

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 Permit Nos)
L-95-S-2802B – Gary Schmidt and John Mitchell) **FINAL ORDER**
and L-95-S-5328 – Idaho Pines, LLC.)
Applicants.)
_____)

I. NATURE OF PROCEEDINGS/ISSUES

A hearing was held on May 26, 2009 at 1:00 pm PST at the IDL Mica Supervisory Office in Coeur d’Alene, Idaho. Jim Brady served as Hearing Coordinator. The Hearing Coordinator issued his Recommendations on July 7, 2009.

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 hearing conducted in Coeur d’Alene, Idaho on May 26, 2009.
- 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 single and two family docks, 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-2802B and L-95-S-5328 be denied by the Mica Supervisory Area and the Mica Supervisory Area should require D. A. Henneberg to bring his encroachment into compliance. Further, the Mica Supervisory Area should only consider future encroachments for these properties if they use the methods described by the Hearing Coordinator in his recommendation dated July 9, 2009

This is a final order of the agency. If the Applicants, 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 20.03.04.025.09.

DATED this 10th day of July, 2009.



GEORGE B. BACON
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of July, 2009, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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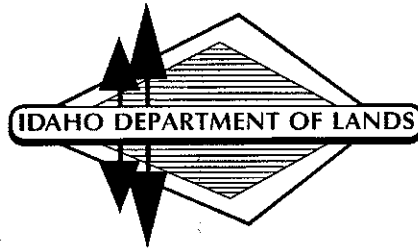
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GEORGE B. BACON, DIRECTOR
EQUAL OPPORTUNITY EMPLOYER

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

July 9, 2009

MEMORANDUM

TO: George B. Bacon, Director

FROM: Jim Brady, Lands Resource Specialist, Sr., Navigable Waters and Minerals, designated Hearing Coordinator

SUBJECT: Recommended Order – Navigational Encroachments L-95-S-2802B – Gary Schmidt and John Mitchell and L-95-S-5328 – Idaho Pines, LLC

I. INTRODUCTION

The following document, which includes a recommendation for your consideration, was prepared following a second hearing conducted by the Idaho Department of Lands (IDL) for these littoral properties in the recent subdivision named Elsa Heights (EHS). The hearing was conducted on May 26, 2009 at 1:00 pm in conjunction with the processing of two (2) encroachment permits (L-95-S-2802B and L-95-S-5328) on Hayden Lake, a navigable lake in Idaho. The applications propose the addition of a two family double slip float dock (L-95-S-2802B) and a single family double slip float dock (L-95-S-5328) adjacent to each other in a small bay of Hayden Lake, Idaho. 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. Please refer to Exhibits A, B, and C attached to this document.
2. On March 26, 2009, Gary Schmidt and John Mitchell (Applicant) submitted to IDL an encroachment permit application (L-95-S-2802B) requesting approval to construct a joint two family float dock on Hayden Lake. The proposal is for a 10' x 16' pier platform, a 3' x 10' ramp and a 29' x 34' double slip float dock extending approximately 60' waterward of the ordinary high water mark (OHWM). The float dock extends from Lot 3 and encroaches on the littoral rights of Lot 2 EHS as indicated by the location of the littoral right lines shown on the application drawing. The Applicant obtained permission

of the Lot 2 owner, Idaho Pines, LLC. Gary Schmidt owns Lot 4 and John Mitchell owns Lot 3, both in EHS. The application is incorporated into this document by reference.

3. On March 24, 2009, Idaho Pines, LLC (Applicant) submitted to IDL an encroachment permit application (L-95-S-5328) requesting approval to reconfigure an existing single family dock from the original littoral property on Hayden Lake. The proposal is to turn an existing double slip float dock 90° clockwise, slip opening to face away from shore and shift the dock south 8'. This will form a 3' x 10' ramp, an 8' x 25' float approach and a 27' x 28' double slip float dock extending 60' waterward of the OHWM. The float dock is primarily in front of Lot 1 EHS but encroaches into the littoral area of Lot 2 EHS as indicated by the location of the littoral right lines shown on the drawing. The Applicant owns Lots 1 and 2 of EHS. The application is incorporated into this document by reference.

4. Because these two encroachment applications are adjacent in EHS, similar in configuration, submitted at nearly the same time, have very similar objections and the outcome will affect all littoral owners in the small narrow bay of Hayden Lake, IDL determined it would be in the best interest of all concerned to combine both encroachment applications into one hearing. Therefore, in accordance with IDAPA 20.03.04.025, IDL initiated a hearing process for the proposed encroachments. The hearing was scheduled for May 26, 2009, at 1:00 pm at the IDL Mica Supervisory Office in Coeur d'Alene. I, Jim Brady, Lands Resource Specialist, Sr., Navigable Waters and Minerals, was designated the Hearing Coordinator. The Notice of Hearing is incorporated into this document by reference.

5. Initially, the investigation indicates the line of navigation may be approximately 60' waterward of the OHWM. Further discussion on the line of navigation is in Conclusions of Law paragraph 9.

6. EHS was created out of a single parcel of land (#5291) with approximately 180' of shoreline. The location of these proposals is in the SE¼ of section 9, T51N, R3W, B. M., Kootenai County, Idaho. Approval from Kootenai County to subdivide this property into four individual littoral lots was granted in August of 2008. Each lot consists of just over 44' of shoreline. Plat approval was requested by Gary and Emma Schmidt. The approved plat is incorporated into this document by reference.

7. L-95-S-2802B and L-95-S-5328 encroachment applications include a drawing indicating littoral right lines between mutual adjacent property lines of Lots 1 and 2, Lots 2 and 3, Lots 3 and 4, Lot 4 and Parcel 8750 (Henneberg), see Exhibit C attached hereto. These littoral right line locations were determined by the Chord Method¹. There is no littoral right line drawn between parcels 8750 and 6812 (Henneberg, D.A. et.al.). The drawing shows a littoral right line between Lot 1 EHS and Mr. Shelton, but no angles are shown indicating the Chord Method was used to determine that littoral right

¹ The Chord Method is done by extending the lot lines to the shoreline. Then, draw lines connecting the points created by the shoreline and lot line. Finally, you bisect the angles formed in the previous step and extend out to the line of navigation.

line. The drawing was prepared by Chad Johnson, PLS, of INC of Post Falls, Idaho, an engineering, surveying and planning company.

8. IDL initiated the processing of L-95-S-2802B as an encroachment pursuant to the Lake Protection Act (Idaho Code § 58-1305) and the associated Rules (IDAPA 20.03.04.025) as a joint two family dock. On March 30, 2009, IDL sent, by regular mail, the required Courtesy Notice of Application to adjacent neighbor Randal Henneberg. The package included a copy of the encroachment permit application submitted by the Applicant (Schmidt/Mitchell). The other adjacent neighbor, Barry Eichelberger (dba Idaho Pines, LLC), had signed the Attachment for Encroachment (form authorizing infringement into setback or littoral area by the Applicant) and this document was submitted with the encroachment application. The Notice of Application is incorporated into this document by reference.

9. IDL initiated the processing of L-95-S-5328 as an encroachment pursuant to the Lake Protection Act (Idaho Code § 58-1305) and the associated Rules (IDAPA 20.03.04.025) as a single family dock. On April 3, 2009, IDL sent, by regular mail, the required Courtesy Notice of Application to adjacent neighbor James Shelton. The package included a copy of the encroachment permit application submitted by the Applicant (Idaho Pines, LLC). The other adjacent neighbor, Gary Schmidt had signed the Attachment for Encroachment (form authorizing infringement into setback or littoral area by the Applicant) and this document was submitted with the encroachment application. The Notice of Application is incorporated into this document by reference.

10. For L-95-S-2802B, IDL received a letter from adjacent neighbor Randal and Pearl Henneberg, dated April 3, 2009, objecting to the two family double slip float dock for Lots 3 and 4 of EHS and the single family double slip float dock for Lot 1 of EHS (L-95-S-5328 which he is not a neighbor to) claiming the proposed location of the L-95-S-2802B dock encroaches into his littoral area and will preclude him from installing a dock on his littoral property and will cause excessive congestion in the small bay.

11. For L-95-S-5328, in addition to the letter from Randal and Pearl Henneberg mentioned above, IDL received a letter from adjacent neighbor James Shelton, dated April 11, 2009, objecting to the single family double slip float dock for Lot 1 of EHS claiming the proposed location of the L-95-S-5328 dock encroaches into his littoral area and will hinder his access to his slip dock which faces Lot 1 of EHS.

12. A letter dated May 8, 2009, IDL notified the following individuals of the scheduled hearing:

- Gary Schmidt
- John Mitchell
- Randal and Pearl Henneberg
- James Shelton
- Idaho Pines, LLC
- Tom Frey, Frey Dock and Barge

- Charles Dodson, Attorney at Law
- John Magnuson, Attorney at Law
- Eric Wilson, PMNWM – Boise
- Mike Denney, Area Manager, Mica Area

The letter is incorporated into this document by reference.

12. On May 26, 2009, IDL held a hearing at 1:00 pm in IDL's Mica Supervisory Office in Coeur d'Alene. Mr. Jim Brady, Lands Resource Specialist, Sr., Navigable Waters and Minerals, served as hearing coordinator. In attendance were Mr. Carl Washburn, IDL Navigable Waters Specialist; Amber Guy, IDL Resource Aid; Mr. Charles M. Dodson, representing Applicant; Mel Schmidt, Randy and Pearl Henneberg, James and Karen Shelton, Gary Schmidt, Chad Johnson and Todd Walker. The hearing was recorded on audio tape and was subsequently transcribed. The transcript of the hearing is incorporated into this document by reference.

a. The Applicant (Idaho Pines, LLC), through the testimony of Mr. Dodson provided a brief overview of the project of Idaho Pines, LLC., a single family double slip float dock. The dock layout was based on the littoral right line drawing under the direction of Chad Johnson, PLS, INC, which utilized the Chord Method, also known as the Cotermious Riparian Right Line Method. The drawings show a littoral right line extending 60' waterward of the OHWM adjacent to Mr. Shelton and 65' waterward of the OHWM adjacent to Mr. Henneberg, claiming this is the established line of navigation.

b. Testimony in opposition from Mr. Shelton claims the proposal is inaccurate because it indicates the dock will be shifted southerly 8' towards his dock, as stated in 6.a. of the Idaho Pines, LLC encroachment application and the dock is already right on the littoral right line. However, the drawing indicates the dock will be 12' northerly of the littoral right line. Mr. Shelton feels the conflicting information should be corrected. Mr. Dodson clarified that the 8' shift came from the original permit, L-96-S-2802; showing that the dock was 23' from the mutual littoral right line and the desired outcome was that the dock would be 12' from the mutual line, $23-8=12$ as stated by Mr. Dodson (actually $23-8=15$). Mr. Shelton feels if the dock encroaches into his littoral area it will devalue his property. Mr. Shelton is concerned that the additional docks in the very shallow bay will have significant impacts to water quality and fish, and additional boats will cause more turbidity.

c. Mr. Dodson then gave a brief overview of the proposal for the two family double slip float dock of Gary Schmidt and John Mitchell (L-95-S-2802B). Mr. Dodson again referred back to the testimony of Mr. Johnson and his depiction of the littoral right lines and the line of navigation. The line of navigation in this case they believe to be 65' waterward of the OHWM because the adjacent dock of D. A. Henneberg, brother of Randal Henneberg, is 65' waterward of the OHWM. Mr. Dodson also noted that both proposals are that the open slip would be pointed away from shore and the back of boats will be in greater than 10' of

water and will not likely cause turbidity when motoring in and out of the slips.

d. Mr. Randal Henneberg testified the current dock for Idaho Pines, LLC., and in front of Idaho Pines, LLC's Lot 1 and 2 EHS, has been enlarged, prior to the current owner, and was never permitted and he did not have the opportunity to object. Mr. Randal Henneberg stated the bay is very shallow and silty and the proposals will make it impossible for him to install a dock in the future. Mr. Randal Henneberg noted that currently, out at 60' in front of his littoral property, the water is only 4.5' deep, and when the lake goes down in late summer, there will only be six inches of water at that distance. Mr. Henneberg believes that since he has been a resident there for 25 years he has more right to a dock than the 4 new lots of EHS and they should be giving up something in terms of the size of an encroachment because EHS is new.

e. Ms. Pearl Henneberg testified she too is concerned that if these two proposals are allowed at their proposed locations, she and her husband will not be able to install a dock in the future because the bay is, shallow, narrow and silty.

f. The hearing coordinator then questioned Mr. Randal Henneberg about the dock that is to the east of his property which belongs to his brother, D. A. Henneberg. Mr. Randal Henneberg says he has been using that dock until he can build his own dock. The dock was permitted originally in 1976 to a Dr. Robert Corbett as a dock 60' long and 20' wide. The hearing coordinator noted there appears to be a new 10' x 25' float dock attached closest to his property. Mr. Randal Henneberg claims the 10' x 25' dock is his dock and has been there for many years and he never made application to place this dock in this location indicating it is currently an unpermitted encroachment. See Exhibit B.

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. Hayden Lake 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 littoral 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. In *Driesbach v. Lynch*, 71 Idaho 501, 234 P.2d 446 (1951), the Idaho Supreme Court set forth general rules which govern establishing littoral zones applicable to adjacent property owners. The courts have striven to see that each shoreline owner shall have his proportionate share of the deep water frontage and all of the rules which have been adopted and applied throughout the years by the courts in relation to this problem have had that end in view; the courts have not hesitated to point out that these rules often require modification under the peculiar circumstances of the case in order to secure an equitable proportionate share, and that where such is the case the courts do not hesitate to invoke a modification to attain such objective.

7. 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.

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

9. At issue here is the determination of littoral right lines to determine the littoral right areas for an equitable apportionment so as to maintain the littoral rights of six lots. This apportionment needs to accommodate the installation of aids to navigation in a narrow, tight radius, shallow bay for five lots (Lots 1 through 4 of EHS and parcel 8750) out to the line of navigation and/or deep water navigation. The proponents submitted encroachment applications suggesting where the littoral right lines should be based on the Chord Method and the line of navigation based on the closest docks to the proposal, see Exhibit C. However, the submitted drawings appear to not be a proportionate share for all lots at where the line on navigation is actually located. In this particular case, due to the narrow tight radius and shallowness of the bay, the line of navigation is best established by a straight line from the northeast corner of the existing permitted Shelton dock, over to the southwest corner of the existing permitted D. A. Henneberg et.al. dock, which is a distance of 108'. These two existing docks are 60' and 65' respectively, out from the shoreline, see Exhibit A and B. The 10' x 25' float dock

discussed in Findings of Fact 12.f above is not considered to be relevant to the issue and is further discussed below in Conclusions of Law 11. Drawing a straight line in this manner to establish the line of navigation results in a littoral right line between Lot 4 EHS and parcel 8750 which is greater than 100', from the shoreline out to the new line of navigation. This measurement was taken by the hearing coordinator, Jim Brady, on June 4, 2009 with the assistance of Al Fonkin, an IDL employee, with a Laser Technology, Inc., TruPulse 200 laser range finder. See Exhibits A and B.

10. The Shelton dock is built in compliance with his encroachment permit and is placed close to the center of his property and is approximately 30' from the littoral right line between his property and Lot 1 EHS. See Exhibit B.

11. The D. A. Henneberg dock does not appear to be constructed in compliance with the encroachment permit issued for the dock. The additional 10' x 25' float dock does not comply with the permit and the structure appears to crowd the littoral right line with Randal and Pearl Henneberg. This dock must be either removed or relocated and permitted. See Exhibit B.

12. The sum of the shoreline of Lots 1 through 4 of EHS and parcel 8750 is equal to 229.54'. Lot 1, 2, 3 and 4 of EHS are each approximately 44' of shoreline, which is 19.5% of the sum of the total shoreline (totaling 78%), and parcel 8750 is 50' of shoreline, which is approximately 22% of the sum of the total shoreline. The line of navigation between the permitted Shelton and D.A. Henneberg docks is 108'. Subtracting the distance from Shelton's dock to the estimated location of the littoral right line, between Shelton and Lot 1 EHS along the new line of navigation, is approximately 18'. I estimated this littoral right line to be slightly skewed to the south because the shoreline in this location is relatively straight. Then, subtracting the 10' set back from the littoral right line between Shelton and Lot 1 EHS into Lot 1 EHS, leaves approximately 80' from that point to D. A. Henneberg's southwest corner of his dock. I believe that the D. A. Henneberg dock is on, if not crossing, the littoral right line between Randal Henneberg and D. A. Henneberg, therefore, I have not subtracted a setback distance from that littoral right line. This leaves approximately 80' of line of navigation to apportion between the five lots in an equitable manner. That apportions approximately 17.6' for parcel 8750 at the new line of navigation and approximately 15.6' for each of the 4 EHS parcels at the new line of navigation, see Exhibit B. Please note, these calculations and measurements are estimates from the information supplied in the applications and from measurements made in the field. The specific apportionments should be performed by a professional land surveyor using this methodology in the event an encroachment permit is ultimately desired for these properties.

13. These apportioned points on the new line of navigation should be connected to the corresponding point on the shoreline where the lot lines meet the OHWM to create new littoral right lines. The trapezoids created by the new line of navigation, the new littoral right lines, and the shoreline delineate the littoral area for each lot. This littoral area is where the lot's owners have the right to install aids to navigation to enjoy their

right associated with their waterfront property. See Exhibit B.

14. Applicants and IDL satisfied all procedural requirements in the processing of the application included in Idaho Code § 58-1305 and IDAPA 20.03.04.

IV. HEARING COORDINATOR CONCLUSIONS AND RECOMMENDATIONS

Based upon the following information provided to me as the hearing coordinator:

1. The fact that the encroachment permit applications for the single family double slip dock (L-95-S-5328) and the two family double slip float dock (L-95-S-2802B) uses a method to determine littoral rights that appears to result in a disproportionate share of access to deep water navigation. The littoral right lines for Lot 4 of EHS and parcel 8750 converge prior to the newly established line of navigation, see Exhibit C.
2. Uses a line of navigation that is different than determined by the hearing coordinator.
3. Lacks sufficient evidence and information that the proposed docks are located in a manner providing an equitable proportionate share of the deep water frontage for all lots in this small narrow shallow bay are within the littoral areas defined above.


Therefore, I recommend that the Director of IDL issue a Final Order stating that the Mica Supervisory Area of IDL should **deny** both encroachment permit applications submitted by the applicants, and that any future applications should use the method defined above to determine littoral right lines for this property.

Further it should be understood that future docks for these properties, do not and should not, extend all the way to the new line of navigation, but preserve access for all properties out to deep water navigation.

In addition, the Mica Supervisory Area should require that the D. A. Henneberg encroachment to be brought into compliance within 60 days of this decision or be subject to further enforcement actions under Idaho Code § 58-1308.

Note. The hearing coordinator has been informed by an attorney that two of the three applicants are no longer owners of Lots 1, 2 and 4 EHS.

DATED this 9th day of July, 2009.


JIM BRADY
Hearing Coordinator

Appendix 1

- Exhibit A Photo taken on June 4, 2009 by the hearing coordinator that has been annotated showing the new line of navigation and existing adjacent neighbor docks.
- Exhibit B Sketch showing currently existing layout of the bay, docks, lots, the new line of navigation and littoral areas as determined by the hearing coordinator. Sketch is drawn by the hearing coordinator and is only for illustrative purposes only and is not to scale.
- Exhibit C Exhibit submitted at hearing by Charles Dodson showing applicants' littoral right lines determination, lots and dock locations.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of July, 2009, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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