

John Richards, ISB #10670
General Counsel
Idaho Department of Lands
300 N. 6th St., Suite 103
Boise, ID 83702
(208) 334-0200
jrichards@idl.idaho.gov

Attorney for Idaho Department of Lands, Navigable Waterways Program

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

IN THE MATTER OF

Encroachment Permit Application No.
L96S2798A

Valiant Idaho, LLC and Valiant Idaho II, LLC

Applicants.

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

OAH Case No. 24-320-05

CLOSING STATEMENT

The Idaho Department of Lands (IDL), by and through its counsel of record John Richards and Allison Olson, and in accordance with the Hearing Officer's request, submits the following Closing Statement in the above-entitled matter.

I. FACTUAL BACKGROUND

IDL incorporates by reference the factual background in its Pre-hearing Statement into this Closing Statement. *See IDL-027* at 1-3. Additionally, since the record remained open after the Pre-hearing Statement was filed, IDL notes the following additional facts that have been incorporated into the record since that time.

On October 7, 2024, the scheduled public hearing was held at Sandpoint High School's auditorium. After the Applicant and IDL presented their material, the public was invited to testify. Based on the significant public interest in both this matter and previous similar applications for

development in the area, the evenings of October 7 and 8 were reserved to ensure adequate time for public testimony. However, the time reserved for the October 7 hearing proved sufficient for all attending members of the public who wished to testify to do so. Therefore, the Hearing Officer announced, on the record, that the public hearing scheduled for October 8 would be cancelled, but the written public comment period would remain open until October 11. IDL updated its website accordingly and distributed a QR code, which linked to IDL's website and provided the email address to submit comments, at the public hearing location in case members of the public appeared to testify on October 8. In total, IDL received over 800 comments from members of the general public. IDL greatly values public input and thanks the general public for their time and resources. As described in IDL's Pre-hearing Statement, IDL, pursuant to I.C. § 58-1306(b), also notified applicable government agencies with relevant knowledge and expertise of the application to provide their opinions on the application. *See IDL-002*. In response, IDL received responsive agency comments from the Idaho Department of Fish and Game (IDFG), the Idaho Department of Environmental Quality (IDEQ), and the Panhandle Health District (PHD). All the comments received by IDL in this process may be considered as part of its evaluation of the above-captioned application and should be afforded appropriate weight.

At 10:00 AM PST on October 8, 2024, the parties met to conduct a site visit of the proposed project area, which was requested by the Hearing Officer. The Hearing Officer, another Administrative Law Judge assisting the Hearing Officer, counsel for IDL, the Applicant (represented by Mr. William Haberman), and the Applicant's consultant (Jeremy Grimm) attended the site visit. Before commencing the site visit, the Hearing Officer placed Mr. Haberman under oath, since he was not present and did not testify at the public hearing and reminded Mr. Grimm that he was still under oath from the previous night. The Applicant and his consultant, Mr. Grimm, proceeded to explain their proposed plan of development. The Hearing Officer audio recorded the site visit and took pictures as the Applicant explained their proposal. *See IDL-040, 041*.

II. IDL JURISDICTIONAL AUTHORITY

During the site visit, the Hearing Officer asked the parties “whether Trestle Creek and the upland improvements of the divert constitute a navigable waterway within IDL’s jurisdiction.” *IDL-040* at 11:20 -11:34. For the reasons explained below, Trestle Creek and upland improvement aspects of the application are not within IDL’s jurisdiction.

The LPA grants IDL the authority to “regulate, control and [] permit encroachments in aid of navigation or not in aid of navigation on, in or above the beds or waters of navigable lakes.” I.C. § 58-1303. The underlying authority for the LPA is the public trust doctrine, which vested title to the beds and banks of navigable waters to the individual states upon statehood. The common law doctrine of the public trust has been interpreted by decisions of the Idaho Appellate Court and is codified at Title 58, Chapter 12, Idaho Code. IDAPA 20.03.04.010.30. A stated purpose of the codified public trust doctrine was to clarify the application of the doctrine in the State of Idaho and to expressly declare the limits of the doctrine in accordance with the authority recognized in each state to define the extent of common law. I.C. § 58-1201(6). As codified, “[t]he public trust doctrine as it is applied in the state of Idaho is solely a limitation on the power of the state to alienate or encumber the title to the beds of navigable waters as defined in this chapter.” I.C. § 58-1203(1). For the codified public trust doctrine, “[b]eds of navigable waters’ means those lands lying under or below the ‘natural or ordinary high water mark’ of navigable waters.” I.C. § 58-1202(1). The codified public trust doctrine recognizes that “private property rights” means “the property rights located above the beds of navigable waters.” *Id.* at (4). The “Natural or ordinary high water mark”, which determines ownership, is statutorily defined in the LPA for a lake as:

[T]he 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). Of note, the ordinary high water mark (OHWM) differs from an “artificial high water mark” (AHWM). An “AHWM” is “the high water elevation above the natural or ordinary high

water mark resulting from construction of manmade dams or control works and impressing a new and higher vegetation line.” I.C. § 58-1302(d).

In other words, “[t]he State's ownership of the lakebed extends up to the [original] high water mark, while a littoral (lakeside) owner on a navigable lake takes title down to the [original] high water mark as it existed in 1890 when Idaho was admitted to the Union.” *Byrd v. Idaho State Bd. of Land Commissioners*, 169 Idaho 922, 928, 505 P.3d 708, 714 (2022). Therefore, the State is the owner of the beds of navigable waters below the OHWM. The littoral landowner owns property above the OHWM, including submerged land between the OHWM (as it existed in 1890) and the AHW.

While the littoral owner owns the land between the OHWM and AHW, the LPA provides IDL with the authority to regulate encroachments on all land below the AHW. *Byrd*, 169 at 929; I.C. 58-1302(b). However, because the codified public trust doctrine expressly only applies to beds of navigable waters below the OHWM, it does not apply to lands between the OHWM and AHW.

(*See Idaho Forest Indus., Inc. v. Hayden Lake Watershed Imp. Dist.*, 112 Idaho 512, 516, 733 P.2d 733, 737 (1987) (“[T]he public trust arises only in land below the natural high water mark of navigable waters.”)) In review of the application, it appears that all requested encroachments and work will occur on privately owned submerged lands between the OHWM and the AHW.¹ Thus, by definition, the public trust doctrine does not extend to the privately owned submerged lands that are the subject of this application. The private property rights between the OHWM and AHW are also acknowledged in the LPA and given special consideration. *See* I.C. 1306(e). The codified public trust doctrine further recognizes that the public trust doctrine shall not be applied to any purpose other than as provided in code and shall specifically not apply to the protection or exercise of private

¹ In some areas of the application, the artificial high-water mark is referred to as the ordinary high water mark. This is specifically noted in some of the professional engineering documents. *See IDL 005* at pg. 20, 76, 79, 80, 98. The legal description and plat for the Idaho Club North Lake shows that the property boundaries extend to what is referenced as the “meander line” in the plat. *Id.* at 12-14. Depictions of the project show that all proposed aspects of the application will occur on privately owned submerged lands or uplands. *See Id.* at 15.

property rights within the state of Idaho. I.C. §58-1203(2)(c).

Navigable waters, as defined in the codified public trust doctrine, are “those waters that were susceptible to being used, in their ordinary condition, as highways for commerce on the date of statehood, under the federal test of navigability.” I.C. § 58-1202(3). The LPA defines “Navigable lake” as

any permanent body of relatively still or slack water, including man-made reservoirs, not privately owned and not a mere marsh or stream eddy, and capable of accommodating boats or canoes. This definition does not include man-made reservoirs where the jurisdiction thereof is asserted and exclusively assumed by a federal agency.

Thus, IDL’s regulatory authority is limited to only those areas specifically identified in the LPA.

Lake Pend Oreille is considered a navigable waterway subject to the jurisdiction of IDL. (*See Kaseburg v. Bd. of Land Comm'rs*, 154 Idaho 570 (2012)(applying the Lake Protection Act to Lake Pend Oreille encroachment permits). Trestle Creek, however, is not a navigable waterway under either the LPA or codified public trust definitions and is thus outside of IDL’s regulatory authority. Similarly, any upland aspects of the project above the AHWM and regulation of water quality are beyond IDL’s statutory authority. The application recognizes that jurisdiction over this project is shared and that jurisdiction under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 lies with the U.S. Army Corps of Engineers and the Idaho Department of Environmental Quality. IDL wishes to clarify that any permit it issues would only authorize work to be done below the ordinary or artificial high water mark as defined in I.C. § 58-1302 and IDAPA 20.03.04.010 and any such permit would not relieve the Applicant from obtaining the necessary additional approvals/permits from other state and federal agencies with regulatory authority over other aspects of the application nor would it relieve the Applicant from complying with other local, state, or federal laws prior to beginning construction. However, it is ultimately the Applicant’s responsibility to comply with the law and obtain the necessary permits and it is the Applicants decision in what order they seek permits and when.

III. LEGAL BACKGROUND

IDL incorporates by reference the legal background in its Pre-hearing Statement into this Closing Statement. *See IDL-027.* The Lake Protection Act (LPA), Title 58, Chapter 13, Idaho Code, and its implementing regulations, IDAPA 20.03.04, govern encroachments upon Idaho's navigable waterways. These authorities grant IDL, acting on behalf of the State of Idaho Board of Land Commissioners (Board), the power to "regulate, control and [] permit encroachments in aid of navigation or not in aid of navigation on, in or above the beds or waters of navigable lakes." I.C. § 58-1303.

In the LPA, the Legislature expressly declared its intent that certain factors be given due consideration in accordance with the provisions of the LPA when regulating encroachments upon Idaho's navigable waterways:

The legislature of the state of Idaho hereby declares that the public health, interest, safety and welfare requires that all encroachments upon, in or above the beds or waters of navigable lakes of the state be regulated in order that the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment. No encroachment on, in or above the beds or waters of any navigable lake in the state shall hereafter be made unless approval therefor has been given as provided in this act.

I.C. § 58-1301; IDAPA 20.03.04.012.01. "Moreover, it is the responsibility of the State Board of Land Commissioners to regulate and control the use or disposition of state-owned lake beds, so as to provide for their commercial, navigational, recreational or other public use." IDAPA 20.03.04.012.01.

In addition to the above overarching policy and factors, Idaho Code § 58-1306(e) provides additional factors to be considered when evaluating nonnavigational or commercial navigational encroachments. That section 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 nonnavigational encroachment, a commercial navigational encroachment or a community navigational encroachment not extending below the natural or ordinary high water mark.*

I.C. § 58-1306(e) (emphasis added).

If, after a hearing, the Board “determines that the benefits, whether public or private, to be derived from allowing such encroachment exceeds its detrimental effects, [the Board] shall grant the permit.” *Id.* The applicable rules also provide that nonnavigational encroachments “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. Further, “[a]pproval under these circumstances is authorized only when consistent with the public trust doctrine and when there is no other feasible alternative with less impact on public trust values.” *Id.* The common law doctrine of the public trust has been interpreted by decisions of the Idaho Appellate Court and is codified at Title 58, Chapter 12, Idaho Code. IDAPA 20.03.04.010.30.

IV. CLOSING STATEMENT

A. Compliance of Proposed Encroachments with LPA and IDAPA Rules

First, IDL would like to clarify an assertion made by Valiant in its Pre-hearing Statement’s opening paragraph. The first sentence states, “Applicant carefully designed the submitted plans to specifically meet the required criteria for a commercial marina, and defined by Idaho Department of Lands (IDL), and as acknowledged by IDL in its Pre-Hearing Statement dated September 20, 2024.” *IDL-037* at 1. IDL did not make this acknowledgment in its Pre-Hearing Statement. IDL did acknowledge that *certain* requirements have been met and noted that there is still information needed to adequately determine if *all* criteria had been met. *See IDL-027.*

i. Littoral Ownership and Signature Requirement.

In its Pre-hearing Statement, Valiant stated that “Applicant concurs that IDL’s requirement that approval from the relevant littoral owners be obtained has been met.” *IDL-037* at 3. IDL agrees that the littoral ownership and signature requirements are met in this case. *See IDL-027* at 4 (“Here, Valiant Idaho, LLC and Valliant II, LLC, via their agent, submitted this application. Thus, companies are littoral owners and have littoral rights.”). IDL is, however, unsure who the “relevant littoral owners” are if not the Applicant, Valiant, themselves. Likewise, IDL is unsure from whom Valiant, the Applicant and littoral owner, sought “approval” from. In this case, they are the littoral owners and submitted the application for encroachment. *See IDL-005* at 1-14. Therefore, they did not need their plans to be “approved [i.e. signed] by the riparian or littoral owner” since they are the owners. *See* § 58-1306(a) (“Applications for nonnavigational, community navigational, or commercial navigational encroachments must be submitted or approved by the riparian or littoral owner.”). Despite this confusion, the applicant is a littoral owner with littoral rights and the requirements of IDAPA 20.03.04.15.02 are met.

ii. Distance from Littoral Lines.

Valiant’s pre-hearing statement states that the “Applicant concurs that IDL’s minimum distance requirement from the adjacent littoral right lines has been met.” However, IDL did not claim that this rebuttable presumption has been “met.” Rather, IDL stated that “this presumption is not applicable in this case.” *See IDL-027*; *see also* IDAPA 20.03.04.015.13.e. IDL’s statement merely concluded that the proposed project will not be within 25 feet of adjacent littoral right lines so the presumption of adverse affect on littoral rights pursuant to IDAPA 20.03.04.015.13(e) does not arise. However, as mentioned in IDL’s Prehearing Statement, it appears likely that there will be minimal, if any, *unreasonable* adverse effects upon adjacent property owners.” *IDL-027* at 11

B. Encroachment Standards.

Here, the Valiant is requesting permission for encroachments in aid of navigation (commercial marina, additional docks, breakwater) and encroachments not in aid of navigation (riprap, pedestrian bridge, excavation and dredging). The applicable statutory and regulatory standards can be found, primarily, in I.C. §§ 58-1301 and 1306 as well as IDAPA 20.03.04.015 and .030.

a. Encroachments in aid of navigation.

Pursuant to the LPA,

"Encroachments in aid of navigation" means and includes docks, piers, floats, pilings, breakwaters, boat ramps, channels or basins, and other such aids to the navigability of the lake, on, in or above the beds or waters of a navigable lake. The term "encroachments in aid of navigation" may be used interchangeably herein with the term "navigational encroachments."

I.C. § 58-1302(h).

i. Commercial Marinas

Encroachment standards specific to Commercial Marinas may be found at IDAPA 20.03.04.15.03. Particularly relevant here are subsections (a), (c), and (d). As stated in IDL's Prehearing Statement, subsection (d) appeared to be satisfied and IDL stated that additional information regarding subsections (a) and (c) was necessary to determine if subsection those requirements were satisfied. IDL-027 at 6-7. Valiant's Pre-hearing Statement states that the "Applicant concurs that the minimum requirement of a public to private moorage ratio of fifty percent (50%) has been met." IDL-037 at 4. IDL, in its Pre-hearing Statement, requested "[c]larity on how Valiant plans to make their marina available to the public." IDL-027 at 6-7. In Valiant's Response to IDL's Pre-hearing Statement it clarified that: "Applicant plans to offer at least fifty percent (50%) of the moorage to the general public subject to leases with terms not to exceed (1) year." IDL-037 at 4. This plan, if followed, would meet the 50% standard required of IDAPA 20.03.04.15.03(a).

IDL also requested more information to determine whether the relevant parking requirements have been met. IDL-027 at 7; *see also* IDAPA 20.03.04.15.03(c) (requiring one (1) parking space per two (2) public watercraft); Bonner County Planning Department, Title 12 Subchapter 4.3 – Parking Standards, Table 4-3 (requiring the same as IDAPA 20.03.04.15.03(c)). Valiant's response clarified

that there would be “a total of forty-six (46) parking spaces, including thirty-three (33) parking spaces designated as Marina User Parking and thirteen (13) larger parking spaces designated as Boat Trailer Parking[.]” Therefore, both IDL’s and Bonner County’s parking requirements have been met.² Thus for these reasons and reasons stated in IDL’s Prehearing Statement, the application satisfies the commercial marina-specific encroachment requirements under IDAPA 20.03.04315.03

ii. *Breakwater*

For the reasons described in IDL’s Prehearing Statement, the requirements for breakwaters under IDAPA 20.03.04.015.06 have been met.

b. Encroachments not in aid of navigation.

Normally, encroachments not in aid of navigation will not be approved and “will be considered only in cases involving major environmental, economic, or social benefits to the general public.” IDAPA 20.03.04.030.02. IDL maintains that there may be heightened economic and social benefits as it relates to the commercial marina. *See IDL-027* at 8. However, it remains unclear as to whether there will be “major environmental ... benefits to the general public.”

As mentioned herein, the proposed nonnavigational encroachments would occur on privately owned lands between the OHWM and AHW. Thus, pursuant to the statutory requirements of the LPA, IDL in this instance “shall consider unreasonable adverse effect upon adjacent property and undue interference with navigation the most important factors to be considered in granting or denying an application for a nonnavigational encroachment...or a commercial navigational encroachment not extending below the natural or ordinary high water mark.” I.C. § 1306(e). Further, “[i]f...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.” *Id.* The three

² The Applicant’s response also states “[a]ny additional parking requirements for the seven (7) shore-affixed private docks will be easily satisfied on the individual private homesites.” *IDL-037 at 4*. IDL wishes to clarify that there are no additional parking requirements for the seven shore-affixed private docks and upland development is outside of IDL’s statutory authority.

proposed nonnavigational encroachments are the riprap installation the excavation and dredging, and the pedestrian bridge.

i. Riprap

The Applicant's proposed riprap installation plan meets the standard requirements for riprap installation, which can be found in IDAPA 20.03.04.015.a. When issuing permits to install riprap, IDL typically encourages use of vegetative riprap, which the application indicates will be used. The Applicant's response to IDL's pre-hearing statement, however, states that "vegetative riprap will be used as much *as is practical*." *IDL-037* at 5 (emphasis added). It should be noted that the Applicant will be required to install riprap *as is required* by the permit, if issued.

ii. Excavated or Dredged Channel

The Applicant proposes excavating and dredging a channel to provide access to their proposed commercial marina as well as to the seven private residential shore-affixed docks and one maintenance dock. The proposed dredging would occur in a previously dredged area within an existing man-made boat basin a slack water channel, and adjacent shoreline. The Applicant is proposing to use the excavated material to fill in a wetland to build the proposed commercial marina.

IDAPA 20.03.04.015.11 subsection (b) requires that an excavated or dredged channel "must have a clear environmental, economic, or social benefit to the people of the state, and must not result in any appreciable environmental degradation." The subsection goes onto state that "[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. Further, since all dredging activities would occur on privately owned submerged lands above the OHWM, primary consideration must be given to the dredging's impact to the unreasonable adverse effect upon adjacent property and undue interference with navigation the most important factors to be considered in granting or denying an application for a nonnavigational encroachment. I.C. § 1306(e).

As described herein IDL maintains that there may be heightened economic and social benefits

as it relates to the commercial marina. *See IDL-027* at 8 However, it remains unclear as to whether there will be “major environmental ... benefits to the general public.” Rather than address IDL’s concerns regarding uncertainty about the potential environmental impacts and cumulative effects of the proposed excavation and dredging, the Applicant stated in its Prehearing Statement that:

Given that IDL, as well as USACE, USFW[,] and [the] Idaho Department of Environmental Quality (IDEQ) all have previously approved projects on this specific site that were much more development intensive and potentially impactful, and that would have required much more excavation, Applicant hereby asserts this issue will be properly addressed and resolved by the requirement of Applicant to secure the appropriate permits from USACE in consultation with USFW, and from IDEQ.

IDL-037 at 6. This is not necessarily applicable to the present application being considered.

The decision to grant or deny any permit required by USACE or IDEQ is independent of the IDL’s permitting process and a condition of any encroachment permit would be that the applicant is not relieved from obtaining the other necessary permits from other applicable regulatory agencies or otherwise complying with local, state, and federal law. As acknowledged by the Applicant, this is a different project than previous iterations. These differences may result in different outcomes. Additionally, regardless of how IDL, or other state and federal agencies, have resolved previous applications for development in the Trestle Creek area, evidence of those previous proceedings are outside the record for this Application, which must be evaluated on its own merits. Thus, it is important to note that the determination of whether the application satisfies the applicable standards and requirements for dredging must be based on the current application and other information contained within the record.

The application itself does contain mitigation measures to limit the impacts of dredging. *IDL-005* at 118 Additionally, since IDL filed its Pre-hearing Statement two state agencies have provided comments relevant to the potential environmental impacts of Valiant’s proposed project, including some comments related to dredging and excavation. Such comments were submitted by IDFG and IDEQ and ought to be given appropriate weight on those matters that fall within IDL’s regulatory jurisdiction. When considering applications such as Valient’s, IDL relies on comments from

appropriate sources, such as IDFG and IDEQ, since they do possess relevant knowledge and expertise. Such comments both provide information for IDL's consideration in granting or denying the permit and/or inform necessary conditions that ought to be placed on a permit, if issued, to adequately protect certain factors.

iii. *Pedestrian Bridge*

For the reasons described in IDL's Prehearing Statement, the requirements for the pedestrian bridge have been met. *See IDL 027* at 9-10.

c. *Considerations applicable to encroachments.*

Before turning to the relevant legal standards, IDL would, once again, like to clarify statements made within Applicant's response to IDL's Pre-hearing Statement. Specifically, the statement that "Applicant concurs that there will be minimal, if any, unreasonable adverse effects upon adjacent property owners and that the proposed project will improve navigation." *IDL-037* at 5. However, IDL's pre-hearing statement, verbatim states: "Likely, there will be minimal, if any, *unreasonable* adverse effects upon adjacent property owners, and the application proposes to improve navigation." *IDL-027* at 11. It is important that the Department's statements remain as stated by the Department.

The Applicant's response goes on to state that, "[w]hile Applicant acknowledges that a commercial marina is likely to have anthropogenic impacts, Applicant concurs that IDL may not have the knowledge nor expertise to independently assess such impacts and challenges any assumption that such impacts will be negative in the absence of any actual empirical evidence of the same." *IDL-037* at 5. As aforementioned, it is the Applicant's burden to prove its application complies with relevant statutory and regulatory standards, based on facts within the record. As stated in IDL's pre-hearing statement, the Department often "relies on comments from appropriate sources that do possess that knowledge and expertise when considering applications such as Valient's." *IDL-027* at 11. The LPA, and its implementing regulations, provide authority for IDL to "determine the opinion of" state

agencies “having an interest in the lake to determine the opinion of such state agencies as to the likely effect of the proposed encroachment upon adjacent property and lake value factors of navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty or water quality.” I.C. § 58-1306(b). The record now contains comments from IDFG, IDEQ, and PHD discussing the impacts of Applicant’s proposal, which the Department may properly rely on in reaching a decision in this matter and which ought to be given appropriate weight. *See IDL-029, 039, 040.*

Additionally, IDAPA requires excavated or dredge challenges or basins to have a clear environmental, economic, or social benefit that “must not result in any appreciable environmental degradation” and prohibits approval if the cumulative effects “would be adverse to fisheries or water quality”. IDAPA 20.03.04.15; *see also* IDAPA 20.03.04.030.02 (stating non-navigational encroachments “will normally not be approved ... and will be considered only in cases involving major environmental, economic, or social benefits to the general public.”).

Here, IDL, in accord with I.C. § 58-1306(b), sought the opinions of state agencies having an interest in Lake Pend Oreille. This is standard practice and IDL finds it particularly helpful when considering complex applications such as Valiant’s.³ Two applicable state agencies responded opining on factors IDL is required to consider. *See IDL-029* (IDFG’s comment most specifically focusing on the potential impacts to fish and wildlife habitat, the aquatic life, and recreation); *IDL-039* (IDEQ’s comment most specifically focusing on water quality and, by extension, fish and wildlife habitat and aquatic life). IDL relies on those agencies’ comments to help ensure the applicable statutory and regulatory requirements are met. IDL requests that the Hearing Officer give due consideration to the comments received.

The Applicant’s response to IDL’s pre-hearing statement states: “Applicant concurs that any

³ This application proposes removal of existing wooden piles, docks, boardwalks, decking and concrete boat ramp; constructing an 88 slip commercial marina; installation of 8 shore-affixed docks; installation of 3,830 linear feet of riprap; excavation of approximately 12,500 cubic yards of material; modifying 139,640 square feet of shoreline; installation of a 3,580 square foot breakwater; discharge of excavated material back into the lake; filling a wetland, and; redirecting the North Branch of Trestle Creek.

such impacts will be properly considered and addressed during the permitting process by the agencies with subject matter jurisdiction that do possess such knowledge and expertise, notably USACE, USFW[,] and IDEQ, as well as by the Water Quality Management Plan.” *IDL-037* at 5; To clarify, IDL’s position is not that impacts outside of IDL’s area of expertise are irrelevant and can only be properly considered and addressed during other agencies’ permitting processes. Instead, IDL’s position is that it may utilize comments from expert agencies when considering required factors under the LPA. *See IDL-027* at 11. The factors IDL is to consider in regard to aspects of Valiant’s proposal may also be considered and addressed by the other listed agencies, but it does not prevent IDL’s consideration of such information in the encroachment permit application process. However, the Department can, and regularly does, protect such factors, including fisheries and water quality, by conditioning IDL permits on the applicant receiving subsequent necessary permits from other regulatory agencies with jurisdiction. If a permit were issued in this instance, said permit would be subject to such condition that the Applicant will not be relieved of obtaining the other necessary permits from other regulatory agencies with jurisdiction nor would they be relieved from otherwise complying with local, state, and federal law. However, that does not limit IDL’s ability to consider, weigh, and adequately address such factors in its decision. Instead, the comments from relevant expert agencies inform IDL’s consideration of LPA factors and, if needed, necessary permit conditions to protect such factors.

C. Idaho Code § 58-1306(e)

The operative statute here is Idaho Code § 58-1306(e) which 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 nonnavigational encroachment, a commercial navigational encroachment or a community navigational encroachment not extending below the natural or ordinary high water mark.*

§ 58-1306(e)(emphasis added). The proposed project lies on privately owned submerged land and

thus, pursuant to statute, unreasonable adverse effect upon adjacent property and undue interference with navigation are the most important factors to consider here. As described herein and in IDL's prehearing statement, the project is not likely to have unreasonable adverse impacts upon adjacent property and the application proposes to improve navigation. Thus, the most important factors, as dictated by statute, weigh in favor of granting the permit.

Recognizing the project is unlikely to adversely affect adjacent parcels or navigation, the most important factors under I.C. § 1306(e), IDL also recognizes the benefits, both public and private, that would be derived from allowing the encroachment and weighs them against its detrimental effects. I.C. § 58-1306(e). If the public and private benefits to be derived from the encroachment exceed its detrimental effects, [the Board] *shall grant* the permit. *Id.* (emphasis added). The Application and record provide evidence of benefits both privately to the Applicant and its members and to the public. The record also contains concerns from the public and agencies related to the proposed encroachments potential detrimental impacts, particularly those related to water quality and fish and wildlife habitat. Applicants have provided measures within their application and within the record on efforts they intend to undertake in order to limit or mitigate the detrimental impacts of the project. Further, agencies, in particular IDFG and IDEQ, provided recommendations to further help mitigate. IDL can include such conditions on a permit in order to protect lake values so long as such condition is necessary and within the statutory authority of IDL. Further, some of the evidence conflicts as to what the benefits or detrimental impacts of the project may be. Ultimately, the conflicting testimony regarding the benefits and detrimental impacts of the encroachment must be resolved and given appropriate weight to determine whether the private and public benefit outweighs the detrimental effects of the proposed project in accordance with the requirements of I.C. § 1306(e). If, after the conflicting evidence is resolved, the benefits of the project outweigh its detrimental effects the permit ought to be granted as required under I.C. § 1306(e).

V. CONCLUSION

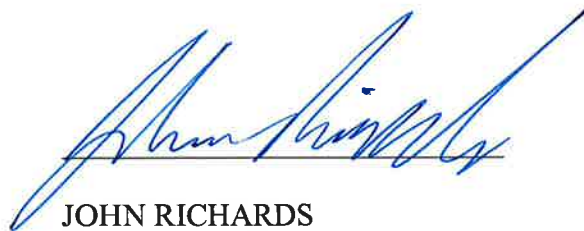
Given the information provided in the application and in the record, Valiant's proposal appears to comply with applicable encroachment standards. Pursuant to 1306(e), IDL must weigh the

private and public benefit of the project against the detrimental effects. These encroachments would occur on privately owned submerged lands which, pursuant to I.C. § 1306(e), makes unreasonable adverse effect upon adjacent property and undue interference with navigation the most important factors to be considered in granting or denying an application. Here, the project is not likely to have unreasonable adverse effects upon adjacent property and the application proposes to improve navigation. Thus, the most important factors, as provided in statute, weigh in favor of granting the permit. As described herein, there is evidence of both public and private benefit of the encroachment as well as evidence of detrimental effect. Ultimately, the conflicting testimony regarding the benefits and detrimental impacts of the encroachment must be resolved and given appropriate weight to determine whether the private and public benefit outweighs the detrimental effects of the proposed project.). If, after the conflicting evidence is resolved, the benefits of the project outweigh its detrimental effects the permit must be granted as required under I.C. § 1306(e).

In this circumstance, it appears that the project meets all of the technical standards for a commercial marina, breakwater, riprap, excavation and dredging, and pedestrian bridge on private submerged lands. If a permit is issued, IDL recommends that it be conditioned, as necessary and within the statutory authority of IDL, to adequately protect lake values.

\

DATED this 18th day of October, 2024.

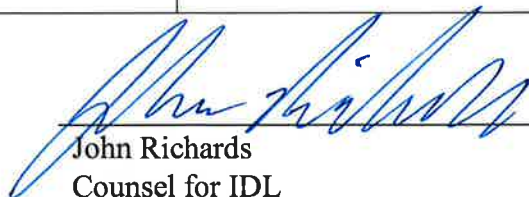


JOHN RICHARDS
Counsel for IDL

CERTIFICATE OF SERVICE

I hereby certify that on this **18th** day of October, 2024, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Will Haberman Valient Idaho, LLC & Valient Idaho II, LLC 151 Clubhouse Way Sandpoint, ID 83864 (407) 973-7875 <i>Applicants</i>	<input type="checkbox"/> Email: wh@theidahoclub.com
Jeremy Grimm Whiskey Rock Planning + Consulting 218 Cedar St., Suite 208 Sandpoint, ID 83864 (208) 946-9944 <i>Applicants' Agent</i>	<input type="checkbox"/> Email: jeremy@whiskeyrockplanning.com
John Richards Idaho Department of Lands 300 N. 6 th St., Ste. 103 Boise, ID 83702 (208) 334-0200 <i>In-house Counsel for IDL</i>	<input type="checkbox"/> Email: jrichards@idl.idaho.gov
Marde Mensinger Idaho Department of Lands 300 N. 6 th St. Boise, ID 83720 (208) 334-0248 <i>IDL Program Manager for Navigable Waters</i>	<input type="checkbox"/> Email: mmensinger@idl.idaho.gov
Kourtney Romine Kayla Dawson <i>Service Contact for IDL</i>	<input type="checkbox"/> Email: kromine@idl.idaho.gov kdawson@idl.idaho.gov
OAH General Government Division P.O. Box 83720 Boise, ID 83720-0104 816 W. Bannock St. (208) 605-4300	<input type="checkbox"/> Email: filings@oah.idaho.gov


John Richards
Counsel for IDL