

GEORGE B. BACON
Director
Idaho Department of Lands
300 N. 6th St., STE 103
P.O. Box 83720
Boise, Idaho 83720-0050

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of;)
)
Encroachment Permits No. L-95-S-2809C and D) **FINAL ORDER**
City of Coeur d'Alene)
)
Applicant.)
_____)

I. NATURE OF PROCEEDINGS/ISSUES

A public hearing was held on September 9, 2008 at 6:00 pm PST at the IDL Staff Office in Coeur d'Alene, Idaho. Eric Wilson served as Hearing Coordinator. The Hearing Coordinator issued his Recommendations on October 6, 2008.

My responsibility is to render a decision 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 provided. Specifically,

- I have read the transcript of the public hearing conducted in Coeur d'Alene, Idaho on September 9, 2008.
- I have reviewed the record including all documents and exhibits.
- I have examined the Hearing Coordinator's Recommendations in light of the entire record.

Encroachments, including buoys, placed on the navigable waters, require a permit issued by the Idaho Department of Lands pursuant to the requirements of Title 58, Chapter 13, Idaho Code, and the Rules for the Regulation of Beds, Waters and Airspace over Navigable Lakes in the State of Idaho, IDAPA 20.03.04, as promulgated by the State Board of Land Commissioners.

II. FINDINGS OF FACT

I concur with the Findings of Fact presented by the Hearing Coordinator.

III. CONCLUSIONS OF LAW

I concur with the Conclusions of Law presented by the Hearing Coordinator.

IV. FINAL ORDER

On the basis of the record, it is my order that Encroachment Permits L-95-S-2809C and D be approved and the permits be issued by the Mica Supervisory Area.

This is a final order of the agency. If the Applicant, or a party who appeared at the hearing, is aggrieved by the director's final decision, they shall have the right to have the proceedings and final decision of the director reviewed by the district court in the county in which the encroachment is proposed. A notice of appeal must be filed within thirty (30) days from the date of the final decision in accordance with IDAPA 20.03.04.030.09.

DATED this 9th day of October, 2008.

Robert M. Bacon *Division Administrator*
for GEORGE B. BACON *Lands, Minerals & Range*
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of October, 2008, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

- | | |
|--|---|
| Steve Schuster
Idaho Department of Lands
300 N. 6 th St. Ste. 103
PO Box 83720
Boise, ID 83720-0050 | <input type="checkbox"/> U.S. Mail, postage prepaid
<input checked="" type="checkbox"/> Hand Delivery
<input type="checkbox"/> Federal Express
<input type="checkbox"/> Facsimile: _____
<input type="checkbox"/> Statehouse Mail |
| Mike Haman
PO Box 2155
Coeur d'Alene, ID 83816-2155 | <input checked="" type="checkbox"/> U.S. Mail, postage prepaid
<input type="checkbox"/> Hand Delivery
<input type="checkbox"/> Federal Express
<input type="checkbox"/> Facsimile: _____
<input type="checkbox"/> Statehouse Mail |
| William C Greenwood
2924 West Blueberry Circle
Hayden, ID 83835-8430 | <input checked="" type="checkbox"/> U.S. Mail, postage prepaid
<input type="checkbox"/> Hand Delivery
<input type="checkbox"/> Federal Express
<input type="checkbox"/> Facsimile: _____
<input type="checkbox"/> Statehouse Mail |
| John F. Magnuson
PO Box 2350
Coeur d'Alene, ID 83816-2350 | <input checked="" type="checkbox"/> U.S. Mail, postage prepaid
<input type="checkbox"/> Hand Delivery
<input type="checkbox"/> Federal Express
<input type="checkbox"/> Facsimile: _____
<input type="checkbox"/> Statehouse Mail |
| Richard D. Barclay
1203 East Lakeshore Drive
Coeur d'Alene, ID 83814-3832 | <input checked="" type="checkbox"/> U.S. Mail, postage prepaid
<input type="checkbox"/> Hand Delivery
<input type="checkbox"/> Federal Express
<input type="checkbox"/> Facsimile: _____
<input type="checkbox"/> Statehouse Mail |
| Van D. Bennett
720 ½ South 11 th St.
Coeur d'Alene, ID 83814-3810 | <input checked="" type="checkbox"/> U.S. Mail, postage prepaid
<input type="checkbox"/> Hand Delivery
<input type="checkbox"/> Federal Express
<input type="checkbox"/> Facsimile: _____
<input type="checkbox"/> Statehouse Mail |

Gerald R. Frank
1425 East Lakeshore Drive
Coeur d'Alene, ID 88814-3834

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Maidy Kress
604 South 13th St.
Coeur d'Alene, ID 83814-3818

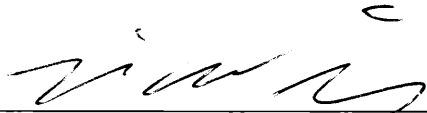
- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Mike Denney
Department of Lands
3706 Industrial Avenue South
Coeur d'Alene, ID 83815

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

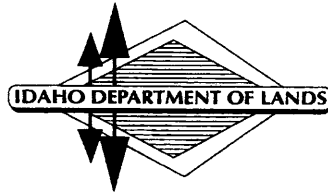
George B. Bacon
Idaho Department of Lands
300 N. 6th St. Ste. 103
PO Box 83720
Boise, ID 83720-0050

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail



ERIC WILSON
IDL Program Manager - Navigable Waters and Minerals

**BUREAU OF SURFACE AND
MINERAL RESOURCES**
300 N. 6th St. Ste 103
PO Box 83720
Boise ID 83720-0050
Phone (208) 334-0200
Fax (208) 334-3698



GEORGE B. BACON, DIRECTOR
EQUAL OPPORTUNITY EMPLOYER

STATE BOARD OF LAND COMMISSIONERS
C. L. "Butch" Otter, Governor
Ben Ysursa, Secretary of State
Lawrence G. Wasden, Attorney General
Donna M. Jones, State Controller
Tom Luna, Sup't of Public Instruction

October 6, 2008

MEMORANDUM

TO: George B. Bacon, Director

FROM: Eric Wilson, Navigable Waters/Minerals Program Manager

SUBJECT: Public Hearing – Nonnavigational Encroachments L-95-S-2809C and D for
City of Coeur d'Alene

I. INTRODUCTION

The following document, which includes a recommendation for your consideration, was prepared following a public hearing conducted by the Idaho Department of Lands (IDL). The public hearing was conducted in conjunction with the processing of two (2) encroachment permits (L-95-S-2809C and D) on Lake Coeur d'Alene, a navigable lake in Idaho. The applications propose the addition of buoys 200 feet from the ordinary high water mark along City Beach and Sanders Beach and the repositioning of existing buoys. Jurisdiction in this matter rests with IDL pursuant to Idaho Code § 58-1303, which empowers the State Board of Land Commissioners to regulate, control, and permit encroachments on, in, or above the beds or waters of the navigable lakes of Idaho.

II. FINDINGS OF FACT

1. On June 13, 2008, the City of Coeur d'Alene (Applicant) submitted to IDL two (2) encroachment permit applications (L-95-S-2809C and D) requesting approval to construct encroachments on Lake Coeur d'Alene. The applications are incorporated into this document by reference.

2. L-95-S-2809C proposes to add two buoys and reposition the three existing buoys offshore of Sanders Beach near East Lakeshore Drive. The resulting five buoys would be 200 feet offshore from 12th Street to the Jewett House. The buoys would be spaced 300 feet, or 100 yards, apart. L-95-S-2809D proposes to add five additional buoys offshore of City Beach near West Lakeshore Drive. These buoys would be 200 feet

offshore from approximately Forest Drive to Independence Point. The buoys would also be spaced 300 feet, or 100 yards, apart. Seven existing buoys are present 300, 400, and 500 feet off shore to keep boat traffic away from swimmers. No changes are proposed to these seven buoys.

3. IDL initiated the processing of L-95-S-2809C and D as encroachments pursuant to the Lake Protection Act (Idaho Code § 58-1306) and the associated Rules (IDAPA 20.03.04.030). On June 30th, 2008 and July 7th, 2008, IDL published the required Notice of Application in the Coeur d'Alene Press newspaper for the encroachment permit applications submitted by Applicant. The Notice of Application is incorporated into this document by reference.

4. In a letter dated June 30th, 2008, IDL notified several agencies, organizations, and persons of the encroachment permit applications submitted by Applicant and requested that the parties provide comments to IDL. Those notified included:

- Idaho Department of Fish and Game
- Idaho Department of Environmental Quality
- Idaho Department of Water Resources
- U.S. Army Corps of Engineers
- Panhandle Health District
- Kootenai County Parks, Recreation, and Waterways
- Kootenai County Marine Division
- Lakes Commission
- Kootenai Environmental Alliance
- Spokane River Homeowners Association
- Eleven (11) littoral homeowners along Sanders Beach
- Eight (8) littoral homeowners along City Beach

The letter is incorporated into this document by reference.

5. IDL received two (2) letters from adjacent neighbors and a member of the public before July 30, 2008, the deadline for hearing requests. One letter, from John F. Magnuson representing Sanders Beach littoral owners Wes Delaney, Dr. John Thomas, Dawn Kettel, and Gerald R. Frank, stated concerns including the adverse impact on the littoral rights of the Sanders Beach residents. The other letter, from Ronald and Cheryl Shields, supported the encroachment applications. These letters are incorporated into this document by reference.

6. Based on a request by Mr. Magnuson on behalf of the four Sanders Beach littoral owners previously mentioned, and in accordance with IDAPA 20.03.04.030, IDL initiated a public hearing process for the proposed encroachments. The public hearing was scheduled for September 9th, 2008 at 6:00 pm at the IDL office in Coeur d'Alene. On August 22nd, 2008 and August 29th, 2008 IDL published the required Notice of Hearing in the Coeur d'Alene Press. The Notice of Hearing is incorporated into this document by reference.

7. Mr. Magnuson is also representing Wes Delaney, Dr. John Thomas, Dawn Kettel, and Gerald R. Frank in a different matter related to encroachments on Sanders Beach. These four littoral owners at Sanders Beach applied for encroachment permits in 2006 and 2007 for single-family docks. Objections to these permits were raised which ultimately led to a consolidated contested case hearing on March 10, 2008. David High was the hearing officer, and the four applications were consolidated into two case numbers, L-LP-07-002 and L-LP-07-003. The decision from that hearing was to deny all four encroachment permits for the docks. The applicants have appealed that decision and it is now under judicial review as Kootenai County Case Number CV 08-5959, which will be referred to in the current proceeding as the "Kootenai County case". Several exhibits from the High contested case hearing and the "Kootenai County case" were entered into the record for the matter before us. While the "Kootenai County case" is a separate proceeding and does not directly concern the matter before us, these exhibits contain a history of Sanders Beach that is pertinent to the current application from the City of Coeur d'Alene. Appendix 1 attached to this recommendation lists the exhibits entered into the record in the matter before us. These exhibits will be referenced through the remainder of this decision. All of the exhibits are incorporated into this document by reference.

8. A letter dated August 19th, 2008 IDL notified the following agencies and individuals of the scheduled hearing:

- Idaho Department of Fish and Game
- Idaho Department of Environmental Quality
- Idaho Department of Water Resources
- U.S. Army Corps of Engineers
- Panhandle Health District #1
- Kootenai County Marine Division
- Kootenai Environmental Alliance
- Lakes Commission
- City of Coeur d'Alene
- City of Coeur d'Alene Fire Department
- Eleven (11) littoral homeowners along Sanders Beach
- Eight (8) littoral homeowners along City Beach

The letter is incorporated into this document by reference.

9. On September 3rd, 2008 IDL received an e-mail from Barb Crumpacker in support of the application. She represents about 30 swimmers on the Sanders Beach Swim Team and many other triathlon and Iron Man competitors. She stated that the buoys are especially needed to protect the swimmers from the non-locals who rent boats and jet skis. Five generations of her family have learned to swim at Sanders Beach.

10. On September 9th, 2008 IDL held a public hearing at 6:00 pm in IDL's Coeur d'Alene office. Mr. Eric Wilson, Navigable Waters/Minerals Program Manager, served as hearing coordinator. In attendance were Mr. Carl Washburn, IDL Navigable Waters

Specialist; Jarrod Kovosh, IDL Navigable Waters Technician; Mr. Mike Haman, representing Applicant; Mr. William Greenwood, representing Applicant; and seven (7) members of the public. The public hearing was recorded on audio tape and was subsequently transcribed. The transcript of the public hearing is incorporated into this document by reference.

a. The Applicant, through the testimony of Mr. Haman and Mr. Greenwood, provided a brief overview of the project. The application is to add additional buoys and reposition the existing buoys one hundred yards apart so the triathlon community and swimmers can gauge their swimming distances. The existing buoys at Sanders Beach have been permitted since 1982. The buoys are needed to protect the swimmers and other recreationalists by marking a “no boating zone.” This makes the buoys both a nonnavigational encroachment and a navigational encroachment. The buoys will only be present during the summer months. Mr. Haman testified that public use, including swimming, in this area goes back at least 100 years. Sanders Beach is generally the area from 11th Street eastward past the 15th Street public access point and includes the public beach in front of Jewett House. The current property owners purchased their littoral lots knowing that Sanders Beach was a public swimming area. As set forth in paragraph 7, Supra, The four littoral property owners represented by Mr. Magnuson applied for dock permits along Sanders Beach between 11th and 15th Streets, and their applications were denied by IDL. Copies of the Hearing Officer’s recommendation (Exhibit A) and IDL’s Final Order (Exhibit B) from the March 10, 2008 hearing on Case Numbers L-LP-07-002 and L-LP-07-003 were presented at the hearing on the matter before us and are incorporated into this document by reference. These documents are also listed in the attached Appendix 1.

b. Testimony in opposition to the project was mainly presented by John Magnuson, who represents the following Sanders Beach littoral owners between 11th and 15th Streets; Wes Delaney, Dr. John Thomas, Dawn Kettel, and Gerald R. Frank. These four littoral owners are appealing IDL’s denial of encroachment permits for docks. Mr. Dick Bartley, another littoral owner on Sanders Beach between 11th and 15th Streets, and Mr. Gerald R. Frank, a party in the “Kootenai County case”, also testified in opposition to the project. Only the buoys in front of Sanders Beach are being contested. Mr. Magnuson stated that the 1982 permit application was not noticed properly and was therefore illegally approved. Five requests have been made for IDL to revoke the 1982 permit, but no revocation proceedings have been initiated. The beach area is privately owned. The swim buoys could easily be placed farther east in front of Jewett House and the resort beach open to the public, all of which is also part of Sanders Beach. By placing them in front of these private littoral lots, the landowner’s littoral rights have been taken away. The line of navigability in this area is less than 200 feet out from the 2128 lake level. The buoys are nonnavigational encroachments. Mr. Magnuson referred to Title 58, Chapter 13, Idaho Code, Section 58-1306(e) as evidence that the permit should be denied, and stated that the lake elevation of 2128 was an artificial high water mark. A map drawn by Mr. Frank at the hearing is

incorporated into this document by reference, and a series of exhibits from Mr. Magnuson were entered into the record at the hearing and are also incorporated into this document by reference. Mr. Magnuson's exhibits are listed in the attached Appendix 1.

c. One member of the public, Maily Kress, spoke in support of the project. Boaters and swimmers do not mix, and the buoys keep them separate. The only other similar place to swim is the beach off West Lake Shore Drive.

11. Sanders Beach has been used as a public swimming and recreation area for at least 50 years, as concluded by Hearing Officer David High on page 13 of Exhibit A. Michael Haman, representing Applicant in the matter before us, testified that the public has been using Sanders Beach for at least 100 years. This is supported by an e-mail from Barb Crumpacker stating that five generations of her family learned to swim at Sanders Beach. The objectors offered no testimony to refute the length of public use at Sanders Beach.

12. Public use of Sanders Beach continues to be heavy, even after the decision of In re Sanders Beach, 143 Idaho 443, 147 P.3d 75 (2006). Coeur d'Alene mayor Sandi Bloem testified at the March 10, 2008 hearing (Pages 4 through 7 of Exhibit A) that several hundred people may be present in the water, at the same time, adjacent to Sanders Beach.

13. The City of Coeur d'Alene Ordinance 8.25 (Exhibit 3) passed in 1982 prohibited the operation of motor-driven water craft within 200 feet of the shoreline between the west edge of the 12th Street right-of-way and the eastward city limit on Sanders Beach. This same ordinance also stated that the area so restricted would be indicated by appropriate buoys. The title of Ordinance 8.25 is City Swimming Beach and Docks.

14. An aerial map (Exhibit 1) indicates that a single-family dock on the west end of Sanders Beach (Brett dock) extends approximately 60 feet from the ordinary high water mark. Mr. Magnuson, on page 21 of Exhibit 34, stated that a single family dock on the Jaeger lot east of Jewett house extends approximately 100 feet from the ordinary high water mark.

15. Mr. Gerald Frank, one of the dock applicants in the "Kootenai County case", testified in the March 10, 2008 hearing (Page 3 of Exhibit A) that the water depth at the end of his 20-foot long proposed dock would be approximately six feet, and not two feet as stated by Mr. Magnuson, the appellant's representative, at the hearing in the matter before us.

16. The 1982 permit drawings in Exhibit 4 suggest that the buoys will be in water approximately 16 feet in depth at the east end of Sanders Beach and 25 feet in depth at the west end of Sanders Beach. All Buoys were to be 200 feet from the 2128 shoreline. The permit was dated July 20, 1982, and the location is listed as Gov't. Lot 5, Section 24, Township 50 North, Range 4 West, B.M., which is the legal description of Sanders

Beach. The 1982 permit was issued for regulatory buoys.

17. The City of Coeur d'Alene's request to add more buoys to their 1982 permit (Exhibit 5) is dated September 22, 1982. This letter states that swimming buoys were desired by the City. An application with a date stamp of September 24, 1982 (Exhibit 5) lists the additional buoy location as S1/2NE1/4 Section 14, Township 50 North, Range 4 West, B.M., which is the legal description of City Beach.

18. The City of Coeur d'Alene has included Sanders Beach to at least the eastern extent of the Jewett property in the City limits.

19. The presumed ordinary high water mark of Lake Coeur d'Alene is 2128 feet, as determined by the Idaho Supreme Court in Erickson v. State, 132 Idaho 208, 970 P.2d 1 (1998) and In re Sanders Beach, 143 Idaho 443, 147 P.3d 75 (2006).

III. CONCLUSIONS OF LAW

1. The Idaho Board of Land Commissioners (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 agency of the Board, as per Idaho Code § 58-119.

2. Lake Coeur d'Alene is a navigable lake as defined by Idaho Code § 58-1302(a). Pursuant to 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.

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. 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 in Idaho Code § 58-1201 through 1203. This statute protects the property rights of private land owners, including the ability to utilize their riparian rights as a means to access the waters of the navigable lakes of Idaho.

5. IDL shall also make decisions on proposed encroachments in accordance with the Public Trust Doctrine as explained by the Idaho Supreme Court in Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085 (1983) (KEA) and subsequent cases. The Supreme Court in KEA determined that public trust uses include those of fish and wildlife habitat, recreation, aesthetic beauty, and water quality. The court in KEA also stated that mere compliance of IDL with its' legislative authority is not sufficient to determine if their actions comport with the requirements of the Public Trust Doctrine.

6. L-95-S-2809C is the only application objected to. The July 30, 2008 objection letter did not specifically state which application was being objected to. This letter just referred to the Notice of Application, which jointly notified both L-95-S-2809C (Sanders Beach buoys) and L-95-S-2809D (City Beach buoys). The hearing notification only referenced L-95-S-2809C, and no testimony was given objecting to L-95-S-2809D. During the hearing, Mr. Magnuson specifically clarified that the objection was only related to L-95-S-2809C for the buoys near Sanders Beach. L-95-S-2809D may therefore be issued because it meets the requirements under IDAPA 20.03.04.

7. The legality of the 1982 permit approval is a moot point and should not be a basis for denial of the current application. The adjacent littoral owner notifications required for processing encroachment applications under Idaho Code § 58-1306 were apparently not sent prior to the 1982 permit approval. Applicant and IDL do not deny this procedural error. The adjacent littoral owner notifications and the public advertisement were completed for the processing of the current permit application. The decision on the current application, therefore, will serve to determine whether or not the buoys meet the requirements contained in Title 58, Chapter 13, Idaho Code, the Public Trust Doctrine, and other pertinent sources of navigable waters law.

8. Idaho Code § 50-221 allows any city to adopt regulations regarding the use of a lake within the city limits and out into the lake one fourth (1/4) of a mile from the low water mark. IDAPA 20.03.04.020.07.d allows a municipality to apply for a noncommercial encroachment intended to improve waterways for public recreation.

9. IDL recognized in 1982 that the city wanted to mark a public swimming area with the “regulatory buoys”, and the purpose of the buoys was to keep motorized boats out of the swimming area. Without the swimming area, the buoys would not be needed in this location. As shown in Exhibits 2 and 3, all of the shoreline within the corporate limits of the City of Coeur d’Alene has use restrictions, but only the public swimming areas at Sanders Beach and City Beach have a prohibition against all motor-driven water craft. Sanders Beach and City Beach are also marked by buoys. The City of Coeur d’Alene does not have any other buoys under their control. The only logical reason to exclude motor-driven water craft is that they are incompatible with the other established uses, such as swimming. By objecting to the proposed buoys, the four littoral owners represented by Mr. Magnuson are essentially objecting to 100 years of public recreation and swimming. As stated by the Applicant at the hearing, the four littoral owners purchased their properties knowing the history of public use at Sanders Beach. The buoys were in place for approximately 25 years before the objectors requested that permit L-95-S-2809 be revoked. If the objectors in the matter at hand still object to the City’s designation of Sanders Beach as a non-motorized, public, recreational and swimming area, then they should address their objection with the City. The alleged lack of proper compensation for the littoral owners’ loss of littoral rights is beyond the scope of this hearing decision and the authority of IDL, and that should also be addressed to the city.

10. The stipulation regarding a public easement in the 1982 permit was either never needed or has been met. The 1982 permit was issued "... subject to ... clarification of public easement on Sanders Beach." The alleged public easement on private property was resolved in State ex rel Haman v. Fox, 100 Idaho 140, 594 P.2d1093 (1979) when the Supreme Court determined that no public easement existed on the private property. Encroachment permit L-95-S-2809 was issued in 1982, three years after State ex rel Haman v. Fox. IDL is not aware at this time why the condition was placed in the permit, but apparently the public easement issue on private land had been resolved at that time.

Mr. Magnuson asserted in his testimony, and a letter dated April 16, 2007 (Exhibit 30), that the Supreme Court in In re Sanders Beach, 143 Idaho 443, 147 P.3d 75 (2006) also clarified the lack of a public easement on Sanders Beach. While In re Sanders Beach clearly established that the public does not have a right to trespass on private land above the 2128 lake level, that decision also addressed public access below the 2128 lake level. Two of the littoral owners represented by Mr. Magnuson, Wesley Delaney and Gerald Frank, asserted in In re Sanders Beach that they could exclude the public from using the lakebed below the 2128 lake level when it was not covered by water. The Supreme Court in In re Sanders Beach 143 Idaho 443, 147 P.3d 75 (2006) expressly denied the littoral owners' right to exclude the public from using the lakebed when it was not covered with water. Sanders Beach, therefore, goes below the 2128 lake level, and Mr. Magnuson admitted in the hearing that the sand was continuous. Thus, Sanders Beach is not restricted to the area above the ordinary high water mark of 2128, and the public may use that portion of Sanders Beach below the ordinary high water mark of 2128.

11. IDAPA 20.03.04.010.02 defines an aid to navigation as buoys, warning lights, and other encroachments in aid of navigation intended to improve waterways for navigation.

12. IDAPA 20.03.04.010.15 defines navigational encroachments as docks, piers, jet ski and boat lifts, buoys, pilings, breakwaters, boat ramps, channels or basins, and other facilities used to support water craft and moorage on, in, or above the beds or waters of a navigable lake.

13. IDAPA 20.03.04.010.16 defines nonnavigational encroachments as all encroachments on, in, or above the beds or waters of a navigable lake, including landfills, bridges, utility and power lines, or other structures not constructed primarily for use in aid of navigation.

14. IDAPA 20.03.04.030.02 states that nonnavigational encroachments will normally not be approved by the Department and will be considered only in cases involving major environmental, economic, or social benefits to the general public, and approval under those circumstances is authorized only when consistent with the public trust doctrine and when there is no other feasible alternative with less impact on public trust values.

15. The proposed encroachments appear to have characteristics of both navigational

and nonnavigational encroachments. Applicant stated during the hearing that they are both navigational and nonnavigational. Mr. Magnuson, however, stated that they are nonnavigational. Nonnavigational encroachments demand a higher level of scrutiny due the requirements in IDAPA 20.03.04.030.02, so the distinction may have relevance for the decision in the matter before us. Permit L-95-S-2809 was issued for regulatory buoys. The City uses the buoys to help enforce City Ordinance 8.25 (Exhibit 3) that restricts motorized water craft usage. The buoys direct boat traffic away from the Sanders Beach area. The definition of navigational encroachments includes buoys, but it uses the qualifying term "...and other facilities used to support water craft and moorage..." Buoys that are clearly navigational encroachments are commonly used for moorage, marking hazards, identifying travel lanes for boats, etc. Some buoys, however, are used to mark the location of water quality data recorders, swimming areas, and other purposes that do not directly aid navigation. Buoys which are not used to support water craft and moorage may therefore not be navigational encroachments. The purpose of the encroachments in the matter before us is to mark the swimming area, provide a distance gauge for the swimmers, and keep boats away from the swimmers. None of these reasons directly support water craft or moorage. Due to the uncertain classification of the buoys, this decision will err on the side of caution and treat the buoys as nonnavigational encroachments. This also gives deference to the objectors' claims.

16. The duration and usage of Sanders Beach for swimming and recreation is pertinent to the determination of whether the proposed buoys meet the standard for approval in IDAPA 20.03.04.030.02. While the exact number of years of public usage is not clear, Sanders Beach has been used by the public for swimming and recreation long before 1982 when Applicant attempted to transform an unofficial but community recognized swimming area into an official city swimming area through City ordinances and buoys. Mr. Magnuson stated on page 16 of Exhibit 34 that swimmers in Lake Coeur d'Alene have over 120 miles of shoreline to swim along. While that may be literally true, it is not practically true. Motorized use around the lake precludes safe swimming except in designated and signed swimming areas. Sandi Bloem, Douglas Eastwood, and David Moseley testified during the March 10, 2008 hearing (pages 5, 7, and 8, respectively, of Exhibit A), that motorized use was greatly curtailed after the buoys were installed in 1982. Sanders Beach and City Beach are the only long distance swimming areas protected from motorized use on Lake Coeur d'Alene, and are among the few swimming areas of any size on the lake with public access. The Sanders Beach swimming area thus provides a major social and recreational benefit to the public. In addition, Triathlon and Iron Man events have been held in Coeur d'Alene for many years, as stated in testimony by Barb Crumpacker and Mike Haman during the current matter at hand, by Maily Kress at the March 10, 2008 hearing (Pages 11 and 12 in Exhibit A), and by the City of Coeur d'Alene in its letter dated January 11, 2007 (Exhibit 9). Bill Greenwood testified for the matter at hand that the current application is the result of a request from the triathlon community and swimmers wanting to gauge their conditioning. As a training area for these events, Sanders Beach helps to support the events which provide major economic benefits to the general public. These major social and economic benefits are public uses recognized by the Public Trust Doctrine and provide the justification for approval under IDAPA 20.03.04.030.02.

17. IDAPA 20.03.04.010.20 defines the line of navigability as a line located at such distance waterward of the low water mark established by the length of existing 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.

18. IDAPA 20.03.04.010.34 states that littoral right lines extend out to the line of navigation.

19. The existing Jaeger and Brett docks, the shoreline profiles with the 1982 buoy application (Exhibit 4), and the testimony from the objectors indicate that the line of navigability at Sanders Beach is at the most 100 feet from the ordinary high water mark. Mr. Magnuson stated during the hearing that the line of navigability is less than 200 feet from the 2128 shoreline. The proposed buoys are located 200 feet from the ordinary high water mark, which places them beyond the littoral right lines of the littoral owners. The buoys would not interfere with the placement of the 20-foot long docks that are the subject of the "Kootenai County case", nor would they hinder the proposed nonmotorized use of the proposed docks. If anything, the buoys would enhance the use of nonmotorized craft by helping to keep Sanders Beach free of motorized use and the large wakes associated with some motorized craft. The proposed buoys are outside of the objectors' littoral rights, and as a result the proposed buoys do not interfere with the objectors' littoral rights.

20. The Sanders Beach dock applications in the "Kootenai County case" are beyond the scope of the application that is the matter at hand. Portions of the record for that case, however, contain pertinent information for the matter at hand and are therefore referenced in this decision. As previously discussed, the buoys would have no effect on these docks if they are ultimately approved. Therefore, no priority in time and right between the dock applications and the buoy applications needs to be established.

21. The placement of the buoys is appropriate given the circumstances that exist at Sanders Beach. Richard Barclay and Gerald Frank testified that the city should place the buoys in front of their own property at Jewett House and the portion of Sanders Beach east of Jewett House. The application does in fact show one of the buoys in front of Jewett House. Approximately 500 feet east of Jewett House, however, is a single-family dock (Jaeger dock) that extends 100 feet into the lake. This dock precludes safe swimming at this end of Sanders Beach. Also, a point of rock just east of the Jaeger dock prevents easy access to the public beach farther east in front of the golf course. Lastly, City Ordinance 8.25 prohibits motorized craft at Sanders Beach only as far east as the City limits, which is approximately the Jewett House. As a result, the proposed buoy locations appear to be appropriate for the swimming and recreational use by the general public.

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

IV. HEARING COORDINATOR CONCLUSIONS AND RECOMMENDATIONS

Based upon the information provided to me as the hearing coordinator, and based upon the fact that the encroachment permit application for the buoys meets all the requirements of Idaho Code § 58-1301 *et. seq.* (the Lake Protection Act) and IDAPA 20.03.04, I recommend that the Director of IDL issue a Final Order stating that the Mica Supervisory Area of IDL should **approve** both encroachment permit applications submitted by the applicant.

DATED this 6th day of October, 2008.



ERIC WILSON
Hearing Coordinator

Appendix 1

Submitted by Mike Haman, Representing City of Coeur d'Alene

- Exhibit A Memorandum Discussion of Significant Testimony, Findings of Fact, Conclusions of Law, and Recommendation (Case Numbers L-LP-07-002 and L-LP-07-003, from the March 10, 2008 Contested Case hearing).
- Exhibit B Final Order for Case Numbers L-LP-07-002 and L-LP-07-003 from the March 10, 2008 Contested Case hearing

Submitted by John Magnuson, Representing Wes Delaney, Dr. John Thomas, Dawn Kettel, and Gerald R. Frank

- Exhibit 1 Aerial Map of Sanders Beach
- Exhibit 2 City of Coeur d'Alene Ordinance 8.24 adopted in 1954
- Exhibit 3 City of Coeur d'Alene Ordinance 8.25 adopted in 1982
- Exhibit 4 Cover letter from IDL dated July 20, 1982 and encroachment permit L-95-S-2809 for three buoys 200 feet from shore at Sanders Beach
- Exhibit 5 Cover letter from City of Coeur d'Alene dated September 22, 1982 and application requesting to add seven buoys at City Beach to encroachment permit L-95-S-2809
- Exhibit 6 Encroachment permit application L-95-S-5150 from Gerald R. Frank
- Exhibit 7 Copy of \$50 check from Gerald R. Frank for permit fee
- Exhibit 8 Faxed notification from IDL to City of Coeur d'Alene regarding the application from Gerald Frank
- Exhibit 9 Letter dated January 11, 2007 from City of Coeur d'Alene to IDL objecting to the Gerald Frank application
- Exhibit 10 Encroachment permit application from Dr. John Thomas
- Exhibit 11 Encroachment permit application from Dawn Kettel
- Exhibit 12 Encroachment permit application from Wes Delaney
- Exhibit 13 A second Encroachment permit application from Wes Delaney
- Exhibit 14 Notification letter from IDL to City of Coeur d'Alene regarding the Wes Delaney encroachment permit application
- Exhibit 15 Notification letter from IDL to City of Coeur d'Alene regarding the Dawn Kettel encroachment permit application
- Exhibit 16 Notification letter from IDL to City of Coeur d'Alene regarding the John Thomas encroachment permit application
- Exhibit 17 Notification letter from IDL to City of Coeur d'Alene regarding the Wes Delaney encroachment permit application
- Exhibit 18 Notification letter from IDL to City of Coeur d'Alene regarding the Wes Delaney encroachment permit application
- Exhibit 19 Notification letter from IDL to City of Coeur d'Alene regarding the Wayne Nash encroachment permit application
- Exhibit 20 Letter from John Magnuson to IDL dated March 21, 2007

requesting revocation of the City of Coeur d'Alene's encroachment permit L-95-S-2809 for buoys. This letter included a copy of the Idaho Supreme Court's decision in In re Sanders Beach, 143 Idaho 443, 147 P.3d 75 (2006), the July 20, 1982 cover letter for encroachment permit L-95-S-2809, and encroachment permit L-95-S-2809.

- Exhibit 21 Letter from Greg Crimp to IDL dated March 22, 2007 objecting to the encroachment applications from Wes Delaney and Wayne Nash.
- Exhibit 22 Letter from IDL to John Magnuson dated March 26, 2007 regarding revocation of encroachment permit L-95-S-2809
- Exhibit 23 Letter dated March 28, 2007 from City of Coeur d'Alene to IDL objecting to the Wes Delaney application
- Exhibit 24 Letter dated March 28, 2007 from City of Coeur d'Alene to IDL objecting to the Dawn Kettell application
- Exhibit 25 Letter dated March 28, 2007 from City of Coeur d'Alene to IDL objecting to the John Thomas application
- Exhibit 26 Letter dated March 28, 2007 from City of Coeur d'Alene to IDL objecting to the Wes Delaney application
- Exhibit 27 Letter from IDL to John Magnuson dated March 26, 2007 regarding revocation of encroachment permit L-95-S-2809
- Exhibit 28 Letter from John Magnuson to IDL dated April 3, 2007 requesting clarification on whether or not revocation of the City of Coeur d'Alene's encroachment permit L-95-S-2809 for buoys will be addressed by the hearing officer in Case Number L-LP-07-002
- Exhibit 29 Letter from IDL to John Magnuson dated April 9, 2007 regarding Case Number L-LP-07-002 and the requested revocation of encroachment permit L-95-S-2809
- Exhibit 30 Letter from John Magnuson to IDL dated April 16, 2007 regarding the City of Coeur d'Alene's encroachment permit L-95-S-2809 for buoys
- Exhibit 31 Letter from IDL to John Magnuson dated May 1, 2007 regarding Sanders Beach
- Exhibit 32 Letter from John Magnuson to IDL dated May 9, 2007 regarding the public swimming area at Sanders Beach
- Exhibit 33 Memorandum Discussion of Significant Testimony, Findings of Fact, Conclusions of Law, and Recommendation (Case Numbers L-LP-07-002 and L-LP-07-003, from the March 10, 2008 Contested Case hearing)
- Exhibit 34 Applicant's Post-Hearing Memorandum for Case Number L-LP-07-002

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of October, 2008, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

- | | |
|--|---|
| Steve Schuster
Idaho Department of Lands
300 N. 6 th St. Ste. 103
PO Box 83720
Boise, ID 83720-0050 | <input type="checkbox"/> U.S. Mail, postage prepaid
<input checked="" type="checkbox"/> Hand Delivery
<input type="checkbox"/> Federal Express
<input type="checkbox"/> Facsimile: _____
<input type="checkbox"/> Statehouse Mail |
| Mike Haman
PO Box 2155
Coeur d'Alene, ID 83816-2155 | <input checked="" type="checkbox"/> U.S. Mail, postage prepaid
<input type="checkbox"/> Hand Delivery
<input type="checkbox"/> Federal Express
<input type="checkbox"/> Facsimile: _____
<input type="checkbox"/> Statehouse Mail |
| William C Greenwood
2924 West Blueberry Circle
Hayden, ID 83835-8430 | <input checked="" type="checkbox"/> U.S. Mail, postage prepaid
<input type="checkbox"/> Hand Delivery
<input type="checkbox"/> Federal Express
<input type="checkbox"/> Facsimile: _____
<input type="checkbox"/> Statehouse Mail |
| John F. Magnuson
PO Box 2350
Coeur d'Alene, ID 83816-2350 | <input checked="" type="checkbox"/> U.S. Mail, postage prepaid
<input type="checkbox"/> Hand Delivery
<input type="checkbox"/> Federal Express
<input type="checkbox"/> Facsimile: _____
<input type="checkbox"/> Statehouse Mail |
| Richard D. Barclay
1203 East Lakeshore Drive
Coeur d'Alene, ID 83814-3832 | <input checked="" type="checkbox"/> U.S. Mail, postage prepaid
<input type="checkbox"/> Hand Delivery
<input type="checkbox"/> Federal Express
<input type="checkbox"/> Facsimile: _____
<input type="checkbox"/> Statehouse Mail |
| Van D. Bennett
720 ½ South 11 th St.
Coeur d'Alene, ID 83814-3810 | <input checked="" type="checkbox"/> U.S. Mail, postage prepaid
<input type="checkbox"/> Hand Delivery
<input type="checkbox"/> Federal Express
<input type="checkbox"/> Facsimile: _____
<input type="checkbox"/> Statehouse Mail |
| Gerald R. Frank
1425 East Lakeshore Drive
Coeur d'Alene, ID 88814-3834 | <input checked="" type="checkbox"/> U.S. Mail, postage prepaid
<input type="checkbox"/> Hand Delivery
<input type="checkbox"/> Federal Express
<input type="checkbox"/> Facsimile: _____
<input type="checkbox"/> Statehouse Mail |

Maidy Kress
604 South 13th St.
Coeur d'Alene, ID 83814-3818


- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Mike Denney
Department of Lands
3706 Industrial Avenue South
Coeur d'Alene, ID 83815

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

George B. Bacon
Idaho Department of Lands
300 N. 6th St. Ste. 103
PO Box 83720
Boise, ID 83720-0050

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail



ERIC WILSON
IDL Program Manager - Navigable Waters and Minerals