

**WINSTON WIGGINS - DIRECTOR**

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Attorney General

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State Controller

**MARILYN HOWARD**  
Sup't of Public  
Instruction

May 12, 2006

Steve Millemann  
P.O Box 1066  
706 North First  
McCall, ID 83638

**SENT VIA CERTIFIED MAIL**

Re: Recommendation – Whitetail, A Club For All Seasons, Reconsideration, IDL's Decision to Issue Encroachment Permit Nos. L-65-S-118M and L-65-S-118N and Deny Encroachment Permit No. L-65-S-1180

Dear Mr. Millemann:

I have reviewed the findings of fact and recommendation prepared by J. Kahle Becker concerning reconsideration of IDL decision to issue the subject encroachment permits on February 9, 2006 (herein referred to as "IDL's decision"). The reconsideration hearing was conducted on April 6, 2006 at the request of The Big Payette Lake Watershed Advisory Group. A copy of the findings of fact and the final recommendation is attached.

Based on the information presented by the appellants for reconsideration and the facts relevant to IDL's decision, Mr. Becker has concluded that the information submitted for reconsideration does not provide a basis for a different decision. Mr. Becker recommends upholding IDL's decision to issue the encroachment permits to Whitetail, A Club For All Seasons with the additional conditions:

**Lift Canopies (Encroachment Permit No. L-65-S-118N)**

The permit should include a term requiring Applicant to remove the canopies during the off-season. This "off-season" should also be defined in the permit.

**Public Access and Lake Protection Act Compliance**

In order to alleviate concerns with public access, economic necessity and regulatory compliance, the Payette Lake Supervisory Area of IDL should include conditions in the new encroachment permits that will assure public access and maximize public benefit. At a minimum, the permit language should address:

- Days and hours of general public (non-lodge guest) access;
- Signage indicating general public (non-lodge guest) access; and
- Identification of general public (non-lodge guest) access areas.

Letter to Steve Millemann  
May 12, 2006  
Page 2 of 2

Additionally, IDL should utilize the penalty provisions of Idaho Code § 58-1308 the next time Whitetail, A Club For All Seasons fails to meet existing permit conditions or the requirements of the Lake Protection Act.

I concur with this recommendation. It is my decision to issue Encroachment Permit Nos. L-65-S-118M and L-65-S-118N on the condition that Whitetail, A Club For All Seasons complies with the conditions stipulated in IDL's original decision and with the additional conditions stipulated above.

Furthermore, I concur with the original hearing officer, Michael J. Murphy, that Encroachment Permit No. L-65-S-1180 should be denied for failing to meet the requirements of I.C. § 58-1301 and IDAPA 20.03.04.

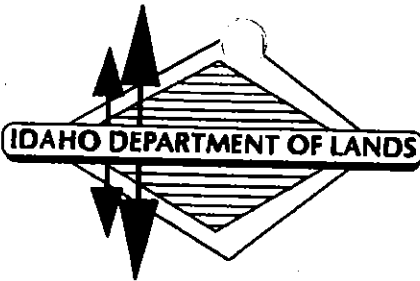
Section 58-1306(d) provides that if you are aggrieved by the decision following reconsideration, you may appeal to district court in the same manner as provided for following a hearing, thus you must file a notice of appeal with the district court within thirty (30) days from the date of this decision. Since I am making the decision to approve the permit, should you wish to appeal, you must, pursuant to Section 58-1306(c), file a bond on such appeal in an amount to be fixed by the court but not less than five hundred dollars (\$500.00) insuring payment to the applicant of damages caused by delay and costs and expenses, including reasonable attorney fees, incurred on the appeal in the event the district court sustains the action of the board."

Sincerely,

  
WINSTON A WIGGINS  
Director

Attachment: Recommendation – Whitetail, A Club For All Seasons, Reconsideration, IDL's Decision to Issue Encroachment Permit Nos. L-65-S-118M and L-65-S-118N

cc/att: Big Payette Lake Watershed Advisory Group  
Denise Mills, Assistant Director, LMR  
Sheldon Keafer, Payette Lakes Area Supervisor  
Scott Corkill, Lands Resource Supervisor  
Mike Murphy, Bureau Chief, Surface and Mineral Resources



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Sup't of Public Instruction

May 12, 2006

Big Payette Lake Watershed Advisory Group  
c/o Bill Weida  
P.O. Box 4058  
McCall, ID 83638

**SENT VIA CERTIFIED MAIL**

Re: Recommendation – Whitetail, A Club For All Seasons, Reconsideration, IDL's Decision to Issue Encroachment Permit Nos. L-65-S-118M and L-65-S-118N

Dear Mr. Weida:

Enclosed for your information is correspondence to the Whitetail, A Club For All Seasons ("Whitetail") concerning reconsideration of our original decision to issue the subject encroachment permits to Whitetail. Based on my review of the findings of fact and recommendation, the information presented by the hearing officer, J. Kahle Becker, it is my decision to uphold IDL's original decision to issue the above-referenced encroachment permits.

Section 58-1306(d) provides that if you are aggrieved by the decision following reconsideration, you may appeal to district court in the same manner as provided for following a hearing, thus you must file a notice of appeal with the district court within thirty (30) days from the date of this decision. Since I am making the decision to approve the permits, should you wish to appeal, you must, pursuant to Section 58-1306(c), "file a bond on such appeal in an amount to be fixed by the court but not less than five hundred dollars (\$500.00) insuring payment to the applicant of damages caused by delay and costs and expenses, including reasonable attorney fees, incurred on the appeal in the event the district court sustains the action of the board."

Sincerely,

  
WINSTON A WIGGINS  
Director

Attachment: Recommendation – Whitetail, A Club For All Seasons, Reconsideration, IDL's Decision to Issue Encroachment Permit Nos. L-65-S-118M and L-65-S-118N

cc/att: Whitetail, A Club For All Seasons  
Denise Mills, Assistant Director, LMR  
Sheldon Keafer, Payette Lakes Area Supervisor  
Scott Corkill, Lands Resource Supervisor  
Mike Murphy, Bureau Chief, Surface and Mineral Resources

KEEP IDAHO GREEN  
PREVENT WILDFIRE

EQUAL OPPORTUNITY EMPLOYER

507  
5c

J. Kahle Becker  
Legal Intern, Office of the Attorney General  
Idaho Department of Lands  
954 W. Jefferson Street  
Boise, Idaho 83702

## **RECONSIDERATION HEARING DECISION**

### **I. INTRODUCTION**

This action has come before the undersigned hearing officer upon Big Payette Lake Watershed Advisory Group's March 1, 2006 request for reconsideration of the Idaho Department of Lands' (hereinafter "IDL") February 9, 2006 decision granting encroachment permit applications L-65-S-118M and L-65-S-118N. The encroachment permit applications were submitted by Whitetail, A Club for All Seasons (hereinafter "Applicant") to IDL. Jurisdiction rests with IDL pursuant to Idaho Code § 58-1303.

The background relevant to IDL's decision and issues raised in the reconsideration hearing and documents submitted by those who testified are discussed below. Based on the findings below, I have concluded the decision to issue encroachment permits L-65-S-118M and L-65-S-118N should be upheld. The information and arguments presented at the reconsideration hearing did not give sufficient reason to change IDL's decision to issue the encroachment permits.

### **II. FINDINGS OF FACT**

1. The findings of fact from the February 9, 2006 IDL decision granting encroachment permits L-65-S-118M and L-65-S-118N are incorporated herein subject to the modifications discussed below.

2. In accordance with Idaho Code § 58-1306 (c) and IDAPA 20.03.04.030, IDL held a reconsideration hearing on April 6, 2006 at 5:30 p.m. (MDT) at the Payette Lakes Middle School. The hearing was recorded on audio tape and was subsequently transcribed. A transcript of the hearing is incorporated into this document by reference.

3. Mr. J. Kahle Becker, Legal Intern, Office of the Attorney General, coordinated the public hearing. In attendance were Mr. Nick Krema, Deputy Attorney General; Mr. Scott Corkill and Sheldon Keafer, representing IDL - Payette Lakes Supervisory Area; Leslie Freeman, representing DEQ; Mr. Bill Weida and Peter Johnson, representing Watershed Advisory Group ("WAG"); four individuals representing the Applicant; several members of the public and a representative from the local newspaper.

4. In conjunction with the public hearing, IDL received a summary of the arguments the Applicant and WAG intended to present. Additionally, the parties submitted post hearing memorandums ten (10) days following the hearing.

5. Mr. Bill Weida provided testimony on behalf of WAG. Overall, WAG's objections to the granting of the proposed encroachments centered on:

- Big Payette Lake water quality degradation;
- Cascade Lake water quality degradation;
- Applicant's Reliance on the U.S. Army Corps of Engineers' General Permit;
- The cumulative shading affect of multiple canopies;
- Alleged *ex parte* communications;
- Economic benefit; and
- Public access.

Mr. Weida also provided a memo summarizing the WAG's proposed testimony dated April 6, 2006.

6. Applicant was represented at the public hearing by Mr. John Sabala, Mr. Dan Nickel (Applicant's consultant) and Mr. Steve Millemann (Applicant's attorney). Mr. Nickel expressed his opinions as to the conditions contained in the U.S. Army Corps of Engineers' General Permit for the canopies and lifts and reaffirmed his opinion that the proposed installation of ten (10) lifts and canopies will have an insignificant impact on the health or trophic status of Big Payette Lake. Mr. Millemann commented on the communications between his client and IDL, as well as those between the WAG and IDL, which occurred during the course of the application process. He also refuted the argument that there were any improper *ex parte* communications. Mr. Sabala provided testimony on some of the public access concerns that were raised at the prior hearing.

At the hearing, Mr. Millemann also submitted a report prepared by Dan Nickel dated April 4, 2006.

7. WAG submitted a post-hearing letter containing rebuttal arguments on April 14, 2006.

8. The Applicant submitted a post-hearing letter containing rebuttal arguments on April 16, 2006.

### III. CONCLUSIONS OF LAW

1. The State Board of Land Commissioners (hereinafter "Board") is designated in 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 instrumentality of the Board, Idaho Code § 58-119.

2. Big Payette Lake is a navigable lake as defined by Idaho Code § 58-1302(a). Pursuant to IDAPA 20.03.04.011.02, encroachments of any kind on, in or above the beds of Big Payette Lake require a permit prior to encroaching on the lake.

3. Pursuant to Idaho Code § 58-1301, lake encroachments must be regulated to protect property and the lake value factors of navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality and 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.

4. IDL shall make decisions on proposed encroachments in accordance with the public trust doctrine as set forth by the Idaho Supreme Court in Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085 (1983) and subsequent cases and Idaho Code §§ 58-1201 through 1203. The beds of Big Payette Lake are public trust resources and IDL must examine the degree of the effect of the project on public trust uses such as navigation, fishing, recreation and commerce; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing encroachments to full use of the public trust resource; the impact to the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited, i.e. navigation, fishing, recreation or commerce; and the degree to which broad public uses are set aside in favor of more limited private ones. Kootenai Environmental Alliance, 105 Idaho at 629-30.

5. Pursuant to Idaho Code § 58-1306, the ten (10) lifts and canopies are encroachments in aid of navigation.

6. The Applicant and IDL satisfied all procedural requirements in the processing of the application, included in Idaho Code § 58-1306 and IDAPA 20.03.04.

7. All of the alleged *ex parte* communications WAG complained of were addressed in the decision from the original hearing and were further explained by Mr. Millemann at the reconsideration hearing. All communications, by representatives of both parties, were proper and made in the normal course of the application process to address concerns raised by IDL.

#### **IV. CONCLUSIONS AND RECOMMENDATIONS**

##### **Lift Canopies (Encroachment Permit No. L-65-S-118N)**

I can find no facet of the Lake Protection Act allowing IDL to deny a lift canopy that successfully addresses the objections historically associated with canopies. The Lake Protection Act allows IDL to regulate canopies on Big Payette Lake because of their potential affect on water quality. The canopy material proposed by Applicant removes the objections IDL previously used as the basis to deny canopy installation by reducing the shading affects. Any shading which may occur would be insignificant in relation to shading caused by other shoreline objects. Furthermore, I find that the benefits of providing a rental boat service on Big Payette Lake will reduce the chances for the introduction of invasive species, while providing an economic benefit to the community.

Based upon the information provided to me and based upon the fact that the encroachment permit application for the ten (10) lift canopies meets the requirements of Idaho Code §§ 58-1301 *et. seq.* (the Lake Protection Act) and IDAPA 20.03.04, I recommend that the Payette Lake Supervisory Area of IDL **approve** the corresponding encroachment permit. The permit should include a term requiring Applicant to remove



the canopies during the off-season. This “off-season” should also be defined in the permit.

**Lifts (Encroachment Permit No. L-65-S-118M)**

Idaho Code § 58-1301 requires IDL to consider the navigational and economic necessity of encroachments on the lakes of Idaho. In recognition of the subjectivity of these criteria I, like the original hearing officer, have strongly considered the scale of the proposed expansion. The proposed expansion represents a small increase in the footprint of the marina as it is presently permitted and the expansion does not extend beyond the established line of navigability.

Applicant is requesting the approval of ten (10) lifts related to a specific business plan involving the rental of four (4) jet skis and six (6) boats. The Lake Protection Act does not put IDL in a position to scrutinize small-scale business decisions made by commercial marina operators unless those decisions represent a significant potential environmental threat or have the potential to create a navigational problem. I, like the original hearing officer, find that the addition of ten (10) lifts at Applicant’s marina is a small-scale expansion and does not threaten the balance of the lake value factors, and will not create a navigational hazard.

Based upon the information provided to me and based upon the fact that the encroachment permit application for the ten (10) lifts meets the requirements of Idaho Code §§ 58-1301 *et. seq.* (the Lake Protection Act) and IDAPA 20.03.04, I recommend that the Payette Lake Supervisory Area of IDL **approve** the corresponding encroachment permit.

## Public Access and Lake Protection Act Compliance

In order to alleviate concerns with public access, economic necessity and regulatory compliance, I strongly recommend that the Payette Lake Supervisory Area of IDL include conditions in the new encroachment permits that will assure public access and maximize public benefit. At a minimum, the permit language should address:

- Days and hours of general public (non-lodge guest) access;
- Signage indicating general public (non-lodge guest) access; and
- Identification of general public (non-lodge guest) access areas.

Additionally, I recommend that IDL utilize the penalty provisions of Idaho Code § 58-1308 the next time Applicant fails to meet existing permit conditions or the requirements of the Lake Protection Act.

DATED this 5<sup>th</sup> day of May, 2006.



---

J. KAHLE BECKER  
Hearing Officer

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 5th day of May, 2006, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

Nick Krema  
Idaho Department of Lands  
954 W. Jefferson  
Boise, ID 83720-0050

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- Hand Delivery
- Federal Express
- Facsimile: \_\_\_\_\_
- Statehouse Mail

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Big Payette Lake Watershed  
Advisory Group  
c/o Bill Weida  
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Tom Kerr  
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John Sabala  
Whitetail, A Club for All Seasons  
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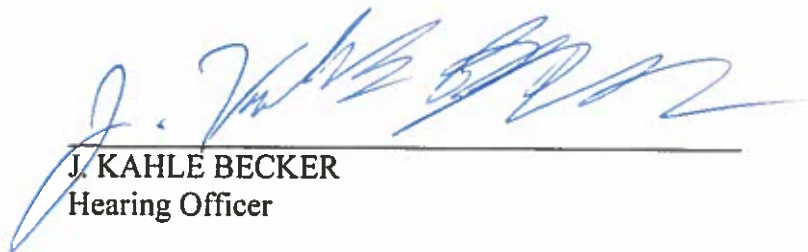
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J. KAHLE BECKER  
Hearing Officer