

From: [Dylan Lawrence](#)
To: [Rulemaking](#)
Cc: [Marde Mensinger](#); [Brian Hirschi](#)
Subject: Comment letter re encroachment rulemaking
Date: Wednesday, June 12, 2024 3:44:16 PM
Attachments:

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Hello; good afternoon. I've attached here a comment letter regarding IDL's current efforts to amend its encroachment rules under the Lake Protection Act. If you have any issues with the attachment, please let me know.

Thank you,
Dylan

Dylan Lawrence

242 N. 8th Street, Ste. 220
PO Box 1676 | Boise, ID 83701
(208) 345-6021
VarinThomas.com



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ATTORNEYS AT LAW

DYLAN B. LAWRENCE
DYLAN@VARINTHOMAS.COM

242 N. 8TH STREET, SUITE 220
P.O. BOX 1676
BOISE, IDAHO 83701
P: 208.345.6021
F: 1.866.717.1758
VARINTHOMAS.COM

June 12, 2024

VIA EMAIL

Idaho Department of Lands
Attn: Marde Mensinger – Rulemaking
P.O. Box 83720
Boise, Idaho 83720-0050
rulemaking@idl.idaho.gov

Re: Comments Regarding Negotiated Rulemaking
IDAPA 20.03.04 (Encroachments on Navigable Lakes)

Dear Ms. Mensinger:

I am writing to provide comments regarding the above-referenced rulemaking. As you may recall, I am one of the attorneys who represented Brian Hirschi at an encroachment hearing on March 11, 2024, in Montpelier. I am aware that Brian has already submitted written comments. He asked me to follow up with some more detailed comments from a legal perspective based upon our experience preparing for and participating in that hearing.

At the outset, I echo Brian's suggestion that IDL should develop encroachment standards specific to Bear Lake, given its unique nature compared to other large recreational Idaho lakes. We spent much time and effort preparing and at the hearing itself dealing with the unique nature of Bear Lake. I believe future encroachment hearings will be significantly more efficient for IDL, OAH, and the parties if they are conducted under existing standards that are specific to Bear Lake and that have been developed with input from a variety of stakeholders.

Rule 003.04: This rule purports to incorporate the International Fire Code (IFC) by reference. In my experience, an agency incorporates other legal provisions by reference when it has legal jurisdiction to enforce them. I do not read Director Miller's April 17, 2024 Final Order to suggest IDL has jurisdiction to enforce the IFC, which is

administered by the Department of Insurance and local fire authorities. Clearly, the IFC has been adopted with amendments by the State of Idaho, and it is enforceable law. However, I question the propriety of IDL's adoption of the IFC in administrative rules specifically promulgated under the Lake Protection Act (LPA).

Rule 010: The terms “encroachment,” “navigational,” and “nonnavigational” are all key concepts under the LPA and the Encroachment Rules, yet they remain undefined. In my experience, it is very unusual for such important terms in a regulatory program to remain undefined. In my opinion, there is enough legislative guidance in the LPA to provide definitions in the Encroachment Rules. This would be particularly helpful for parties who are not represented by attorneys or consultants.

Rule 010.26: I suggest inserting the phrase “subject to decisions by the Idaho Supreme Court” before “will generally be at right angles to the shoreline.” As I recall, the Idaho Supreme Court applies flexible standards to littoral lines that are highly specific to the particular lake and shoreline at issue. For unrepresented parties, it may be helpful to reference generally that it is important to consult Idaho Supreme Court opinions on this issue.

Rule 015.09: The new language is helpful for littoral owners on Bear Lake, but the language is still vague and subject to multiple interpretations. IDL should more specifically state whether this is a minimum or maximum of one moorage per littoral landowner. To the extent it is the latter, I question the legal basis for the limitation in the first place. If IDL prefers docks to moorage, it should say so expressly in the rules so that applicants are aware of the preference.

Rule 015.15: See general comment above. IDL has given itself authority to adopt lake-specific rules. It should do so for Bear Lake.

Rule 020.01: The language about what “will” be considered an encroachment should either be removed or revised to more specifically track the language of the LPA, which does not reference “dredged material” at all, and which only references “landfills” once. Otherwise, IDL is administratively revising the Legislature’s definition of encroachments.

Rule 055.01: The standards in the LPA and its three sets of rules that govern when easements and leases are required are extremely vague. When legal standards are

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vague, courts will often decline to enforce them, because the legislature and agency have not provided the courts with enough guidance. I believe that is the case here. Given the lack of guidance provided by the Legislature regarding easements and leases, IDL should develop rules that are consistent with the traditional understanding of those terms. There is significant judicial case law defining leases and easements. IDL should use those as guidance in developing rules governing leases and easements of navigable lakebeds, until the Legislature provides more direction.

I hope these comments are helpful. If you have any questions about these comments or I can clarify any of them, please do not hesitate to contact me. Otherwise, thank you the opportunity to provide these comments and for your consideration of them.

Sincerely,

VARIN THOMAS

A handwritten signature in blue ink, appearing to read "Dylan B. Lawrence". The signature is fluid and cursive, with a long horizontal stroke at the end.

Dylan B. Lawrence