

BEFORE THE IDAHO DEPARTMENT OF LANDS

In the Matter of

Application for Encroachment Permit

Heidi Ferguson

Applicant

AGENCY Case No. CC-2024-NAV-22-001

OAH Case No. 24-320-04

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. 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.”

On or around June 10, 2024, IDL received a complete Joint Application for Permits to build a single-family dock filed by Heidi Ferguson. A hearing was held on August 1, 2024, and an onsite visit with the parties was conducted on August 2, 2024. Due to requests from Applicant and Objector, Jason Martin, the record was held open until August 9, 2024. Administrative Law Judge (“ALJ”) Leslie Hayes, of the Office of Administrative Hearings, served as the duly appointed hearing officer and attended the onsite visit. On August 30, 2024, ALJ 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.

As Director of IDL, my responsibility is to render a Final Order pursuant to Idaho Code § 58-1305 and IDAPA 20.03.04.025.06, on behalf of the State Board of Land Commissioners and based on the record, which I have reviewed in the context of my personal expertise gained through education, training, and experience. I relied on the entire record for this matter, including examining the hearing officer's Recommended Order.

II. FINDINGS OF FACT

I adopt the Recommended Order's Findings of Fact as my Findings of Fact.

III. CONCLUSIONS OF LAW

I adopt the Recommended Order's Conclusions of Law as my Conclusions of Law.

IV. ORDER

I conclude that the ALJ's Recommended Order is based on substantial evidence in the record, and I adopt the Recommended Order's Findings of Fact and Conclusions of Law as my decision in this matter. I hereby incorporate by reference the Recommended Order's Background, Findings of Fact, and Conclusions of Law into this Final Order. I have enclosed and served the Recommended Order along with this Final Order.

Based on the adopted Findings of Fact and Conclusions of Law, I HEREBY ORDER that the Encroachment Permit Application ERL95S1908A is DENIED.

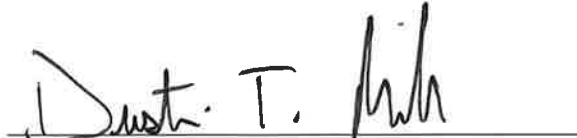
This is a final order of the agency. Pursuant to Idaho Code §§ 58-1305(c), 58-1306(c) and IDAPA 20.03.04.025.08, the Applicant or any aggrieved party who appeared at the hearing has a right to have the proceedings and Final Order reviewed by the district court in the county where the encroachment is 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 September 18, 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 19th day of September 2024, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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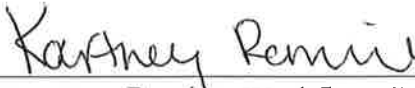
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Kourtney Romine, Workflow Coordinator

BEFORE THE IDAHO DEPARTMENT OF LANDS

In the Matter of)
Application for Encroachment Permit,) AGENCY Case No. CC-2024-NAV-22-001
Heidi Ferguson,) OAH Case No. 24-320-04
Applicant.) **FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND RECOMMENDED
ORDER**
_____)
)

This matter was assigned to Administrative Law Judge (ALJ) Leslie Hayes as the Hearing Officer on July 12, 2024. ALJ Hayes set an in-person, evidentiary hearing for August 1, 2024 and held a remote prehearing status conference on July 26, 2024, via Zoom. This prehearing status conference was recorded. ALJ Hayes reviewed the governing rules of procedure for the hearing, stipulations/objections to any prehearing filings, remote attendance at the hearing, and the burden of proof pursuant to Idaho Code section 58-1305.

The hearing was held on August 1, 2024. Present at the hearing were Administrative Law Judge (ALJ) Leslie Hayes; Objector Jason Martin; Allison Olson, counsel for Idaho Department of Lands (“IDL”); IDL’s Program Manager for Navigable Waters Marde Mensinger; and IDL’s Lands Resource Supervisor Mike Ahmer. Applicant Heidi Ferguson joined the hearing via Zoom later in the proceedings. 8.1.24 Hearing Recording at 19:36-21:55.¹ The hearing was recorded via Zoom as well as reported by a court reporter, who appeared remotely.

¹ Ms. Ferguson had the wrong date for the hearing. The Hearing Officer called Ms. Ferguson prior to commencing the proceedings and, after receiving the message, Ms. Ferguson called the Hearing Officer and joined the hearing via Zoom. 8.1.24 Hearing Recording at 0:00-1:28 and 15:56-21:55. Ms. Ferguson was provided a copy of the Zoom recording and was able to provide testimony in these proceedings the following day, August 2, 2024, during the onsite inspection. See Ferguson Site Visit.m4a.

The parties agreed at the hearing that a site visit would be helpful in understanding the location of the requested dock and the boundaries between Ms. Ferguson's and Mr. Martin's property. The site visit took place on August 2, 2024, the day after the hearing. Present and participating at the site visit, which was recorded by the ALJ Leslie Hayes, were Applicant Ms. Ferguson, Objector Mr. Martin, and IDL counsel Ms. Olson.² ALJ Hayes photographed the site attempting to correlate testimony by Ms. Ferguson and Mr. Martin with the physical location in question.

Both Applicant and Objector voiced being unprepared to present their entire case on the date of the hearing or at the onsite visit and, for that reason, ALJ Hayes held the record open until the statutory deadline of August 9, 2024, for any additional submissions.

ALJ Hayes, having considered the evidence and arguments offered at the hearing, the documents in the administrative record, and the other papers and pleadings on file, makes the following Findings of Fact and Conclusions of Law pursuant to Idaho Code section 58-1305 and IDAPA 62.01.01.252.01.d.

PRELIMINARY EVIDENTIARY RULINGS

Prior to the hearing, IDL offered exhibits IDL 1-5. During the hearing, Ms. Ferguson requested the submission of an additional document, which was to be entered as IDL Exhibit 6. 8.1.24 Hearing Recording at 28:29-30:03. The document referenced as IDL 6 was never identified by Ms. Ferguson in follow-up correspondence with the Hearing Officer and IDL's attorney and, therefore, is not admitted into the record. During the onsite visit, Ms. Ferguson offered exhibits Ferguson 1-6. During the onsite visit, ALJ Hayes took photos IMG_0127-IMG_0159. Therefore, the following exhibits have been entered into evidence in these proceedings: IDL Exhibits 1-5;

² Present and not participating at the onsite visit was ALJ Hayes's child, A.S.

Ferguson Exhibits 1-6; Photographs IMG_0127-IMG_0159. Any reference to IDL Exhibit 6 in the 8.1.24 Hearing Recording is stricken.

FINDINGS OF FACT

1. On June 10, 2024, IDL received a complete Joint Application for Permits (Application ERL95S1908A) from Applicant Heidi Ferguson for a single-family dock at her property on Hauser Lake. IDL Ex. 1. The existing dock on the property is in disrepair and needs to be replaced. IDL Ex. 1, p. 1; IMG_0127 – IMG_0129.

2. Ms. Ferguson’s neighbor, Tom Woertink, gave his consent on June 10, 2024, for the dock to be built even though it would be located closer than the required ten (10) feet to the adjacent littoral right line between their properties. IDL Ex. 1, p. 6.

3. On June 11, 2024, IDL mailed out a Courtesy Notification of Application for Encroachment to Jason Martin. IDL Ex. 2.

4. On July 2, 2024, Mr. Martin submitted an objection to Ms. Ferguson’s application. IDL Ex. 2. His objection was “littoral right of water and land.” IDL Ex. 2.

5. Mr. Martin provided information to IDL that “called into question the littoral rights and littoral ownership of the Applicant.” IDL Ex. 5, p. 9.

6. Ms. Ferguson’s warranty deed, which was recorded on March 8, 2023, deeds her the property at 12153 North Wildwood Point Road, Hauser, Idaho 83854. IDL Ex. 3, p. 6.

7. Exhibit A to the warranty deed describes the property as “to the Northerly line of the public road” for both parcels purchased. IDL Ex. 3, p. 7.

8. From Ms. Ferguson’s property, Hauser Lake is to the south of the public road. IDL Ex. 3, p. 5.

9. A survey was conducted on the property in November of 2010 and September of

2023. IDL Ex. 3, pp. 5, 8. Both surveys show that Ms. Ferguson’s property line ends at the north end of the road, which is consistent with the property description on the warranty deed. IDL Ex. 3, p. 8.

10. During the onsite inspection, Ms. Ferguson stated that the survey of the property showed that her property line ended at the north end of the road. Ferguson Site Visit.m4a at 9:03-9:12; IMG_0144.

11. The public road lies in between the lake and Ms. Houser’s property. IDL Ex. 3.

12. Ms. Ferguson relies on the listing of the property, which states “Exterior Features: Covered Deck; Covered Porch; Dock/Boat Slip; Open Deck; RV Parking – Open” to demonstrate that she is a littoral owner with littoral rights. Ferguson Ex. 1, p. 2.

13. Ms. Ferguson also testified that the prior to the construction of the road, Hauser Lake was called Sucker Lake, which consisted of marshland that would cover the road, which is what she relies on to demonstrate that she is a littoral owner. Ferguson Site Visit.m4a at 9:12-10:14; Ferguson – 3.

CONCLUSIONS OF LAW

1. The Idaho Legislature enacted the Lake Protection Act (“LPA”), Title 58, Chapter 13, Idaho Code, in 1974 stating, in Idaho Code §58-1301, that:

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.

2. The Board of Land Commissioners, through IDL, “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.” Idaho Code §58-1303; see also Idaho Code §58-119(1) and *Newton v. MJK/BJK, LLC*, 167 Idaho 236, 242 (2020).

3. Through its statutory authority, IDL has promulgated Rules for the Regulation of Beds, Waters and Airspace Over Navigable Lakes in the State of Idaho. See IDAPA 20.03.04.

4. There is no dispute as to whether Hauser Lake is a navigable lake and is within IDL’s authority to regulate encroachment permits.

5. A littoral or riparian rights “means only the rights of owners or lessees of land adjacent to navigable waters of the lake to maintain their adjacency to the lake and to make use of their rights as riparian or littoral owners or lessees in building or using aids to navigation but does not include any right to make any consumptive use of the waters of the lake.” I.C. § 58-1302(f).

6. Riparian or littoral owner means “[t]he fee owner of land immediately adjacent to a navigable lake, or his lessee, or the owner of riparian or littoral rights that have been segregated from the fee specifically by deed, lease, or other grant.” IDAPA 20.03.04.010.33.

7. “The Department and the Board do not have the authority to determine property ownership; rather, the extent of the agency’s powers lies in verifying littoral rights before issuing an encroachment permit.” *Byrd v. Idaho State Board of Land Commissioners*, 169 Idaho 922, 929 (2022).

8. Applicant has not submitted sufficient evidence to demonstrate that she is a littoral owner with littoral rights as defined in Idaho Code §58-1302.

9. This is not to say that Ms. Ferguson is not a littoral owner; simply that she has not met her burden in these proceedings. See *Byrd*, 169 Idaho at 930 (“the Department could not claim

Byrd and Millins were *not* littoral owners without validating Coffey’s claim of ownership. . . . it was right to deny the encroachment application due to insufficient evidence of ownership.”)

10. For that reason, the Application should be denied for insufficient evidence of littoral ownership.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends that the Ferguson Application for an encroachment permit for a single-family dock be **DENIED**.

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 forty-five (45) days of the close of the evidentiary portion in this case, which occurred on August 9, 2024. *See* I.C. § 58-1305(c). The agency head’s final order in this case must be issued no later than **September 23, 2024.**

Pursuant to Idaho Code section 67-5244, the parties may file an exception to this recommended order with the agency head. Any such exception must be filed within five (5) business days after the service date of this recommended order or no later than September 6, 2024. Written briefs in support of or taking exception to the recommended order shall be filed with the agency head. If time permits, the agency head may schedule oral argument in the matter before issuing a final order. Following the agency head’s issuance of a final order, the parties’ rights to seek reconsideration of or appeal that order are prescribed by Idaho Code section 58-1306(c), (d), and IDAPA 20.03.04.025.08.

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DATED: August 30, 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 30th day of August, 2024, I caused to be served a true and correct copy of the foregoing by the following method to:

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