

## BEFORE THE IDAHO DEPARTMENT OF LANDS

In the Matter of

Application for Encroachment Permit

Valiant Idaho, LLC and Valiant Idaho II, LLC

Applicant

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

OAH Case No. 24-320-05

**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 on, in or above the beds or waters of navigable lakes” as provided in the Lake Protection Act, title 58, chapter 13, Idaho Code (“LPA”). 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” (“LPA Rules”).

On or around June 27, 2024, IDL received a complete Joint Application for Permits (“Application”) and attachments from Valiant Idaho, LLC and Valiant Idaho II, LLC, (“Valiant” or “Applicant”) through their managing member, William Haberman, and their agent, Jeremy Grimm, President of Whiskey Rock Planning and Consulting, “[to] remove and reconstruct an existing dilapidated marina to meet current safety, environmental, and aesthetic commercial marina standards, and convert an old RV park property into 7 private home sites.” IDL-005-Application. A public hearing was held on October 7, 2024, and an onsite visit with the parties was conducted on October 8, 2024. The record was held open until October 11, 2024. Hearing Officer Leslie Hayes, of the Office of Administrative Hearings, served as the duly appointed hearing officer and attended the onsite visit. On November 6, 2024, Hearing Officer Hayes issued a Findings of Fact, Conclusions of Law, and Recommended Order (“Recommended Order”), which contains the following sections: Background, Preliminary Evidentiary Rulings, Findings of Fact, and Conclusions of Law. On November 8, 2024, Applicant filed a Request for Exception to Recommended Order pursuant to IDAPA 62.01.01.207.

As Director of IDL, my responsibility is to render a Final Order pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.030.07, on behalf of the State Board of Land Commissioners based on the record reviewed in the context of my personal expertise gained through education, training, and experience. In making this determination I relied on the record for this matter. Specifically,

- I read the transcript of the public hearing conducted in Sandpoint, Idaho on October 7, 2024.
- I reviewed the entire record including all documents, exhibits, photographs, and statements submitted by the parties.
- I reviewed written comments submitted by members of the public and state agencies.
- I examined the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommended Order in light of the entire record.

Below is my response to Applicant's Request for Exception to the Recommended Order and my revised Findings of Fact and Conclusions of Law. For the reasons stated below, Applicant's Request for Exception is denied and Applicant's Application for Encroachment Permit Application L-96-S-2798A is **APPROVED** with the condition that Applicant obtain all other permits required by the respective agencies before starting construction.

## II. APPLICANT'S REQUEST FOR EXCEPTION IS DENIED

As a threshold matter, Applicant's Request for Exception is denied. The Hearing Officer's Recommended Order states that "if either party disagrees" with the Order, "[p]ursuant to Idaho Code § 67-5244, the party may file an exception to this recommended order with the agency head." Applicant filed an exception to the Recommended Order on November 8, 2024. Notwithstanding language to the contrary in the Recommended Order, these proceedings are governed by the process set forth in I.C. § 58-1306(c), which does not provide any right to file an exception and preempts any general review procedure provided by the Administrative Procedures Act ("APA").

The APA provides that "[a] proceeding by an agency . . . that may result in the issuance of an order is a contested case and is governed by the provisions of this chapter, *except as provided by other provisions of law.*" I.C. § 67-5240 (emphasis added). The LPA is one such other provision of law and provides specific guidance for issuance of final orders and appeal procedures. "Any applicant or other aggrieved party so appearing at a hearing shall have the right to have the

proceedings and decision of the board reviewed by the district court in the county where the encroachment is proposed by filing notice of appeal within thirty (30) days from the date of the board's decision.” I.C. § 58-1306(c). Neither the LPA nor the LPA rules address the nature and effect of the recommended order or the parties’ right to file exceptions to such a decision. In the absence of subject specific procedural statutes, the more specific statute controls. *Eller v. Idaho State Police*, 165 Idaho 147, 154, 443 P.3d 161, 168 (2019) (where two statutes conflict, courts should apply the more recent and more specifically applicable statute).

Nonetheless, I have considered Applicant’s Request for Exception to Recommended Order and determined it is not necessary to incorporate into this record or the Final Order.

### **III. FINDINGS OF FACT**

I adopt paragraphs 1, 3, 5, and 7 of the Recommended Order as my findings of fact. I decline to adopt paragraphs 2, 4, 6, 8, 9, 10, 11, and 12 and instead add the following paragraphs as substitutions to those declined and additional findings of fact. Certain additional findings of fact are incorporated into the Conclusions of Law.

2. The Application is signed by William Haberman, Manager of Valiant Idaho, LLC and Managing Member of Valiant II, LLC.

4. Lake Pend Oreille is a navigable lake with an artificial high water mark created by the Albeni Falls Dam, which regulates summer pool level at 2062.5 NGVD.

6. Valiant submitted a Joint Application for Permits outlining seven separate and distinct activities<sup>1</sup> for the commercial marina, not all of which fall under IDL’s jurisdiction:

- Excavation, contouring and stabilization of portions of the existing boat basin (hereinafter “Excavation” or “Redredging”);
- Re-direction of the North Branch of Trestle Creek (hereinafter “Trestle Creek Restoration Project”);
- Removal of existing boat launch;

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<sup>1</sup> For purposes of this Order and ease of reference only, certain activities proposed by the Application are referred to in short terms.

- Dock system consisting of 88 fixed pier boat slips for public use and 7 single family residential docks with breakwater, maintenance dock, boat-bilge pump out station (collectively “Marina Project”);
- Free-spanning pedestrian bridge to access docks;
- Upland development consisting of 7 residential home sites, parking and boat storage, and road development (hereinafter “Upland Development”)
- Placement of riprap along 1,310’ of shoreline near docks and 2,520’ of combined vegetated riprap along existing shoreline edge.

The Upland Development will be constructed on the site of an historic abandoned RV park. The Trestle Creek Restoration Project will take place on private property not owned by Valiant. IDL has no jurisdiction over the Trestle Creek Restoration Project or Upland Development. The Excavation and Redredging will occur within an existing man-made boat basin. The location of the Marina Project and Excavation activities is currently filled with old, dilapidated docks, pilings, bridges, railroad ties, and other environmental hazards and debris. The docks, boat slips, breakwater, maintenance dock, and pump-out station will be constructed on the site of an historic abandoned public marina.

8. The Application includes the following documents in support which are included in the record as separate exhibits (shown in parentheses):

- Application (IDL-005)
  - Statement of purpose and need
    - Existing condition on bathymetric survey map
    - Existing condition review narrative
    - Existing condition photo documentation fall and spring 2023
  - Project description details and plans
    - Proposed conditions
    - Excavations
    - Jurisdictional fills and riprap
    - Dock plans
  - Alternatives analysis
  - Mitigation review and statement
  - Water quality management plan

○ Public interest review

- Easement documents for Trestle Creek Restoration Project (IDL-007)
- Trestle Creek Restoration Project plans (IDL-008)
- Test excavation report (IDL-009)
- Wetland reports, maps, and updates (IDL-010)
- Hydrogeology report (IDL-011)
- Preliminary SWPPP and BMPs (IDL-012)
- Preliminary vegetation restoration plans (IDL-013)
- Bonner County documents (IDL-014)
- USCG Application materials for pedestrian bridge (IDL-015)
- Idaho Club Marina Lakeshore exhibits (IDL-016)

9. IDL published Notice of the Application in the Coeur d'Alene Press for two consecutive weeks beginning on August 3, 2024. (IDL-004).

10. On August 1, 2024, IDL sent a memorandum to various agencies including The Idaho Department of Fish and Game; Idaho Department of Environmental Quality; Idaho Department of Water Resources; Idaho Department of Transportation; Idaho Department of Agriculture; US Army Corp of Engineers; Bonner County Parks and Waterways; Bonner County Building, Planning and Zoning; Panhandle Health District; Lakes Commission; Idaho Conservation League; Idaho Panhandle National Forest. The memorandum states, in pertinent part: "Valiant Idaho, LLC and Valiant Idaho II, LLC have submitted an application requesting permission to permit a commercial marina, to install riprap, to install a pedestrian bridge, and to dredge on Lake Pend Oreille. Please submit your comments, recommendations, or objections . . . regarding the likely effect of the proposed encroachments upon navigation, adjacent property, lake and streambed value factors of navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty or water quality." (IDL-002).

11. On August 1, 2024, IDL sent Notification of Application to adjacent neighbors USACE and Kalispel Indian Community of the Kalispel Reservation requesting the neighbors to "provide your consent or objection by filling out and returning the enclosed forms to IDL . . ." (IDL-003).

12. On August 13, 2024, IDL notified the Office of Administrative Hearings of the Application and requested the appointment of a hearing officer to preside over the public hearing

and issue a preliminary order. (IDL-001). Hearing Officer Leslie Hayes was appointed on August 15, 2024. (IDL-017). The Hearing Officer issued an order setting the public hearing for October 7 and 8, 2024 at the Sandpoint High School Auditorium.

13. IDL received approximately 859 public comments via email. Most of the content is identical and redundant. The comments generally express opposition to the project, citing concerns about increased boat traffic, potential oil and gas leaks, recovery of bull trout, water quality, and overdevelopment. One comment supports the Application, expressing frustration over misinformation and pointing out positive impacts of the project to the public.

14. IDL received written comment and objection from adjacent landowner Kalispel Tribe from Deane Osterman, Executive Director of the Natural Resources Department. The comment objects to two specific activities, riprap and dredging, and provides recommendations “to help ensure the proposed project is less impactful.” (IDL-020). The comment describes the proposed riprap placement as being located on alluvial fan deposits, and concerns that riprap “locks a landform in place” and “leads to a long-term reduction of habitat formation.” The comment suggests using “a more deformable shoreline stabilization approach that emphasizes the use of vegetation and natural toe stabilization materials . . .” citing to the Pend Oreille Shoreline Bank Stabilization Guide which is not included as a part of this record. The comment states that the KNRD “would be willing to work with the project’s design professionals to develop a more sensitive approach.” The comment states similar concerns to the upland Trestle Creek Restoration Project that “will take place on Tribal property.” The comment does not recommend denial. (IDL-020).

15. IDL received written comment from the Panhandle National Forest who had no comment, recommendation or objection. (IDL-020, bates 00014).

16. IDL received written comment from the Bonner County Planning Department, who acknowledged receipt and did not provide comment, recommendation or objection. (IDL-024).

17. IDL received written comment from Idaho Department of Fish and Game (“IDFG”), stating the “purpose of these comments is to assist the decision-making authority by providing technical information that can be used to minimize fish and wildlife impacts.” The comment cites “concerns with the location of the project, and possible negative effects to fish and wildlife.” The comment points out that all of Lake Pend Oreille and its major tributaries, including Trestle Creek, have been designated as critical bull trout habitat. Trestle Creek is “one of the most

important spawning and rearing tributaries in the Pend Oreille watershed” and IDFG has spent considerable time and resources improving spawning habitat along the migration corridor up Trestle Creek. IDFG cites concerns with water quality and potential increased nutrient inputs into the lake from “shoreline construction, septic, stormwater runoff, day-to-day marina operations and increased boat traffic.” The comment notes, “[i]t is critical that the mouth of Trestle Creek be undisturbed and protected to maintain year-round connectivity to Lake Pend Oreille and not impede fish movement to and from spawning and rearing habitat.” The comment notes that the Trestle Creek Restoration Project “will benefit downstream migrating salmonids” and that failure to reroute the north branch “would have negative effects on bull trout.” IDFG offers to “collaborate on a design for the reroute so that it may provide a net conservation benefit to migrating salmonids.” IDFG notes that “docks, piers, marinas, and pilings are an encroachment in lakes and rivers that can be detrimental to fish, aquatic habitat, and public use of those waterways.” IDFG “directs Department staff to work with land and water users, Indian tribes, and federal and state resource agencies to reduce human-caused impacts to native trout habitat.” IDFG cites “potential hazards” including increased predator habitat, potential spills, grey and black water pump out spills, propwash and sedimentation, aquatic invasive weeds, and increased boat traffic that increases baseline noise as potential concerns. IDFG notes that “at some level wildlife will be permanently displaced with conversion of forested open space to homes and a marina.” IDFG provides several recommendations to reduce impacts – many of which are already contemplated in the Application:

- Use of sound and vibration suppression BMPs;
- Dredging conducted during low water and use erosion, sediment and turbidity BMPs;
- Use of native riparian vegetation buffers to reduce nutrient input;
- Replacing dead replantings until 80% survival is achieved;
- Protecting vegetation buffers in perpetuity;
- Integrating willows into riprap to improve habitat;
- Use of licensed geomorphologist for work near the mouth of Trestle Creek;
- Realignment of the North Branch of Trestle Creek into the main channel
- Retaining cottonwood trees and as much native vegetation as possible;
- Refrain from using beach sand along the shoreline;
- Implementing a no wake zone around the marina and mouth of Trestle Creek

- Adherence to Bonner County setback requirements;
- Adherence to Bonner County water regulations on surfaces within 200' of water;
- Mitigation plan for fuel spills and black/grey water discharge;
- Mitigation plan for aquatic invasive weeds.

IDFG does not recommend denial of the Application. (IDL-026).

18. IDL received written comment from Idaho Department of Environmental Quality (“DEQ”) noting that “water quality certification will be required for USACE’s permit for dredge and fill activities, which has not yet been issued.” DEQ points out that “comments on the revised proposal focus on environmental concerns that will not be addressed in the water quality certification, due to the recent regulatory changes.” DEQ’s primary concern for water quality focuses on “pollution from stormwater, wastewater, and daily marina activities, which are minimally addressed in the supplemental water quality management plan.” The comment points to “gaps” in protections over the long term to spill prevention, management of invasive species, and potential runoff. To help protect water quality in the long term, DEQ recommends the following:

- Develop a comprehensive plan to manage pollutants entering the lake and Trestle Creek;
- Add enforcement mechanisms and responsible parties to the “clean boat policy”
- Clarify responsibility for maintaining stormwater and wastewater systems;
- Place permanent systems to manage and monitor pollutants from parking lots.

In addition, DEQ cites concerns for “nuisance geese” and fuel cans from personal boat use. DEQ notes that the Application received variances for setbacks for wetlands and impervious surfaces, which “are not aligned with the TMDL or 1999 Plan and do not support water quality protection . . .” (IDL comments 00037-00039).

19. IDL received written comment from Panhandle Health Department (“PHD”). The comment indicates that Valiant has “no current wastewater disposal applications on file” and that “PHD must receive current applications and detailed proposals before we can properly establish the nature and quantity of wastewater proposed for discharge, and to establish maximum allowable wastewater flows.” Ultimately, PHD recommends that IDL limit the number of boat slips and “types of shorebased activities, uses and structures” to only what the site is capable. (IDL comments 00032-00036).



20. IDL received written comment from Idaho Conservation League (“ICL”) urging denial of all aspects of the application under IDL’s jurisdiction. ICL claims it is “inappropriate for IDL to consider the application until after the USACE completes their analysis and decision on the [404 permit].” ICL notes that “even if the Corps issues a 404 permit . . . [it] may require changes to the project.” ICL is concerned with the “overall loss of wetlands in the State of Idaho and Lake Pend Oreille” which “are known to play a critical role in protecting water quality . . .” According to ICL, “The Recovery Unity Implementation Plan identifies upland/riparian land use and management as the single most important unmanaged threat” to Core Area B. ICL cites to many authorities which are not part of this record in support of their recommended denial, and not proper to consider without their entire context. Citing concerns with TMDL and water quality, ICL states that IDL “must not approve encroachments that contradict the management objectives of other state and federal agencies like IDEQ.”

21. On October 7, 2024, a public hearing took place at the Sandpoint High School in Sandpoint, Idaho in person and via Zoom at 5:00 p.m. pacific time.

22. Valiant submitted testimony through Jeremy Grim of Whiskey Rock Planning and Consulting. Mr. Grim’s testimony was supported by a PowerPoint presentation which included an overview of the property history. The proposed project will be constructed on the site of a previous and currently abandoned RV park and public marina known as the “Idaho Country Campground” which was heavily used. (Tr. p. 13, ll 11-16). Grim compared the current Application with previously permitted 2008 project, which included 105 slips, 96 upland condominiums, tennis court, pool, and event area. (Valiant PowerPoint at 6). The 2008 project was not built before the sunset period, and the permit eventually expired.

23. Public testimony was given by Kathleen Huntley, Don Holland, Bill Lewis, Jennifer Ekstrom, Eric Berntsen, Perky Smith Hagadone, Kyle Volkman, Brad Smith, Pam Duquette, Tamini Weber, Tim Patton, Greg Flint, Nettie Moriello, David Britton, Jennifer Someillan, John Monks, Bill Lewis, Maria Albergato – all of which expressed opposition to the Application for various reasons.

24. Merrit Horsman of IDFG also provided testimony stating that he signed up to speak “to make sure that my comments [] or Fish and Game’s comments were not used to show support or opposition of the project because as an agency, that is not what we do.” (Tr. p. 62, ll. 20-23). Mr. Horsman clarified IDFG reviews projects “and we identify things that could negatively affect

fish and and wildlife and then we give recommendations to avoid, minimize, and mitigation [sp] for those issues.” Horsman cited concerns with the Trestle Creek Restoration Project and offered to help with a design that was more suitable and of benefit to bull trout. Horsman cited concerns with potential increased nutrient input and having “too many mouths to feed” in the lake. Horsman states that potential nutrient input could result in a weedline at the mouth of Trestle Creek. Horsman stated that IDFG “would like to see the reroute done regardless of this project because it would be a benefit for the bull trout.” (Tr. p. 66, ll. 1-4).

25. After the hearing, the parties conducted a site visit with the Hearing Officer, IDL counsel, William Haberman and Jeremy Grimm on October 8, 2024. The Hearing Officer took pictures and video documenting the visit that included in the record. The photos show various upland and littoral sites. The upland property is overgrown and contains what appear to be piles of rubble and trash of the old RV park buildings. (Images 0220, 0223, 0225, 0231, 0234). The photos also show remnants of the old docks, bridges and slips that are decaying in the water. (Images 0240, 0251, 0252, 0253, 0257, 0279, 0286, 0288). The photos also show unstable banks (Images 0296, 0298, 0299, 0300, 0301, 0305, 0239). The site contains environmental hazards and attractive nuisances, creating liability for Valiant.

26. The site of the proposed marina will be within an existing man-made boat basin that was extensively dredged to create the existing configuration. Valiant will excavate and re-dredge the existing boat basin which, over time, has been filled with sediments consisting of outwash sand, silt, and gravels from adjacent eroded areas and broken concrete and dock debris from the abandoned RV park and marina. The proposed excavation and re-dredging will occur during low water periods to minimize potential impacts to the lake and no in-water dredging will occur. The proposed excavation will occur mainly on privately-owned submerged lands between the AHWM and the OHWM. Some of the excavation will occur on upland property, over which IDL has no jurisdiction. The stated purpose is to increase the navigability of the boat basin and stabilize the shoreline and remove hazards.

#### IV. CONCLUSIONS OF LAW

I adopt the Recommended Order's Conclusions of Law 1-7 and 9-15 as my Conclusions of Law. I decline to adopt paragraphs 8, 13<sup>2</sup>, and 16-43 and instead add the following paragraphs as substitutions to those declined and additional conclusions of law.

**The Application meets the Requirements of Idaho Code § 58-1306(a) and IDAPA.**

16. Applications for construction of a nonnavigational encroachment or a commercial navigational encroachment "shall be submitted upon forms to be furnished by the board and accompanied by plans of the proposed encroachment containing information required by section 58-1302(k), Idaho Code, and such other information as the board may by rule require in conformance with the intent and purpose of this chapter." I.C. § 58-1306(a). Plans is defined as "maps, sketches, engineering drawings, aerial and other photographs, word descriptions, and specifications sufficient to describe the extent, nature and approximate location of the proposed encroachment and the proposed method of accomplishing the same." I.C. § 58-1302(k). Plans shall include:

- Lakebed profile in relationship to the proposed encroachment. The lakebed profile shall show the summer and winter water levels.
- Copy of most recent survey or county plat showing the full extent of the applicant's lot and the adjacent littoral lots.
- Proof of current ownership or control of littoral property or littoral rights.
- A general vicinity map.
- Scaled air photos or maps showing the lengths of adjacent docks as an indication of the line of navigability, distances to adjacent encroachments, and the location and orientation of the proposed encroachment in the lake. surface.
- Total square footage of proposed docks and other structures, excluding pilings, that cover the lake
- Names and current mailing addresses of adjacent littoral landowners.

The Application includes lakebed profiles for the various activities, prior and current surveys, proof of ownership of Lots 1 and 2 via quitclaim deeds, a general vicinity map, scaled aerial

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<sup>2</sup> The conclusions in the Recommended Order are misnumbered in the following way: ... 11, 13, 12, 13, 14 ... . This order does not accept the first number 13, and accepts the second.

photographs showing dock lengths, distances to adjacent encroachments, location and orientation of all proposed encroachments, total square footage of proposed encroachments that cover the lake, and the names and addresses of adjacent littoral landowners. The Application meets the requirements of I.C. § 58-1306(a), 58-1302(k), and IDAPA 20.03.04.020.07.a.

17. All Applications must be submitted or approved by the littoral owner. I.C. § 58-1306(a). If the encroachment will lie over or upon private lands between the OHWM and the AHWM, the application must be submitted by the owner(s) of such lands and must bear the signature of an authorized officer. The Application was signed by William Haberman, member and managing member of Valiant Idaho, LLC and Valiant II, LLC, owners of the property as indicated by the quitclaim deeds in the Application. This Application meets the requirements of I.C. § 58-1306(a) and IDAPA 20.03.04.020.02 and 07.b and 07.c.

18. If the Department orders a public hearing within its discretion, IDL will publish notice of the public hearing once a week for two consecutive weeks. IDL provided Notice of Application and Hearing to Coeur d'Alene Press. The hearing requirement is satisfied.

**The Application meets the standards required for the commercial marina**

19. A commercial marina is defined as a “navigational encroachment whose primary purpose is to provide moorage for rental or for free to the general public.” IDAPA 20.03.04.010.09.

20. A commercial marina must have a minimum of fifty percent (50%) of moorage available for use by the general public that does not “require membership in a club or organization[.]” in order to qualify, on a first come, first serve basis, to rent or lease the moorage. IDAPA 20.03.04.015.03.a.

21. The Applicant stated that “Applicant plans to offer 50% of the moorage to the general public . . . None of the moorage within the commercial marina will require membership in any private club.” This was repeated at the public hearing. (Valiant prehearing statement p. 4, Application Ex. B, Tr., p. 12, ll. 17-18). This meets the requirements of a commercial marina.

22. “If local city or county ordinances governing parking requirements for marinas have been adopted, commercial marinas must provide a minimum of upland vehicle parking equivalent to one (1) parking space per two (2) public watercraft or float home moorages.” IDAPA 20.03.04.015.03.c.

23. Pursuant to Bonner County Code, Applicant is required to have a minimum of 44 parking spaces available for an 88-slip commercial marina. Applicant plans to have 46 parking

spaces designated for “Marina Use.” Applicant Prehearing Statement, p. 4. This meets the requirements of Bonner County’s parking requirements and IDAPA 20.03.04.015.03.c.

The Application meets the requirements for a commercial navigational encroachment.

24. The LPA and LPA rules do not provide a size limitation for commercial navigational encroachments. Comments from at least one agency recommended keeping the number of slips proportionate with any additional required approvals. Based on the record, the size of the encroachment and number of slips appears reasonable given the existing location and the fact that it does not extend beyond the OHWM or be within 25’ of adjacent littoral neighbors. The marina will be operational from approximately May-October. The location of the marina is more than 150’ from the mouth of Trestle Creek and entrance to the marina is even further. The length of the docks will not extend beyond the line of navigability.

25. IDAPA 20.03.04.015.06 provides the following standards for a breakwater: Breakwaters built upon the lake for use in aid of navigation will not be authorized below the level of normal low water without an extraordinary showing of need, provided, however that this does not apply to floating breakwaters secured by piling and used to protect private property from recurring wind, wave, or ice damage, or used to control traffic in busy areas of lakes.

26. The proposed breakwater is “to protect the new marina docks and basin from wave and wind action[.]” IDL – 005 – Application, p. 2.

27. It was additionally explained during the onsite inspection that one purpose of the breakwater is to redirect boat traffic in and out of the marina further north of the mouth of Trestle Creek so that the boat traffic will enter/exit closer to Lot 1 (Trestle Creek is located on Lot 3). Onsite Recording at 24:50-25:46; see also Image 282-285.

28. The proposed breakwater complies with IDL regulations as it is a floating breakwater secured by piling and used to protect private property from weather and to control marina traffic away from the mouth of Trestle Creek. IDL -05 – Application, pp 86-87.

29. 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 nonnavigational encroachment, a commercial navigational encroachment, or a community navigational encroachment not extending below the natural or ordinary high water mark.

IDAPA 20.03.04.030.10 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, if present, the Department will 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 either a nonnavigational encroachment or a commercial navigational encroachment not extending below the natural or ordinary high water mark.

The commercial marina will be located on private submerged lands below the AHWM and OHWM.

30. IDAPA 20.03.04.015.13.e provides that it will be presumed that commercial navigational encroachments will be presumed to have an adverse effect on adjacent littoral rights if located closer than 25' to the adjacent littoral right lines. Nothing in the application or evidence shows that any part of the project is located within 25' of the adjacent littoral right lines.

31. Nothing in the Application or evidence suggested that the project would present undue interference with navigation. The project proposes to increase access to navigation that does not currently exist. The most important factors as provided in statute and rule have been met.

**The marina will provide a clear environmental, economic and public benefit.**

32. Regarding excavation and dredging, in the existing man-made boat basin, IDAPA 20.03.04.015.11 provides:

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.

Applicant proposes to re-dredge an existing boat basin filled with sediment, sand and hazardous debris to increase access to navigability. Applicant provided an economic analysis of the marina in Attachment E to the Application. Applicant also provided Excavation area sediment contamination review and testing that does not show appreciable environmental degradation in Attachment E. Increased public moorage increases the recreational and navigational access to the lake. Moorage is not restricted to members of any club or HOA. The state of the boat basin now is clear from the photographs provided. Evidence showed that the current slackwater is home to predator fish with "many mouths to feed." All dredging will occur during low water after the lake draws down to 2055' and use best management practices to reduce noise and vibration and impacts

to fish. The current state of the boat basin does not provide the public with recreation, navigation, or economic benefits and shows environmental degradation if left in its current state. No evidence was produced to show that excavation would result in any appreciable environmental degradation. Although concerns were raised about water quality, Applicant addressed the times of excavation and fill, use of BMP and other methods, and provided a study of sediment analysis, a wetland delineation report, a hydrogeology report, and water quality management plan. IDFG recommended that Valiant work with a hydrogeologist and excavate during low water periods and use of low vibration practices – all of which Valiant confirmed.

33. Regarding concerns of water quality in response to the excavation and redredging, IDL does not have jurisdiction over the Clean Water Act as recognized in the LPA Rules: “A water quality certification from the Idaho Department of Environmental Quality is required regardless of how re-dredging is addressed in any existing or future permit.” IDAPA. 20.03.04.020.06. The excavation and redredging present clear environmental and navigational and public benefits. Valiant will be required to obtain a water quality certification from DEQ before any re-dredging commences.

**The riprap meets the standards provided by the LPA rules.**

34. The standards for riprap are outlined in IDAPA 20.03.04.015.08.a:

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.

IDL received concerns from agencies regarding riprap from the Kalispel Tribe, IDFG, ICL, and DEQ. All recommended utilization of native plants, which Applicant has agreed to in the application and exhibits. IDFG recommended that Valiant monitor the plantings and Applicants have submitted a plan to do so. Applicants’ proposed installation of riprap and native plantings were designed by an environmental engineer and meet the standards as stated above.

IDL does not have jurisdiction over upland development or the Trestle Creek Restoration Project.

35. The Application is a joint application and details certain parts of the project over which IDL has no jurisdiction, including upland development, sewer and septic requirements, restoration of the North Branch of Trestle Creek, impervious surfaces, residential structures,

**The public benefits derived from the marina exceed the detrimental effects.**

32. IDL must also consider whether the public benefits derived from the marina, excavation and riprap exceed the detrimental effects. The parts of the project under IDL's jurisdiction consist of a public marina with moorage, a breakwater, riprap and revegetation, excavation and re-dredging the existing boat basin. All of these encroachments meet the standards provided by the statute and rules. From the outset, it is clear that the Application has been carefully considered and designed to minimize impacts on fish and water quality. The Application is supported by hundreds of pages of reports prepared by professionals outlining construction practices, materials used, times of year, mitigation plans, sediment analyses, best management practices and how each one meets or exceeds the standards required. For the particular activities in the Application that are beyond the scope of IDL's statutory authority, each will require scrutiny and approval from the appropriate agencies including DEQ, and USACE.

This public marina will provide public moorage and access to navigation and recreation on the lake. The right to wharf out and make use of the water is well-settled in Idaho law. I.C. § 58-1302; *Lake CDA Invs., LLC v. Idaho Dep't of Lands*, 149 Idaho 274, 284, 233 P.3d 721, 731 (2010) (A littoral owner possesses certain littoral rights including right to access the water and the right to build wharves and piers in aid of navigation.); *Newton v. MJK/BJK, LLC*, 167 Idaho 236, 243, 469 P.3d 23, 30 (2020) (Littoral rights are defined as a littoral owner's right to maintain their adjacency and access to the lake).

33. The record contains conflicting views on whether this harms or enhances fish and wildlife habitat. IDFG did not expressly state that the marina will harm fish habitat. Any concern over harm provided was speculative at best. It is clear however, that leaving the marina in its current state is not good for bull trout habitat – it is filled with predator fish, warm slackwater, and environmental debris and navigational hazards. The entrance to the marina is far situated from the mouth of Trestle Creek. The marina will be operational for 5 months out of the year. The dredging and removal of habitat will deepen the water and cool the water temperature, and provide better flow of lakewater through the boat basin.

34. Constructing a marina increases recreational opportunities to the public by providing boat moorage and public access to the water. IDFG commented that a healthy population of fish will result in happier anglers as fishing is a significant recreational draw. Constructing the marina brings public benefits with regard to recreation.



35. As provided in the photographs and video, the property in its current state is highly degraded. Removal of the old pilings, docks, concrete, debris piles, bridges, and other materials will greatly increase the aesthetics of the site. Planting native vegetation on the shoreline and placement of riprap to reduce erosion and stabilize the shoreline will contribute to the aesthetics. The record contains conflicting views on what is considered “beautiful” which is a subjective term. Based on the photographs and evidence provided in the record, the marina will be an improvement from the current state of degradation.

36. Many raised concerns that the project could impact water quality with speculative comments. No one presented evidence that the project will degrade water quality. The applicant provided ample information to address practices and mitigation. Concerns regarding runoff, sewage treatment, and upland development are not within IDL’s jurisdiction and will require a separate analysis and permitting from the appropriate authorities.

37. IDL regulates encroachments. IDL does not regulate upland development standards including setbacks, impervious upland surfaces, traffic plans, zoning, boat traffic, sewer or septic systems, species conservation, water discharge, and has no statutory authority to do so. Although legitimate questions were raised by public and agency comments, all that are outside of IDL’s statutory authority must be addressed through the responsible agencies. The Joint Application contains aspects of the project that would not be appropriate for IDL to permit and IDL can only review those activities for which it is given authority.

## **V. ORDER**

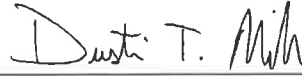
Based on the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED that the Encroachment Permit Application L-96-S-2798A is APPROVED and a permit will be issued with the condition that the Applicant obtain all other required permits from DEQ and USACE prior to starting construction on the project.

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 this Final Order. The filing of a petition for judicial review does not itself stay the effectiveness or enforcement of this Final Order under appeal pursuant to Idaho Code § 67-5274.

IT IS SO ORDERED.

DATED this 18<sup>th</sup> day of November, 2024.

IDAHO DEPARTMENT OF LANDS

A handwritten signature in black ink, appearing to read "Dustin T. Miller", is written over a horizontal line.

DUSTIN T. MILLER  
Director

## CERTIFICATE OF MAILING

I hereby certify that on this 18<sup>th</sup> day of November 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  
Valiant Idaho, LLC and Valiant Idaho II, LLC  
151 Clubhouse Way  
Sandpoint, ID 83864  
*Applicant*

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Jeremy Grimm  
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Sandpoint, ID 83864  
*Applicants' Agent*

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Kourtney Romine, Workflow Coordinator

**BEFORE THE IDAHO DEPARTMENT OF LANDS**

In the Matter of	)	
	)	AGENCY Case No. PH-2024-NAV-20-002
Application for Encroachment Permit,	)	
	)	OAH Case No. 24-320-05
Valiant Idaho, LLC and Valiant Idaho II,	)	
LLC,	)	<b>FINDINGS OF FACT, CONCLUSIONS</b>
	)	<b>OF LAW, AND RECOMMENDED</b>
Applicants.	)	<b>ORDER</b>
	)	
	)	

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This matter was assigned to Hearing Officer Leslie Hayes on August 15, 2024. A public, in-person administrative hearing was set for October 7-8, 2024. A prehearing conference was held on September 30, 2024, and recorded. The prehearing conference addressed the general rules of procedure, stipulations/objections to any prehearing filings, time constraints associated with the hearing, and how to address the orderly and efficient presentation of evidence and public comment in these proceedings, including how long after the completion of the in-person hearing to accept public comment. It was decided that public comment would be accepted through October 11, 2024.

The hearing was held on October 7, 2024, 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,<sup>1</sup> Counsel for Idaho Department of Lands (“IDL”), Alison Olson, the Agent for Valiant Idaho, LLC, and Valiant Idaho II, LLC, Jeremy Grimm President of Whiskey Rock Planning and Consulting, and 59 members of the public. A Zoom link was provided to individuals who could not attend in-person. This hearing was open to the public and, at the conclusion of the

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<sup>1</sup> Administrative Law Judge Merritt Dublin attended to aid in the orderly presentation of public testimony at the hearing. She did not participate in the decision.

parties' presentations, public comment was received. An audio recording of the hearing was made available to the public on the IDL website (<https://www.idl.idaho.gov/lakes-rivers/administrative-hearings/>). There was sufficient time to accept public comment on October 7, 2024, and the Hearing Officer vacated the second day of the hearing and requested that a representative from IDL be present at the Sandpoint High School Auditorium to inform the public of the cancellation and how to submit public comment prior to the deadline of October 11, 2024.

On October 8, 2024, an in-person onsite inspection of the property was held with Hearing Officer Leslie Hayes, the managing partner of Applicant, William Haberman, Agent Jeremy Grimm, IDL Counsel Alison Olson and Administrative Law Judge Merritt Dublin in attendance. This onsite inspection was recorded, and pictures were taken during the inspection by the Hearing Officer. The information provided by Mr. Haberman was taken under oath and is part of the record in these proceedings. Mr. Grimm was still under oath and any testimony that he gave is also considered sworn testimony.

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**

1. Exhibits. All exhibits were submitted without objection and are hereby admitted into the agency record.

2. Request for Judicial Notice. Applicant requested that judicial notice<sup>2</sup> be taken of IDL Agency Case No. PH-2023-NAV-20-0003, OAH Case N. 23-320-07 of the Findings of Fact,

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<sup>2</sup> Pursuant to IDAPA 62.01.01.479, the term in administrative proceedings is "official notice" and official notice needs to be requested prior to the hearing with the opportunity for the other party to respond and offer additional facts. During the hearing, Applicant was put on notice that the prior application was not part of the record in these

Conclusions of Law and Recommended Order dated October 19, 2023. *See* Closing Statement of Applicants, p. 2 (Live Dkt. 059) (“Prior Order”). IDL has stated that “regardless of how IDL, or other state and federal agencies, have resolved previous applications for development of the Trestle Creek area, evidence of those previous proceedings are outside the record for this Application, which must be evaluated on its own merits.” IDL Closing Statement, p. 12 (Live Dkt. 060).<sup>3</sup>

“The presiding officer at hearing is not bound by the Idaho Rules of Evidence[.]” IDAPA 62.01.01.475. However, “[w]hile a presiding officer is not bound by the Idaho Rules of Evidence . . . the presiding officer may assign less weight to evidence that would be inadmissible under the Idaho Rules of Evidence.” IDAPA 62.01.01.476. Under the Idaho Rules of Evidence, “[t]he court may judicially notice a fact that is not subject to reasonable dispute because it (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” I.R.E. 201(b).

“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (2) the fact is of consequent in determining the action.” I.R.E. 401. Applicant points specifically to pages 16-23 of the Prior Order for this judicial notice request, which is the entirety of the Conclusion of Law in the Prior Order. Judicial Notice will be taken of the Prior Order’s existence, which is a fact appropriate for judicial notice. The Conclusions of Law in the Prior Order are not relevant to these proceedings – nor are they “facts” that would be appropriate for judicial notice – as this is a new Application for a project different than the prior project described in the Prior Order and is not relevant to these proceedings. *See* Tr.

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administrative proceedings when the Hearing Officer stated: “I would like to note that this is the second application on the same parcel for this applicant; however, I cannot rely on my knowledge from those prior proceedings or admit any of the evidence from those prior proceedings for consideration in these proceedings.” Tr. at 6:10-15 (Like Dkt. 039).

<sup>3</sup> This comment is in response to Applicant’s statement that this project has been modified from other iterations that are previously approved and not necessarily in response to the request for judicial notice.

11:23-13:9 (Live Dkt. 039) (highlighting the differences between this Application and the prior application).

3. Public Comment. “The presiding officer may exclude evidence that is irrelevant[] [or] unduly repetitious[.]” I.C. § 67-5251. “The presiding officer may exclude inadmissible evidence with or without motion.” IDAPA 62.01.01.475.

a. Written Public Comment. 855 written public comments were received. Of those, 36 were duplicate comments (submitted by the same person). Duplicate comments will not be considered pursuant to Rule 475 (62.01.01) and Idaho Code section 67-5251 as unnecessarily repetitious.

b. Verbal Public Comment. 18 individuals testified under oath at the public hearing. Of those, five also provided written public comment that duplicated their verbal comments. The verbal comments will be considered and the written comments by those six individuals will be given less weight as unduly repetitious in these proceedings. *See* IDAPA 62.01.01.475 and I.C. § 67-5251. Three individuals testified on behalf of three different entities (the Idaho Conservation League, the Kalispell Tribe, and the Idaho Department of Environmental Quality). These written and verbal comments will be given equal weight since the purpose of the testimony was to expand upon the written comments of those entities and answer questions by the Hearing Officer.

i. Public Comment Re: Trestle Creek Restoration. During the onsite inspection, it was requested that the parties include in closing briefing whether the Trestle Creek restoration project was within IDL’s jurisdiction as it appeared to be an upland improvement to the property. As discussed

below, because the Trestle Creek restoration project is an upland issue outside of IDL's jurisdiction, comments related to this project are not relevant to these proceedings as they are outside of IDL's jurisdiction and will not be considered.

### **FINDINGS OF FACT**

1. On June 27, 2024, Applicant Valiant Idaho, LLC, and Valiant Idaho II, LLC, through their Managing Member, William Haberman, and their Agent, Jeremy Grimm, President of Whiskey Rock Planning and Consulting, applied (Application L-96-S-2798A) for an encroachment permit on two parcels of land. IDL-005-Application (Live Dkt. 005).

2. Applicant is the corporate entity that owns the Idaho Club. IDL-005-Application (Live Dkt. 005).

3. Applicant owns two lots on Lake Pend Oreille in Bonner County. Lot 1 is Tax Parcel No. RP031740000010A. Lot 2 is Tax Parcel No. RP031740000020A. IDL-005-Application, p. 1 (Live Dkt. 005).

4. Lake Pend Oreille is a dam-controlled lake with an artificial high water mark by man-made alteration.

5. The purpose of the project is "[t]o remove and reconstruct an existing dilapidated marina to meet current safety, environmental, and aesthetic commercial marina standards, and convert an old RV park property into 7 private homesites." IDL-005-Application (Live Dkt. 005).

6. The Application lists the seven specific activities of the project as follows:

(1) Limited portions of the existing boat basin, slack water channel and adjacent shoreline will be excavated, contoured, and stabilized; (2) North Branch of Trestle Creek will be redirected to its historic alignment, stabilized, and restored pursuant to a reciprocal easement for access and utilities between the Applicant and the owner of the parcel on which Trestle Creek flows; (3) Remove existing Boat launch near the mouth of Trestle Creek; (4) Construction of commercial dock system



consisting of 88 fixed pier docks; A breakwater to protect new marina docks and basin from wave and wind action; A boat bilge pump out station; and shore-aligned fixed pier docks at each of the 7 private residential lots[;] (5) Construction of spanning pedestrian bridge, 70' x 6', to access the docks described in #4 above[;] (6) Uplands development will include: Seven residential home sites; Parking and boat storage areas; and minor road development for access to The Idaho Club North Lake PUD[;] (7) Placement of rip rap along 1,310 feet of shoreline where docks will be constructed; Placement of 2,520 feet of combined vegetated rip rap along areas of existing ongoing shoreline edge erosion and locations of edge excavations necessary for navigability needs.

7. The Trestle Creek restoration project is located on privately owned land above the ordinary and artificial high water marks and is not within IDL's regulatory jurisdiction.

8. Trestle Creek is not a navigable waterway within IDL's jurisdiction.

9. The mouth of Trestle Creek enters Lake Pend Oreille.

10. The Applicant intends to have forty-six parking spaces designated for marina use.

*See Applicant Prehearing Statement, p. 4 (Live Dkt. 037).*

11. The breakwater has been designed by an engineer and will "consist of steel piles supporting decking and wood slats." IDL – 05 – Application, pp. 86-87 (Live Dkt. 005). It has been designed to withstand wave height and load. *Id.*

12. The Application requests both encroachments in aid of navigation and encroachments not in aid of navigation.

### **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. “Pursuant to the public trust doctrine, the State owns in trust the beds and banks of navigable waters for the use and benefit of the public, including the uses of navigation, commerce, and fisheries.” *Byrd v. Idaho State Board of Land Commissioners*, 169 Idaho 922, 928 (2022).

4. The beds 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).

5. Natural or ordinary high water mark means:

the line that water impresses on the soil by covering it for sufficient periods to deprive the soil of its vegetation and destroy its value for agriculture purposes. When the soil, configuration of the surface, or vegetation has been altered by man’s activity, the natural or ordinary high water mark shall be located where it would have been if no alteration had occurred.

I.C. § 58-1202(2).

6. Because Lake Pend Oreille is dam controlled, it has an artificial high water mark by man-made alteration. An artificial high water mark occurs when “the high water elevation above the natural or ordinary high water mark resulting from construction of a man-made dams or control works and impressing a new and higher vegetation line.” I.C. § 58-1302(d).

7. “The State has authority to regulate encroachments below either the ordinary or artificial high water marks.” *Byrd*, 169 Idaho at 929.

8. The public trust doctrine does not apply to the “protection or exercise of private property rights within the state of Idaho.” I.C. § 58-1203(2)(c).

9. “Private property rights” are the rights located above the beds of navigable waters. I.C. § 58-1202(4).

10. Trestle Creek is not a navigable waterway within IDL’s jurisdiction.

11. The Trestle Creek restoration project will occur above the ordinary and artificial high watermark and is not within IDL’s regulatory jurisdiction.

13. The Application requests both encroachments in aid of navigation and encroachments not in aid of navigation. The request for encroachments not in aid of navigation (rip rap, dredge, and pedestrian bridge to access the marina) are unnecessary to address if the encroachment in aid of navigation (commercial marina and breakwater) are not recommended for approval at this time.

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

In recognition of continuing private property ownership of lands lying between the natural or ordinary high water mark and the artificial high water mark, the board shall consider unreasonable adverse effect upon adjacent property and undue interference with navigation the most important factors to be considered in granting or denying an application for a nonnavigational encroachment, a commercial navigational encroachment . . . not extending below the natural or ordinary high water mark. If . . . following a hearing, the board determines that the benefits, whether public or private, to be derived from allowing such encroachment exceed its detrimental effects, it shall grant the permit.

(Emphasis added).

13. In considering both the commercial navigational encroachment (the commercial marina and breakwater) and the nonnavigational encroachments (rip rap, excavated or dredged channels, and pedestrian bridge) the standard is: (1) whether there is unreasonable adverse effect upon adjacent property owners; (2) whether there is an undue interference with navigation; and (3) whether the benefits derived exceed any detrimental effects. *See id.*

14. Through its statutory authority, IDL promulgated Rules for the Regulation of Beds, Waters and Airspace Over Navigable Lakes in the State of Idaho under IDAPA 20.03.04.000 et. seq.

15. 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).

#### **Encroachments in Aid of Navigation**

16. Idaho Code section 58-1302(h) defines encroachments in aid of navigation to include "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."

#### **Commercial Marina**

17. A commercial marina is defined as a "navigational encroachment whose primary purpose is to provide moorage for rental or for free to the general public." IDAPA 20.03.04.010.09.

18. A commercial marina must have a minimum of fifty percent (50%) of moorage available for use by the general public that does not "require membership in a club or organization[]" in order to qualify, on a first come, first serve basis, to rent or lease the moorage. IDAPA 20.03.04.015.03.a.

19. A repeated public comment was related to whether the Applicant would truly open the commercial marina to the general public rather than restricting use to members of the Idaho Club. If the Applicant is granted a permit, the Applicant is required to comply with the terms of the permit. *See I.C. § 58-1301; see also IDAPA 20.03.04.012.02* ("No encroachment on, in or above the beds or waters of any navigable lake in the state may be made unless approval has been

given as provided in these rules.”); *see also* Applicant Prehearing Statement, p. 4 (Live Dkt. 037) (“Applicant concurs that the minimum requirement of a public to private moorage ratio of fifty percent (50%) has been met [as proposed].”)

20. “None of the moorage within the commercial marina will require membership in any private club, including The Idaho Club.” Applicant Prehearing Statement, p. 4 (Live Dkt. 037).

21. “If local city or county ordinances governing parking requirements for marinas have been adopted, commercial marinas must provide a minimum of upland vehicle parking equivalent to one (1) parking space per two (2) public watercraft or float home moorages.” IDAPA 20.03.04.015.03.c.

22. The proposed project is located in Bonner County, which has adopted parking standards. Bonner County requires community docks and marinas to have 0.5 parking spaces for every boat slip. Bonner County Code, Title 12, Chapter 4, 4.3 “Parking Standards” (reference Table 4-3).

23. Pursuant to Bonner County Code, Applicant is required to have a minimum of 44 parking spaces available for an 88-slip commercial marina. Applicant plans to have 46 parking spaces designated for “Marina Use.” Applicant Prehearing Statement, p. 4 (Live Dkt. 037). This meets the requirements of Bonner County’s parking requirements and IDAPA 20.03.04.015.03.c.

24. Public comment also raised concerns about boat traffic interfering with fish spawning in Trestle Creek. While the restoration project at Trestle Creek is outside the scope of IDL’s jurisdiction, boat traffic from the marina interfering with fish entering and exiting the mouth of Trestle Creek is within IDL’s jurisdiction because the mouth of the creek goes into the lakebed.

25. Applicant has taken steps to minimize boat traffic impact on fish entering Lake Pend Oreille from Trestle Creek by placing the proposed marina on Lot 1. As discussed below, Applicant has also utilized a breakwater to reduce impact on fish entering the lake.

#### Breakwater

26. IDAPA 20.03.04.015.06 provides the following standards for a breakwater:

Breakwaters built upon the lake for use in aid of navigation will not be authorized below the level of normal low water without an extraordinary showing of need, provided, however that this does not apply to floating breakwaters secured by piling and used to protect private property from recurring wind, wave, or ice damage, or used to control traffic in busy areas of lakes.

27. The proposed breakwater is “to protect the new marina docks and basin from wave and wind action[.]” IDL – 005 – Application, p. 2 (Live Dkt. 005).

28. It was additionally explained during the onsite inspection that one purpose of the breakwater is to redirect boat traffic in and out of the marina further north of the mouth of Trestle Creek so that the boat traffic will enter/exit closer to Lot 1 (Trestle Creek is located on Lot 3). Onsite Recording at 24:50-25:46 (Live Dkt. 040); *see also* Image 282-285 (Live Dkt. 041 Part 4).

29. The proposed breakwater complies with IDL regulations as it is a floating breakwater secured by piling and used to protect private property from weather and to control marina traffic away from the mouth of Trestle Creek. IDL -05 – Application, pp 86-87 (Live Dkt. 005).

30. The proposed breakwater further mitigates the impact on fish entering Lake Pend Oreille from Trestle Creek by directing boat traffic to a point of entry of the marina that is as far from Trestle Creek as possible.

#### The Application is Premature as it Stands

31. Pursuant to Idaho Code section 58-1306(e), the following questions must be answered: (1) whether there is unreasonable adverse effect upon adjacent property owners; (2)

whether there is an undue interference with navigation; and (3) whether the benefits derived exceed any detrimental effects.

32. There is no evidence of unreasonable adverse effect upon adjacent property owners.

33. The commercial marina and breakwater propose to improve navigation and will not unduly interfere with navigation.

34. Whether the benefits derived exceed the detrimental effects of the proposed breakwater and commercial marina cannot be weighed at this time.

35. The most detrimental effect as it stands is that the current state of the property has the north branch of Trestle Creek providing a path for spawning Bull Trout to pass through a culvert and into a slack water channel where there are warm water predatory fish. *See* onsite inspection Image 235-243 (Live Dkt. 041 Part 1 and Part 2). IDL -05-Application pp. 25-34 (Live Dkt. 005).

36. Idaho Department of Fish and Game (IDFG) describes the concern as follows:

The realignment of the North Branch of Trestle Creek will benefit downstream migrating salmonids including Bull Trout by routing them back into 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.

(Live Dkt. 035, p. IDL 00025) (emphasis added).

37. The public has concerns about the realignment of the north branch of Trestle Creek that are not credible and demonstrate a misunderstanding of the current state of the property, Trestle Creek, and how the current slack channel impacts migrating fish.

38. This credibility determination is based on IDFG's support of the restoration project and the information learned from the onsite inspection. The rerouting of Trestle Creek is a necessary component of this project to protect Bull Trout and eliminate the current path for Bull

Trout to exit the main channel of Trestle Creek and be redirected to a slack channel where warm water predators await.

39. Applicant has demonstrated a desire to protect the Bull Trout and has included mitigation efforts in its Application, including placing the docking system as far away from the mouth of Trestle Creek as possible on Lot 1 (Trestle Creek is on Lot 3) and proposing a breakwater that directs traffic in and out of the marina away from the mouth of Trestle Creek. Despite that, until Trestle Creek stops flowing into the area where the marina is proposed to be built, the detrimental effects of this Application cannot be weighed against the potential benefits derived.

40. Before it can be said that the detrimental effects, if any, outweigh the benefits, proof of the current state of the property without harm to Bull Trout must be demonstrated. This cannot be done until the restoration project at Trestle Creek is completed.

41. Judicial Notice was taken of the existence of the Prior Order relating to a prior application by Applicant. In that Prior Order, it was recommended that the application be granted. That application was different than this application in that most of the dredging, fill, and docks were to be located on Lot 2 of the property. *See* Tr. 12:16-17 (Live Dkt. 039) (“The east slack channel [Lot 2] remains unfilled and navigable.”) While the Trestle Creek restoration was not addressed as a jurisdictional issue in the Prior Order, it was (1) not a standalone project separate and apart from the rest of the application; and (2) it was listed as a condition precedent required prior to beginning the proposed work on Lot 2. *See* Prior Order, p. 23. Because this Application is different, as stated by Applicant, a different result is warranted here.

42. The request for Items 2 and 6 (Trestle Creek and residential homes) in the Application are upland improvements that are outside of IDL’s jurisdiction and need not be addressed in this Order.



43. The remaining items in the Application (rip rap, dredge, pedestrian bridge) are unnecessary to decide at this juncture because the need for the encroachment permit for these projects hinge on approval of the encroachments in aid of navigation.

### **RECOMMENDED ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends that this Application be **DENIED** without prejudice and subject to resubmission for consideration if the Trestle Creek restoration project is completed or the Applicant determines the restoration project is unneeded/unnecessary.

### **RULE 625—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 October 18, 2024. *See* I.C. § 58-1306(c). The agency head's final order in this case must be issued no later than **November 18, 2024.**

If either **party** disagrees with this recommended order, pursuant to Idaho Code section 67-5244, the **party** may file an exception to this recommended order with the agency head. Public witnesses under Idaho's Administrative Procedure Act are not considered parties and, therefore, exceptions from the public cannot be accepted. *See* IDAPA 62.01.01.207. Motions for reconsideration filed with the presiding officer will not be considered. You may file any exception you may have to this recommended order, with a supporting brief, directly with the agency head within two (2) business days from the service date of this recommended order, or no later than November 8, 2024, unless the agency head sets a different deadline.

If another party has filed exceptions to this recommended order with the agency head, you must file any opposition brief within one (1) business day from the service date of the exception, or no later than November 12, 2024. No further briefing by any party will be permitted unless the agency head, in their discretion, requests it. Oral argument will not be allowed unless requested by the agency head.

DATED: November 6, 2024.

OFFICE OF ADMINISTRATIVE HEARINGS

/s/ Leslie M. Hayes

Leslie M. Hayes

Deputy Chief Administrative Hearing Officer

## CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2024, I caused to be served a true and correct copy of the foregoing by the following method to:

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/s/ Leslie M. Hayes  
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