“IDL Pre-Hearing Statement”).

STATEMENT IN RESPONSE TO IDL HEARING

As stated in Applicants’ Pre-Hearing Statement and hearing testimony, Applicants carefully designed the submitted plans to specifically meet the required criteria for a commercial marina, as defined by Idaho Code and IDL. Applicants have repeatedly, throughout its application process and in previous iterations of their plans, acknowledged and embraced the value and responsibility to protect Trestle Creek and its significant contribution to the viability of Bull Trout and other fish species in Lake Pend Oreille. IDL did not provide any evidence, or otherwise disputes this, during IDL’s hearing testimony.

Throughout our project planning, Applicants have made significant adjustments to the proposed project to avoid, minimize and mitigate potential impacts from both upland and waterward development, as more completely described in Applicants' Pre-Hearing Statement.

LEGAL ANALYSIS

Given that Applicants submitted an encroachment permit application to IDL for a previous version of this project, and that project was reviewed and approved by the Director of IDL after the previous administrative hearing, IDL Agency Case No. PH-2023-NAV-20-003 and OAH Case No. 23-320-07, Applicants request that the Hearing Officer take judicial notice of the the FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER dated October 19, 2023, notably the Conclusions of Law, Pages 16 to 23, many of which remain relevant to the revised scope of the project.

Applicants hereby assert that, based on the current proposed scope of the project, the following Conclusions of Law are again pertinent and should apply, modified where appropriate to address specific changes to the proposed scope of the project:

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.

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).

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 (“USACE”) and Idaho Department of Environmental Quality (“IDEQ”). Applicants will be required to obtain additional permits through USACE and IDEQ.

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.

Lake Pend Oreille is a navigable lake and is within IDL’s authority to regulate encroachment permits.

Proposed Excavation and Fill

Excavating requires an encroachment permit. IDAPA 20.03.04.015.11.a.

“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.

Applicants seek to excavate portions of an existing man-made island, portions of an existing man-made boat basin, and portions of an existing man-made slack channel.

Applicants hereby state the following as to the need for the excavation: (1) eliminating a substantial safety hazard, and related potential legal liability to the Applicants, by removing dilapidated and dangerous old docks, board walks, bridges and other man-made features that prevent the safe and reasonable use of Applicants’ Properties; (2) protecting and stabilizing the existing banks for the safe and reasonable use of Applicants’ Properties; (3) removing a hanging 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 and unsafe existing boat ramp that is located in close proximity to the mouth of Trestle Creek.

The need for some excavation was confirmed during the onsite inspection as Applicants’ Properties in their current condition present many hazards, shallow warm water, and the slack channel presents a hazard for migrating Bull Trout.

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 Winter 2024 and 2025.

Fill as part of the restoration of the North Branch of Trestle Creek will be done between August and October of 2025, or such other time when the creek is dry or mostly dry.

The restoration of the North Branch of Trestle Creek has a clear environmental impact to the State of Idaho. Idaho Department of Fish and Game ("IDFG") has confirmed that redirecting migrating Bull Trout to the main channel of Trestle Creek will benefit the Bull Trout population.

The excavation of a small portion of the man-made island provides a clear economic and social benefit to the State of Idaho by building 88 additional commercial boat slips and 8 private boat docks, providing economic and recreational benefits, when there is a shortage of boat slips available on Lake Pend Orielle.

Given that IDL, as well as USACE, U. S. Fish & Wildlife ("USFW") and IDEQ, have previously approved projects on this specific site that were much more development intensive and potentially impactful, that would have required much more excavation, Applicants hereby assert this issue will be properly addressed and resolved by the requirements of Applicants to secure the appropriate permits from USACE in consultation with USFW, and from IDEQ.

Proposed Commercial Marina

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

Applicants seek a commercial navigational encroachment pursuant to Idaho Code § 58-1306.

Encroachments in aid of navigation include commercial marinas. I.C. § 58-1302(h).

IDL's authority in this matter is limited to the encroachment "on, in or above the beds or waters" of Lake Pend Orielle. I.C. § 58-1301.

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).

"[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).

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).

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).

Idaho Code § 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 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.”

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).

There is no evidence in the record of “adverse effect upon adjacent property.” The construction of proposed commercial marina is to occur on Applicants’ Properties. The adjacent 5.8 acre parcel to the South of Applicants’ Properties (“Kalispel Tribe Property”) was gifted to The Kalispel Tribe of Indians (“Kalispel Tribe”), who has provided written comments to the permit application which are addressed below.

There is no evidence in the record of “undue interference with navigation.”

The project does not seek to extend below the natural or ordinary high water mark.

The proposed commercial marina meets all the standards outlined in IDAPA 20.03.04.015.02.

There is a presumed adverse effect if a commercial marina is located closer than 25 feet to adjacent littoral rights. Applicants' Properties are adjacent to the Kalispel Tribe Property, however, the proposed commercial marina is over 150 feet from the littoral line between Applicants' Properties and the Kalispel Tribe Property.

Proposed Riprap

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."

Applicants' proposal to use riprap is intended, in large part, to arrest existing active and aggressive erosion along all of the high wall embankments throughout the project, which is an ongoing source of sediment into the lake in the vicinity of Trestle Creek. The proposed riprap will significantly reduce the amount of this sediment reaching the lake, and thus will provide a benefit to the public and the aquatic habitat as a whole.

Applicants' proposal meets these requirements for riprap, and all riprap work will be completed on Applicants' Properties.

Additional Considerations

IDL has no authority to regulate the upland development of Applicants' Properties or the Kalispel Tribe Property.

As to concerns that this project is not in the public's best interest, the commercial marina will provide benefit to the public given the number of boat slips that are in clear demand. These slips will be available to the general public, including members of The Idaho Club, which have previously been determined to be members of the public.

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. The proposed project meets the definition of and requirements for a commercial marina.

As to any concerns about parking and property setback requirements of Bonner County, the impact of the human footprint, compliance with the Clean Water Act, and enforcement of conditions placed on the permit, these are all outside the authority of IDL, but within the authority of other governmental agencies that require permits for this project, notably USACE and IDEQ.

Applicants assert that there will be minimal, if any, unreasonable adverse effects upon adjacent property owners and that the proposed project will improve navigation. Commercial marinas are specifically included within the statutory definition of “encroachments in aid of navigation.” Applicants concurs with the conclusion stated in IDL Pre-Hearing Statement that IDL may not have the knowledge nor expertise to independently assess such impacts, and Applicants challenge any assumption that such impacts will be negative in the absence of any actual evidence of the same.

Applicants concur with IDL that any such impacts will be properly addressed during the permitting process by the agencies with subject matter jurisdiction and that possess such knowledge and expertise, notably USACE, USFW and IDEQ, as well as by Applicants’ Water Quality Management Plan.

RESPONSE TO STATEMENTS FROM IDAHO FISH & GAME

In its comment letter to IDL dated September 26, 2024, IDFG expressly states that “[T]he realignment of the North Branch of Trestle Creek will benefit downstream migrating salmonids including Bull Trout by routing them back in the mainstem Trestle Creek rather than through a perched culvert into a slackwater channel. This includes post-spawn adults and juveniles. While this part of the project is proposed as mitigation / restoration, it should be noted that without this reroute, the North Branch would continue to drain into the proposed marina which would have negative effects on Bull Trout.” Further, IDFG stated that, “IDFG recommends that the proposed reroute use simple channel morphology, and not provide holding habitat to encourage fish to remain within the channel to prevent possible stranding of both adults and juveniles when it goes dry.”

Regarding the approach for the restoration of the North Branch of Trestle Creek, the proposed design plans were prepared by River Design Group, Inc. (“RDG”), an environmental services company that specializes in river and stream restorations. At the RDG website, (www.riverdesigngroup.com), the company is described as follows: “River Design Group (RDG) is a team of highly skilled professionals that combine science-based knowledge with proven restoration techniques to advance the field of ecosystem and river restoration. Our staff have over 400 years of combined restoration experience with more than 550 river restoration design projects, 1,450 river miles assessed or restored, 65 culverts and bridges designed and built for fish passage, 46 dams removed or modified, 50 fish screen projects implemented, and 1,750 acres of wetland or estuary restoration projects designed. Over the last 10 years, we have exceeded \$75M in constructed restoration projects in the Western United States.” In short, RDG is an experienced and qualified firm with expertise in this particular specialized area of design.

The design documents prepared by RDG clearly provide a detailed analysis of the project scope, location and site conditions on which the recommended design is based. Nearly identical plans were previously reviewed and deemed acceptable by USACE, USFW and IDFG as part of Applicants’ previous IDL permit application and IDL’s approval of the past iteration of the project. Further, during the planning and permitting of the original proposed project, IDFG was consulted, and worked with the previous owner and RDG, on the preferred approach. Those original plans are nearly identical to the current proposed design.

No evidence to the contrary was presented to challenge the approach recommended by RDG. While Applicants are willing to work with IDFG on the most beneficial means to protect the fish and aquatic habitat within the North Branch, this would need to be subject to agreement from the jurisdictional authorities, USACE and USFW, as to the best methodology to achieve the stated goal.

It is important to note that, based on the proposed design for the restoration of the North Branch of Trestle Creek, all of the work will be completed above the artificial high water mark and thus is outside IDL’s jurisdictional authority.

If this is still to be considered, as stated previously, Idaho Code § 58-1306(e) states that, “[I]n 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 navigational encroachment not extending below the natural or ordinary high water mark” (emphasis added). Idaho Code § 58-1306(e) further states, “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). Thus, Applicants assert that mere differences of opinion as to whether the proposed design for the restoration of the North Branch of Trestle Creek is the best method to complete its stated objective will not result in “unreasonable adverse effect upon adjacent property” or “undue interference with navigation”, nor will they establish or prove “detrimental effects” that exceed the “benefits” of the encroachments, particularly in the absence of any evidence to support such conclusions.

RESPONSE TO STATEMENTS FROM THE KALISPEL TRIBE

In its comment letter to IDL dated August 27, 2024, the Kalispel Tribe raised issues related to the following: (1) the proposed approach to shoreline stabilization; and, (2) the proposed approach to the restoration of the North Branch of Trestle Creek.

Regarding the proposed approach to shoreline stabilization, Applicants concur with IDL’s conclusion stated in the IDL Pre-Hearing Statement that “[W]ave and water activity on Lake Pend Oreille is significant and typically requires more than vegetation to stabilize shorelines.” Applicants further assert that the riprap design was prepared by a licensed engineer, based in part on a wave and fetch analysis to determine the sufficiency of this approach, and that it meets all of the IDL requirements for such riprap. Finally, all of the proposed riprap will be installed on the Applicants’ Properties. The restoration of the North Branch of Trestle Creek is the only work to be completed on the Kalispel Tribe Property, and that work does not include any riprap.

Regarding the approach for the restoration of the North Branch of Trestle Creek, Applicants’ position is clearly stated above in response to similar comments from IDFG. Most significantly, based on the proposed design for the restoration of the North Branch of Trestle Creek, all of the work will be completed above the artificial high water mark and thus is outside IDL’s jurisdictional authority. In addition, while there may be more than one way to achieve the goal of redirecting the North Branch of

Trestle Creek, the professional qualifications of the design professionals at RDG who have studied the specific project scope and site conditions, and developed a detailed and well-reasoned plan, should be given more weight than the mere opinion of the Kalispel Tribe as an adjoining property owner. Again, no evidence to the contrary was presented to challenge or discredit the approach recommended by RDG.

For the reasons stated above, Applicants assert that the proposed plan will not result in “unreasonable adverse effect upon adjacent property” or “undue interference with navigation”, nor will it result in “detrimental effects” that exceed the “benefits” of the plan, particularly in the absence of any evidence to support such conclusions.

SITE VISIT SUMMARY

Below is a summary of the site visit with the Hearing Officer and counsel for IDL, and what Applicants believe to be the most relevant site conditions as they pertain to the permit application:

- 1) **Positive impact of the bargain sale for conservation of the Kalispel Tribe Property:** Applicants discussed with the Hearing Officer and counsel for IDL that an affiliate of Applicants completed a bargain sale of the Kalispel Tribe Property to allow the Kalispel Tribe, in cooperation with IDFG, to place the Kalispel Tribe Property into conservation in perpetuity. To put this into context, Applicants showed that the Kalispel Tribe Property represents 100% of the linear frontage along the Main Branch of Trestle Creek, from where Trestle Creek intersects with Highway 200 to the mouth of Trestle Creek, where it continues on into Lake Pend Oreille. Applicants also showed that the Kalispel Tribe Property is where the North Branch of Trestle Creek crosses and where nearly all of the critical restoration work will be completed to restore the North Branch and redirect it back to its natural configuration. Thus, this bargain sale to the Kalispel Tribe has resulted in a permanent upland buffer between a critical boundary of Trestle Creek, including the mouth of Trestle Creek and beyond.
- 2) **Actual distance from mouth of Trestle Creek and existing land buffer to closest point of boat traffic:** Applicants showed that direct potential dock, boat and fish interaction will be significantly reduced from the previously permitted plan by isolating the vast majority of boat traffic around the entrance to the proposed commercial marina, with an 150+ foot land buffer between and away from the mouth of Trestle Creek. Applicants also showed where a 350+ foot long breakwater will be

constructed, which would further extend the distance from the entry and exit point for the commercial marina even further away from the mouth of Trestle Creek.

- 3) **Positive impact of the restoration of the North Branch of Trestle Creek:** Perhaps most importantly, Applicants showed the importance of its commitment to remove a major fish passage barrier by reverting the North Branch stream back to the Main Branch of Trestle Creek. As a direct result of this proposed mitigation effort, the Main Branch will have more water for a longer time of the year for better fish passage, and the existing kill zone below the North Branch hanging culvert, where out-migrating juvenile salmonids are dumped into predator-rich slack water, will be eliminated.
- 4) **Positive impact of removal of hanging culvert:** Applicants showed the location and hazardous condition of the existing North Branch hanging culvert that will be eliminated, where returning spawning fish are blocked and as a result subject to increase predation. It is important to note that this hanging culvert is the only direct connection between Applicants' Properties and Trestle Creek, and this will eliminate that singular connection.
- 5) **Positive impact of removal of existing boat ramp at the mouth of Trestle Creek:** Applicants showed the location of an existing boat launch in close proximity to the mouth of Trestle Creek that will be eliminated, and discussed how eliminating this boat launch will significantly reduce the potential for interactions between boats and fish at nearest point between Trestle Creek and the project.
- 6) **Positive impact of replacing and/or repairing hazardous current upland improvements:** Applicants showed the existing dilapidated docks, foot bridges, retaining walls and other hazardous structures that presently provide abundant predator habitat and are significant safety hazards to the upland enjoyment and use of Applicants Properties, all of which will be removed or replaced.

CONCLUSION

IDL recognizes that the proposed commercial marina meets the standards and requirements for littoral ownership and littoral setbacks, standards for encroachments in aid of navigation, and standards for encroachments not in aid of navigation. Further, the few questions IDL noted in its Pre-Hearing Statement have been properly addressed or necessarily will be during the permitting processes of USACE

and IDEQ. As a result, Applicants respectfully request that the Hearing Officer recommend approval of Applicants' application for an IDL encroachment permit.

DATED this 18th day of October 2024.

APPLICANTS

VALIANT IDAHO, LLC & VALIANT IDAHO II, LLC

A handwritten signature in dark ink, appearing to read "Will Haberman", with a long horizontal flourish extending to the right.

William Haberman
Managing Member & Manager

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October, 2024, I caused the foregoing to be served upon the following via the delivery method noted below:

Idaho Department of Lands Allison Olson 300 N. 6th Street, Suite 103 Boise, ID 83702 (208) 334-2400 In-House Counsel for Idaho Department of Lands	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: aolson@idl.idaho.gov
Idaho Department of Lands Marde Mensinger IDL Program Manager for Navigable Waters 300 N. 6th Street Boise, ID 83720 (208) 334-0248	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: mmensinger@idl.idaho.gov
Kourtney Romine / Kayla Dawson Service Contact for IDL	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: kromine@idl.idaho.gov kdawson@idl.idaho.gov
Leslie M. Hayes Office of Administrative Hearings P.O. Box 83720 Boise, ID 83720-0104 (208) 605-4300 Hearing Officer	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: leslie.hayes@oah.idaho.gov
OAH P.O. Box 83720, 816 W. Bannock St., Suite 203 Boise, ID 83720-0104 (208) 605-4300	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: filings@oah.idaho.gov
Jeremy Grimm Whiskey Rock Planning + Consulting 218 Cedar St., Suite 208 Sandpoint, ID 83864 (208) 946-9944 Agent for Applicant	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: jeremy@whiskeyrockplanning.com



William Haberman, On Behalf of Applicant