

**BEFORE THE IDAHO DEPARTMENT OF LANDS**

In the Matter of,

Encroachment Permit Application No.  
L96S2798A

Valiant Idaho, LLC & Valiant Idaho II, LLC  
Applicants

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

OAH Case No. 24-320-05

**APPLICANTS' REQUEST FOR EXCEPTION TO RECOMMENDED ORDER**

This Applicants' Request for Exception to Recommended Order ("Exception") is hereby provided to the Idaho Department of Lands Director ("IDL Director") by William Haberman, Managing Member of Valiant Idaho, LLC, and, Manager of Valiant Idaho II, LLC (collectively, "Applicants"), the owners of Lot 1 and Lot 2 of The Idaho Club North Lake, according to the Plat thereof, recorded in Book 13, Page 42, Official Records of Bonner County, Idaho ("Applicants' Properties").

Applicants reaffirm in their entirety the Pre-Hearing Statement of Applicants and Closing Statement of Applicants, and restate that the submitted plans specifically meet the required criteria for a commercial marina, as defined by Idaho Code and Idaho Department of Lands ("IDL"), and as acknowledged by IDL in IDL's Pre-Hearing Statement dated September 20, 2024 ("IDL Pre-Hearing Statement") and IDL's Closing Statement dated October 18, 2024 ("IDL Closing Statement").

**STATEMENT IN RESPONSE TO RECOMMENDED ORDER OF HEARING OFFICER**

The Hearing Officer in the above captioned matter, in the Findings of Fact, Conclusions of Law, and Recommended Order dated November 6, 2024 ("Recommended Order"), states the following:

"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.*" (emphasis added)

Pursuant to Idaho Code § 58-1306(e), in recognition of continuing private property ownership of lands lying between the ordinary high water mark (“OHWM”) and the artificial high water mark (“AHWM”), “the board shall consider unreasonable adverse effects upon adjacent property and undue interference with navigation *the most important factors* to be considered in granting or denying an application” for a navigational encroachment not extending below the OHWM.” (emphasis added)

The Hearing Officer does not dispute that the proposed encroachments will not result in unreasonable adverse effects on adjacent property owners, or that they will not cause undue interference with navigation. IDL also does not dispute this, either in its IDL Pre-Hearing Statement or IDL Closing Statement, which verbatim state: “Likely, there will be minimal, if any, unreasonable adverse effects upon adjacent property owners, and the application proposes to improve navigation.” Thus, the Recommended Order, and specifically the recommendation to deny the application, is based solely on conclusions as to “whether the benefits derived exceed any detrimental effects.” Regarding this point, the Recommended Order is further limited to the completion of the proposed restoration of the North Branch of Trestle Creek, as described in the Joint Application for Permits (“Joint Application”) submitted to the U. S. Army Corps of Engineers (“USACE”), Idaho Department of Water Resources (“IDWR”) and IDL.

### **RECOMMENDED ORDER, FINDINGS OF FACT**

Applicants acknowledge and agree with Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

As stated correctly in the Recommended Order, Findings of Fact, Section 6, Subsection 2, Applicants are committed to the following: “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.” Applicants’ commitment to complete the restoration of the North Branch of Trestle Creek is firmly established in the Joint Application, as a proposed condition to and requirement of an USACE permit.

The first paragraph of the Joint Application outlines the jurisdictional differences between state and federal agencies:

“The [USACE], [IDWR], and [IDL] established a joint process for activities impacting jurisdictional waterways that require review and or approval of both the [USACE] and state of Idaho.

[USACE] permits are required by section 10 of the Rivers and Harbors Act of 1899 for any structures or work in or affecting navigable waters of the United States and by section 404 of the Clean Water Act for the discharge of dredged or fill materials into waters of the United States, including adjacent wetlands. State permits are required under the state of Idaho, Stream Protection Act, title 42 chapter 38, Idaho Code, and Lake Protection Act, section 58 chapter 13 Idaho Code. In addition the information will be used to determine compliance with section 401 of the Clean Water Act by the appropriate state, tribal, or federal entity.”

Any encroachment permit issued by IDL can be, and the project as a whole necessarily is, conditioned upon Applicants also obtaining required permits from USACE and IDEQ pursuant to their respective jurisdictional authorities. Until USACE, in consultation with U. S. Fish & Wildlife (“USFW”), completes their own processes and analyses, certain impacts of the proposed encroachments may not clear. Jurisdiction under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 lies with USACE and Idaho Department of Environmental Quality (“IDEQ”), and such permits will also address any specific potential impacts within their respective jurisdictions.

### **RECOMMENDED ORDER, CONCLUSIONS OF LAW**

Applicants acknowledge and agree with Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14 and 15. Applicants disagree with the conclusions in the first one of two Sections 13 (two sections are numbered as 13 in the Recommended Order on Page 8).

For the reasons stated herein, Applicants hereby request that the full application, including for both encroachments in aid of navigation and encroachments not in aid of navigation, be considered for approval. Applicants disagree that the requests for encroachments not in aid of navigation are “unnecessary”, as the IDL Director may agree with the Applicants’ Request for Exception and accept Applicants’ Conclusion and proposed resolution described herein.

### **RECOMMENDED ORDER, ENCROACHMENTS IN AID OF NAVIGATION**

Applicants acknowledge and agree with Sections 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30.

## **RECOMMENDED ORDER, APPLICATION IS PREMATURE AS IT STANDS**

Applicants acknowledge and agree with Sections 31, 32, 33, 35, 36, 37, 38 and 42. Applicants generally disagree that the application is premature as it stands, and take specific issue with Sections 34, 39 (in part), 40, 41 and 43.

In the Recommended Order, Section 34, the Hearing Officer states, “Whether the benefits derived exceed the detrimental effects of the proposed breakwater and commercial marina cannot be weighed at this time.” In the Recommended Order, the Hearing Officer describes *existing* undesirable conditions that the Applicants seek to improve if the proposed project is approved. There is no actual evidence presented that supports the conclusion that any future detrimental effects will result from the project. The claimed detrimental effects to the Bull Trout are *existing* due to the current conditions of the property. These are the specific detrimental conditions that Applicants seek to improve with the restoration of the North Branch of Trestle Creek. Thus, the plan for the restoration of the North Branch of Trestle Creek is offering beneficial impacts, rather than causing net detrimental effects. This is confirmed by the Hearing Officer’s own conclusions stated in Recommended Order, Sections 35, 36 and 37, and is further supported by the conclusion stated in Recommended Order, Section 38, which cites the support of Idaho Fish & Game (“IDFG”) for the restoration of the North Branch of Trestle Creek.

In the Recommended Order, Section 40, the Hearing Officer states, “Before it can be said that the detrimental effects, if any, outweigh the benefits, proof of the current state to the property without harm to Bull Trout must be demonstrated. This cannot be done until the restoration project at Trestle Creek is completed.” This is a flawed conclusion. Applicants acknowledge that adverse conditions *currently exist*. The primary purpose for Applicants’ proposed restoration of the North Branch of Trestle Creek is to specifically correct or mitigate for these existing adverse conditions. The record in this proceeding, including but not limited to the Joint Application and the response from IDFG, support Applicants’ claims that the proposed mitigation measures will provide beneficial effects to the current conditions for Bull Trout. IDFG specifically acknowledges and agrees that the mitigation efforts from the restoration of the North Branch of Trestle Creek will likely be beneficial to Bull Trout and the aquatic habitat. It is also notable that the record does not include any specific or quantifiable adverse impacts that will result from

the proposed project. Thus, the possibility of net adverse impacts are speculative at best, while the potential benefits are clearly described in the Joint Application and in part acknowledged by IDFG. Finally, while the Hearing Officer acknowledges that the restoration of the North Branch of Trestle Creek is not specifically within IDL jurisdiction, the Hearing Officer recommends that the issuance of an IDL encroachment permit be specifically contingent upon the completion of this non-jurisdictional work.

In the Recommended Order, Section 41, the Hearing Officer states, “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.” This too is a flawed conclusion. Nearly all of the proposed excavation, fill and docks are still to be located on Lot 2 of the property. The primary changes from the previous project that was approved include a significant reduction in areas to be filled and a reduction in the number of proposed boat slips. The restoration of the North Branch of Trestle Creek is not a “standalone project” separate and apart for the rest of application, as the application is a Joint Application to USACE, IDWR and IDL. The permit request for the restoration of the North Branch of Trestle Creek was included in the previous application just as it is in the current Joint Application. Finally, the restoration of the North Branch of Trestle Creek is proposed as a condition precedent in the Joint Application, just as it was in the previously approved application. Even if that is not clear, IDL has the authority to impose such a condition precedent while still approving the issuance of an encroachment permit, and Applicants fully expect that to be a condition precedent of the USACE permit, IDL permit, or both, as it was in the previously approved USACE and IDL permits.

In the Recommended Order, Section 43, the Hearing Officer states, “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.” As addressed above, in the event that the Director decides to grant the encroachment permit, subject to appropriate conditions, it is necessary to decide whether the encroachments not in aid of navigation meet the appropriate standards and requirements.

For riprap, Applicants' proposal is intended, in large part, to arrest existing active and aggressive erosion along all of the high wall embankments throughout the project, which is an ongoing source of sediment into the lake in the vicinity of Trestle Creek. The proposed riprap will significantly reduce the amount of this sediment reaching the lake, and thus will provide a benefit to the public and the aquatic habitat as a whole. Applicants' proposal meets the statutory requirements for riprap, and all riprap work will be completed on Applicants' Properties. No evidence has been presented that such riprap will have any detrimental effects or result in any environmental degradation.

For excavation and dredging, the standards are outlined in IDAPA 20.03.04.015.11.b: “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.” (emphasis added). It is important to note that the standard, “clear environmental, economic OR social benefits” does not require proof of all three such benefits, even though Applicants assert in this case that the project will provide all three. The proposed project, as described in the Joint Application, does establish clear economic and social benefits (market demand for boat slips, economic benefits from development, increased recreational opportunities, etc). While some public testimony has been submitted on the potential environmental effects, these comments are speculative when the potential impacts of only the proposed encroachments within IDL jurisdiction are considered. The proposed excavation and fill are necessary to produce the clear economic and social benefits of a commercial marina, and no evidence has been presented that such excavation and fill will have any detrimental effects or result in any environmental degradation.

For the pedestrian bridge, Applicants agree with the reasons described in IDL's Pre-Hearing Statement, Pages 9-10, that the requirements for the pedestrian bridge have been met. No evidence has

been presented that the pedestrian bridge will have any detrimental effects or result in any environmental degradation.

### **PUBLIC OR PRIVATE BENEFITS**

As for the corresponding benefits, Idaho Code § 58-1306(e) provides in part: “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)

Applicants hereby restate the following as clear public or private benefits of the project: (1) eliminating a substantial safety hazard, and related potential legal liability to the Applicants, by removing dilapidated and dangerous old docks, board walks, bridges and other man-made features that prevent the safe and reasonable use of Applicants’ Properties; (2) protecting and stabilizing the existing banks for the safe and reasonable use of Applicants’ Properties; (3) removing a hanging culvert and man-made rock feature that is a safety hazard as well as detrimental to migrating fish, including Bull Trout; (4) restoring the North Branch of Trestle Creek to its natural configuration to improve the aquatic habitat for Bull Trout; and, (5) removing a dilapidated and unsafe existing boat ramp that is located in close proximity to the mouth of Trestle Creek.

The restoration of the North Branch of Trestle Creek will have a clear environmental impact to the State of Idaho. IDFG concurs that redirecting migrating Bull Trout to the main channel of Trestle Creek will benefit the Bull Trout population.

The excavation of a small portion of the man-made island and man-made channel provides a clear economic and social benefit, both public and private, by adding eighty-eight (88) commercial boat slips and eight (8) private boat docks that will provide obvious economic and recreational benefits, particularly given that there is an insufficient supply of boat slips available on Lake Pend Oreille relative to market demand.

For the reasons stated herein, Applicants hereby reassert that the proposed plan will not result in “unreasonable adverse effect upon adjacent property” or “undue interference with navigation”, nor will it result in “detrimental effects” that exceed the “benefits, whether public or private” of the proposed plan, particularly in the absence of any actual evidence to the contrary.

## **CONCLUSION**

IDL recognizes that the proposed commercial marina meets the standards and requirements for littoral ownership and littoral setbacks, standards for encroachments in aid of navigation, and standards for encroachments not in aid of navigation. The only stated reason for the Hearing Officer's recommendation for denial can be properly addressed with a condition precedent to the IDL encroachment permit, and necessarily will be addressed during the permitting processes of USACE and IDEQ, that the restoration of the North Branch of Trestle Creek be completed. As a result, Applicants respectfully request that the Director approve Applicants' encroachment permit with appropriate conditions, including a requirement that the restoration plan for the North Branch of Trestle Creek be completed pursuant to all necessary permits, notably those required by USACE and IDEQ.

DATED this 8th day of November 2024.

## **APPLICANTS**

VALIANT IDAHO, LLC & VALIANT IDAHO II, LLC

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

William Haberman  
Managing Member & Manager



## CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of November, 2024, I caused the foregoing to be served upon the following via the delivery method noted below:

Idaho Department of Lands John Richards, General Counsel 300 N. 6th Street, Suite 103 Boise, ID 83702 (208) 334-2400 In-House Counsel for Idaho Department of Lands	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: <a href="mailto:jrichards@idl.idaho.gov">jrichards@idl.idaho.gov</a>
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William Haberman, On Behalf of Applicants