

**BEFORE THE STATE BOARD OF LAND
COMMISSIONERS STATE OF IDAHO**

In the Matter of:)	
)	
Encroachment Permit Application)	FINAL ORDER
No. ERL-96-S-219C.)	
)	
Peter and Shelagh Kaseburg – Applicant)	

I. NATURE OF PROCEEDINGS/ISSUES

Encroachments, including docks, placed on navigable waters require a permit issued by the Idaho Department of Lands (IDL) pursuant to the requirements of the Lake Protection Act, Title 58, Chapter 13, Idaho Code, and the corresponding administrative rules promulgated by the State Board of Land Commissioners, IDAPA 20.03.04, Rules for the Regulation of Beds, Waters and Airspace over Navigable Lakes in the State of Idaho.

On April 24, 2014, IDL initiated reprocessing the Kaseburg (Applicant) encroachment application. The encroachment application was reprocessed as a result of administrative and judicial actions related to the instant encroachment application in Glengary Bay of Lake Pend Oreille. On remand from the Idaho Supreme Court, the Department was instructed to determine a Line of Navigation in Glengary Bay of Lake Pend Oreille. I, Thomas M. Schultz, Director, Idaho Department of Lands, have adopted the finding of the Line of Navigation dated April 14, 2014. That Line of Navigation was found to be at elevation 2049.6' msl.

My responsibility is to render a decision pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.030.07 on the 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 have relied on the record for this matter. Specifically,

- I have reviewed the record including all documents and exhibits.
- I have examined Jim Brady's Recommendation in light of the entire record.

II. FINDINGS OF FACT

I concur with the Findings of Fact presented by Jim Brady.

III. CONCLUSIONS OF LAW

I concur with the Conclusions of Law presented by Jim Brady.

IV. FINAL ORDER

I conclude Jim Brady's Recommendation is based on substantial evidence in the record, and I adopt the Recommendation as my decision in this matter. The Recommendation is incorporated by reference herein and attached to this Final Order. The Applicant is qualified to make application for an encroachment permit with the applicable standards.

On the basis of the record, it is my order that Encroachment Permit No. ERL-96-S-219C is DENIED.

This is a final order of the agency. Pursuant to Idaho Code § 58-1306(c) and IDAPA 20.30.04.030.09, the Applicant, if dissatisfied with the director's decision, shall have thirty (30) days from the date of the director's decision to have the proceedings and decision of IDL reviewed by the District Court in the county in which the encroachment is proposed.

DATED this 15th day of August, 2014.



Thomas M. Schultz, Jr.
Director, Department of Lands

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of August, 2014, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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TOM SCHULTZ, DIRECTOR
EQUAL OPPORTUNITY EMPLOYER

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Lawrence G. Wasden, Attorney General
Brandon Woolf, State Controller
Tom Luna, Sup't of Public Instruction

July 24, 2014

Findings of Fact, Conclusions of Law, and Recommendation

TO: Tom Schultz, Director
FROM : Jim Brady, Resource Supervisor, Lands & Waterways
SUBJECT: Peter and Shelagh Kaseburg
Application for Encroachment Permit No. ERL-96-S-219C

I. INTRODUCTION

The following document, which includes a recommendation for your consideration, was prepared following the reprocessing of an encroachment application, by Peter and Shelagh Kaseburg, that is proposed beyond the Line of Navigability (LON) of Glengary Bay in Lake Pend Oreille. The encroachment application was reprocessed in response to the Idaho Supreme Court decision in *Kaseburg v. State*, 154 Idaho 570, 300 P.3d 1058 (2013) (*Kaseburg*).

The Applicants propose to

1. Install a floating dock system that can be moved in and out with the lake level to maintain 7.5 foot draft at the end of the dock.
2. Cut off and remove all existing piling to either near lake bottom if no longer needed or to within 3 feet of lake bottom if the pile is incorporated in the current application.
3. Install an anchor buoy system.
4. Modify the waterline anchor/tie-down system.

Lake Pend Oreille, a natural northern Idaho lake, has an artificial high water mark (AHWM) of 2062.5' above mean sea level (msl). Albeni Falls Dam raised the level of the lake approximately 11.5' in the early 1950s primarily for power generation and flood protection. The normal operation of the lake is to maintain a summer pool elevation at or near 2062.5' msl. The lake is drafted in the fall to near the generally accepted ordinary high water mark (OHWM) of 2051' msl.

The most waterward anchor point for the moveable dock would be approximately two hundred thirty-five feet (235') waterward of the AHWM, approximate lakebed contour elevation 2042.5' msl. The mooring buoy would be approximately one hundred ninety-five feet (195') waterward of the AHWM, approximate lakebed contour elevation 2045' msl. The second anchor point for the two (2) anchor point system would be approximately two hundred forty-five feet (245') waterward of the AHWM, approximate lakebed contour elevation 2042.4' msl. The domestic water intake line would be attached to an existing pile approximately three feet (3') above the lakebed and approximately two hundred twenty feet (220') waterward of the AHWM, approximate lakebed contour elevation 2042.5' msl.

II. PROCEDURAL BACKGROUND

The procedural history of the instant encroachment permit application is set forth in detail in *Kaseburg*, 154 Idaho at 572-76, 300 P.3d at 1060-64. The Kaseburgs filed applications for Encroachment Permit Nos. L-96-S-219-B and L-96-S-219-C with the Idaho Department of Lands (IDL) in 2009. IDL denied both applications in January 2010. The Kaseburgs sought judicial review of IDL's decisions with the First District Court for Bonner County in February 2010. The district court set aside IDL's denials of the Kaseburgs' applications and remanded the matter to IDL. IDL appealed the district court's decision to the Idaho Supreme Court. In *Kaseburg*, the Supreme Court affirmed the district court's decision in part, and reversed in part. The Supreme Court held the district court erred by setting aside IDL's denial of application for Encroachment Permit No. L-96-S-219-B, and held the district court properly set aside IDL's denial of application for Encroachment Permit No. L-96-S-219-C. The Supreme Court remanded the case to IDL, stating: "On remand, the IDL must make a finding, based on substantial evidence, establishing the line of navigability. Then, the IDL must process Application 219-C in accordance with that finding." *Kaseburg*, 154 Idaho at 580, 300 P.3d at 1068.

IDL held a public hearing to take testimony to determine a LON in Sandpoint, Idaho on August 15, 2013. Mike Murphy, hearing coordinator for the LON finding, forwarded his recommended finding of the LON at lakebed elevation 2049.6' msl, which is approximately 165' waterward of the AHWM in this particular location of Glengary Cove, on April 7, 2014. Thomas M. Schultz, Jr., Director, IDL, adopted the recommended finding for the LON in Glengary Cove

as 2049.6' msl on April 14, 2014. IDL initiated this reprocessing after the *Director's Finding on Line of Navigability* in Glengary Cove of Glengary Bay of Lake Pend Oreille on April 24, 2014. The record of IDL's Finding on the LON is incorporated into the instant record by reference.

III. FINDINGS OF FACT

1. This application was originally submitted to IDL on September 2, 2009, by Peter Kaseburg for the moveable dock system, mooring buoy, piling removal and reattachment of the waterline on Glengary Bay of Lake Pend Oreille. IDL concluded the Application was complete in 2009. IDL began reprocessing ERL-96-S-219C on April 24, 2014, after the IDL Finding that the LON in the vicinity of the proposed encroachment was 2049.6' msl, approximately 165' waterward of the AHWM. The identical application is being reprocessed. IDL incorporates by reference the record from the original 219C application into the instant record.
2. Applicant's proposed encroachment is for a single family dock extending beyond the LON is 700 square feet in size and could extend as far as 245' waterward of the AHWM, or lakebed contour elevation 2042.5' msl when the lake is drawn down to winter operations level of 2051' msl. A mooring buoy is proposed approximately 195' waterward of the AHWM, approximate lakebed elevation 2045' msl. Additionally, when the dock is extended during low water, any boat tethered to the mooring buoy would extend an additional 30' into the bay. The Applicants also propose to remove the unused old piling located in Glengary Bay adjacent to the Applicants' upland property by cutting them off at the bed of the lake or the mudline. They also proposed to reattach the domestic water intake line three (3) feet above the lakebed, either to an old piling or some other structure. Piling used to support the encroachment will be cut off to about three (3) feet above the bed of the lake. Thus, the proposed encroachment would extend beyond the LON as found by IDL.
3. The Applicants submitted a narrative with their application as an "aid to your understanding of the why and hows of my proposal to construct a movable floating dock and fixed anchor buoy system in lieu of my previously submitted dock/piling application [application 219B]." In summary, a moveable dock system is proposed to allow the Applicants to move the boat waterward or landward, depending on the lake elevation, so boats will remain in the water at all times. The Applicants explain that their family uses wooden boats, which must remain in the water year-round to prevent the hulls from drying out and cracking.

4. The application was processed in accordance with Idaho Code § 58-1306 and the related administrative rules, IDAPA 20.03.04, Rules for the Regulation of the Beds, Waters, and Airspace Over Navigable Lakes in the State of Idaho, because the proposed encroachment extends beyond the LON.

5. In a memorandum dated April 24, 2014, IDL notified the following parties of the encroachment permit application submitted by Applicant and requested that the parties provide comments to IDL in accordance with IDAPA 20.03.04.030.03:

- US Army Corps of Engineers-CDA
- Idaho Department of Fish and Game
- Idaho Department of Environmental Quality
- Idaho Department of Water Resources
- Idaho Department of Transportation
- Bonner County Marine Division of the Sheriff's Office
- Bonner County Public Works
- Lakes Commission
- Idaho Conservation League
- Lake Pend Oreille Waterkeeper
- Pend Oreille Lake*A*Syst Coordinator
- Adjacent Neighbors (Reg Galusha and George Congelton)

6. On April 29, 2014 and May 6, 2014, IDL published a Notice of Application in the *Bonner County Daily Bee* for ERL-96-S-219C pursuant to Idaho Code § 58-1306(b) and IDAPA 20.03.04.030.01.

7. IDL received five (5) letters from agencies, neighbor, and members of the public prior to May 27, 2014, the deadline for comments. These letters generally covered the following topics:

- a. The Lake Pend Oreille, Pend Oreille River, Priest Lake and Priest River Commission provided comments intended to dissuade IDL from granting the permit. The Commission objected because it felt the proposal would negatively impact the public's right to navigation by extending beyond the LON, it would be unsightly and negatively impact the beauty of Lake Pend Oreille, and would suffer ice damage to the boats and dock. The Commission also noted that as of the winter of 2104-15,

the elevation of the winter pool of Lake Pend Oreille will be flexible. Rather than keeping the winter pool at or near the low water elevation of 2051' msl each winter, the Corps of Engineers may raise and lower the lake level as much as five (5) feet during the winter. It is these potential changes of lake elevation that could create damage from ice.

b. The Idaho Department of Fish and Game (IDFG) recognized that the instant application is the same as the 2009 application and incorporated their previous comments. IDFG recognized that the proposal would create additional navigational hazards. IDFG also was concerned that the proposed cables and pilings cut three (3) feet above the lake bed would pose an unseen hazard to boaters, anglers and other recreationists. IDFG recommended that the project be modified to reduce these potential hazards.

c. The Idaho Conservation League (ICL) urged IDL to deny the permit because of the navigational hazard that the proposal would have on the relatively small Glengary Bay. ICL opined that IDL should allow a party to exceed the LON for a dock only for minor exceedances and when no reasonable alternative is available, and that a party's affinity for wooden boats does not create such a hardship. ICL was also concerned about the precedent that would be established if IDL approved the application, which ICL believes is a flagrant violation of IDL's rules. ICL also pointed out that year-round moorage could be located at one of the commercial marinas on Lake Pend Oreille.

d. The Applicants' neighbor, George Congleton, submitted two (2) email comments to IDL. In an April 24, 2014, email to Jim Brady of IDL, Mr. Congleton provided some measurements concerning the proposed dock and objected to IDL's determination of the LON Finding, opining that the LON should be 55 feet waterward of the AHWM as it is in other parts of Lake Pend Oreille, and raising a series of questions to IDL. Mr. Congleton sent IDL a letter on April 30, 2014, objecting to the proposal because it extended well beyond the LON. Mr. Congleton opined that this would create a navigational hazard with a boat floating tethered to a buoy in the bay, and that this proposal would benefit one (1) landowner at the expense of five (5) other property owners that live in the bay and marina users, as well as the general public. Mr. Congleton also incorporated by reference his previous comments to IDL concerning

the 219B and 219C applications on March 29, 2009, April 17, 2009, October 27, 2009, December 8, 2009, and his presentation before the Hearing Officer at the IDL LON hearing on August 15, 2013. This previously-submitted information includes information gathered by Mr. Congleton as to the locations of the piling, bay depth, littoral rights lines, and wave and flow patterns in Glengary Bay.

e. The Idaho Department of Transportation commented that the proposed encroachment would have no impact on the State highway system.

8. On April 14, 2014, Thomas M. Schultz, Jr., Director, Idaho Department of Lands, issued the *Director's Finding on Line of Navigability*. In this Finding, the director adopted Mike Murphy's, Hearing Coordinator, Recommended Finding as his finding on the LON in this portion of Glengary Bay. This Finding determined the average low water mark to be 2052.6' msl from hydrologic data covering 1952 to 2005, and that a vast majority of the boats registered in Bonner and Kootenai Counties are 30' or less and can safely moor with 3' of draft. Therefore the line of navigability was found to be 2049.6' msl, approximately 165' waterward of the AHW in Glengary Bay.

9. Based upon the various comments submitted to IDL during the original processing of the instant application, the comments submitted to IDL since April 24, 2014, concerning the current reprocessing of the application, and IDL's analysis of the proposal given the geographic features of Glengary Bay, IDL finds that the proposed encroachment would constitute a hazard to navigation. The proposed cables and submerged piling stumps are submerged obstacles that could ensnare unsuspecting boaters, fishermen, swimmers or other recreationists. Additionally, when the dock is extended during low water, the boat tethered to the mooring buoy and extending out up to 30' will be an obstacle to navigation for the other landowners in the bay, as well as the public. This is particularly true since it appears that the location and movement of the boat will be subject to the vagaries of the wind and winter weather.

10. One aspect of the proposed dock system would provide a benefit to the public, i.e., the removal of the existing old, decaying wood piling installed in the 1930s. These old piling constitute an existing hazard to navigation as well, as recognized by the Court in *Kaseburg*, 154 Idaho at 572, 579, 580, 300 P.3d at 1060, 1067, 1068. It is likely that these piling will continue to decay as they have in the past and eventually no longer exist in the bay.

IV. CONCLUSIONS OF LAW

1. The Idaho Board of Land Commissioners (Board) is designated by Idaho Code § 58-104(9) and § 58-1303 to regulate, control and permit encroachments on, in, or above the beds of navigable lakes in the state of Idaho. IDL is the administrative agency of the Board, as per Idaho Code § 58-119. Jurisdiction in this matter rests with the IDL.
2. The Kaseburgs are littoral owners possessing littoral rights and are therefore qualified to make application for an encroachment. Littoral rights include a littoral owner's right to construct docks. Idaho Code § 58-1302(f); IDAPA 20.03.04.010.32.
3. Lake Pend Oreille is a navigable lake as defined by Idaho Code § 58-1302(a). Pursuant to Idaho Code § 58-1301 and IDAPA 20.03.04.012.02, encroachments of any kind on, in, or above the beds of a navigable lake require a permit prior to encroaching on the lake.
4. Pursuant to Idaho Code § 58-1301, lake encroachments must be regulated to protect property, and the public trust values of navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. These values must be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from, the proposed encroachment.
5. IDL shall make decisions on proposed encroachments in accordance with the Public Trust Doctrine as set forth in Idaho Code § 58-1201 through 1203.
6. IDL shall also make decisions on proposed encroachments in accordance with the Public Trust Doctrine as set forth by the Idaho Supreme Court on *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 671 P.2d 1085 (1983) (KEA), and subsequent cases.
7. The "line of navigability" is defined by Idaho Code § 58-1302(g) and IDAPA 20.03.04.010.20 as "[a] line located at such distance waterward of the low water mark established by the length of legally permitted encroachments, water depths waterward of the low water mark, and by other relevant criteria determined by the board when a line has not already been established for the body of water in question."

8. As set forth in the factual background, *supra*, IDL has found that the LON at the location of the proposed encroachment is at elevation 2049.6' msl, or approximately 165' waterward of the AHWM. Thus, IDL is required to process the instant application in accordance with Idaho Code § 58-1306 and IDAPA 20.03.04.030 as an encroachment extending beyond the LON.

9. IDAPA 20.03.04.015.01.c states that "[n]o portion of the docking facility shall extend beyond the line of navigability. Shorter docks are encouraged whenever practical and new docks normally will be installed within the waterward extent of existing docks or the line of navigability." IDAPA 20.03.04.015.01.d state that "[a] variance contained in Subsection 015.01 of these rules may be approved by the department where it can be justified by site specific considerations such as the distance to the established line of navigability." The justification for the length of the proposed encroachment in the case at hand is to allow the Applicants' boat to remain in the water all year to prevent drying and cracking of wood boat hulls. In other words, the Applicants are seeking a variance of IDL's general rule that no portion of a dock shall extend beyond the LON so that they can keep their boats in the water year-round.

10. In weighing the navigational or economic necessity, or justification for, or the benefit to be derived from the proposed moveable dock beyond the LON against the protection of property, navigation, fisheries, wildlife habitat, aquatic life, recreation, aesthetic beauty, IDL determines that the permit for a moveable dock and floating buoy in this situation should not be issued because it would constitute a navigational hazard. If implemented, during low water, there would be a boat attached to a mooring buoy drifting around with the vagaries of the wind near the middle of the bay, over 250' from the AHWM. It would also constitute a hazard during high or intermediate water, being well beyond the LON. Furthermore, the only justification for the dock would be the personal convenience of the Applicants in maintaining a wooden-hulled boat in the water year-round to prevent cracking. On balance, there is little or no navigational or justification or benefit to constructing this dock beyond the LON, and what benefit does accrue, boat maintenance, accrues only the Applicants. This use does not justify impairment of public navigation.

11. The Applicants proposal would include removal of some of an existing navigational hazard, the old wood piling. These piling have existed since the 1930s and

are considered "grandfathered" as a lake encroachment. See Idaho Code § 58-1312 (permitting of encroachment existing as of January 1, 1975). The purpose for the installation of these piling is unknown, and there is no evidence that they have ever served any navigational purpose. *Kaseburg*, 154 Idaho at 572, 300 P.3d at 1060. IDL would not permit such an encroachment today as non-navigational encroachments can be permitted only if they will provide major environmental, social or economic benefits to the general public. IDAPA 20.03.04.030.02. In fact, the Idaho Supreme Court upheld IDL's decision to deny the Kaseburg's original plan to replace the wood piling with metal piling in part on the basis that the new piling would provide no public benefit. *Kaseburg*, 154 Idaho at 578, 300 P.3d at 1066. The existing wood piling will eventually decay and cease to be a navigational hazard as nature runs its course. The proposed moveable dock, however, would also constitute a navigational hazard, but would be permitted under current standards and could be perpetuated indefinitely. IDL does not believe that it is justified under current standards to replace a grandfathered non-navigational encroachment that is a hazard to navigation, but that will eventually decay, with a new navigational hazard that could be perpetuated indefinitely.

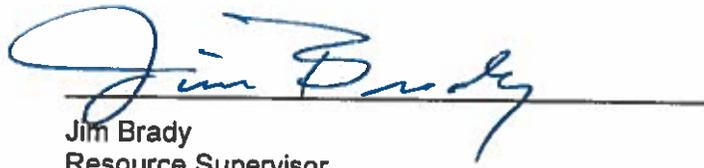
12. The Applicants have the burden to justify a variance to IDAPA 20.03.04.015.01.c. IDL concludes that a variance is not justified in this instance for the reasons set forth above.

13. As set forth in Conclusion of Law #2, *supra*, the Applicants are littoral owners possessing littoral rights for an aid to navigation. The instant application denial is without prejudice to the Applicants to apply for a dock permit that comports with IDL's permitting standards, and is otherwise justified in accordance with Idaho Code § 58-1301.

V. RECOMMENDATION

Based on the evidence in the record, the Applicants' proposed encroachments are located waterward of the established LON and would constitute a hazard to navigation. Therefore, I recommend that IDL deny the Application for the proposed moveable dock and mooring buoy.

DATED this 24th day of July, 2014



Jim Brady
Resource Supervisor
Lands & Waterways
Idaho Department of Lands