

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

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of;)
)
Encroachment Permit No. L-95-S-4840A)) **FINAL ORDER**
)
Peter Nemeth, Applicant.)
)
)
)
_____)

I. NATURE OF PROCEEDINGS/ISSUES

A public hearing was held on May 11, 2011 at 6:00 pm PDST at the Federal Building in St. Maries, Idaho. Sid Anderson served as Hearing Coordinator. The Hearing Coordinator issued his Recommendations on June 14, 2011.

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 St. Maries, Idaho on May 11, 2011.
- 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 docks, placed on the navigable waters, require a permit issued by the 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

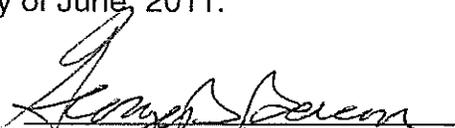
I concur with the Conclusions of Law presented by the Hearing Coordinator.

IV. FINAL ORDER

On the basis of the record, it is my order that Encroachment Permit L-95-S-4840A be approved and the permit be issued to the Applicant by the St. Maries Supervisory Area.

This is a final order of the agency. Any party may file a motion for reconsideration of this final order within twenty (20) days of the date of this final order. The agency will dispose of the petition for reconsideration within thirty (30) days of its receipt, in accordance with IDAPA 20.03.04.030.09.

DATED this 16 day of June, 2011.



GEORGE B. BACON
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of June, 2011, 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. 6th St. Ste. 103
PO Box 83720
Boise, ID 83720-0050

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

Michael L. Fish
174 S. Coeur d'Alene St. – H301
Spokane, WA 99201

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

Marc P. Ellis & Josh J. Castro
3124 W. Riverview Drive
Spokane WA 99205

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

Merle and Carol Humphrey
60 Carley Lane
St. Maries, ID 83861

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

Janet L. Lake
PO Box 65
Smelterville, ID 83868

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

Allen L. Townsend
200 Whiskey Lane
St. Maries, ID 83861

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

John W. Adams
955 S. 4th Street
St. Maries, ID 83861

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

Colin F. Port
30 St. Joe River Park
St. Maries, ID 83861

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

Norm Suenkel
2313 Cromwell
St. Maries, ID 83861

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

Marvin C. Lake
PO Box 65
Smelterville, ID 83868

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

Betty A. Ellis
174 S. Coeur d'Alene St. - H204
Spokane, WA 99201

- 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

Ken Ockfen
St. Joe Area Manager
1806 Main Avenue
St. Maries, ID 83861

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



SID ANDERSON
IDL Program Manager - Navigable Waters

**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
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June 14, 2011

MEMORANDUM

TO: George B. Bacon, Director

FROM: Sid Anderson, Program Manager – Public Trust, Navigable Waters

SUBJECT: Public Hearing – Encroachment L-95-S-4840A for Peter Nemeth

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 a commercial encroachment permit (L-95-S-4840A) for 28 docks on the St. Joe River.

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 July 30, 2010, IDL notified Peter Nemeth (Applicant) of unauthorized encroachments and that he would need to either provide evidence of the original encroachment permits, provide documents from Benewah County assessors that the docks existed in their current form since January 1, 1975, submit an encroachment application or he would need to remove the docks.

2. Subsequently on October 5, 2010 Mr. Nemeth submitted a completed application to IDL for a commercial encroachment permit (L-95-S-4840A). Requesting approval of 28 commercial docks on the St. Joe River, 14 existing and 14 proposed. The docks will be constructed of either wood or plastic and secured to the shoreline using cable and metal posts, the existing pilings or trees, no new piling will be constructed. The docks range in size from 71 to 228 square feet and will not encroach beyond 22 feet. There

are a variety of different designs and configurations all of which provide for side tying of watercraft.

3. The applicant is the upland owner of the site of the encroachment application, tax parcels RP46N01W183500A, RP46N01W076500A and RP46N02W31200A Benewah County. The applicant ranches, operates a seasonal RV park and camp ground on the uplands of the proposed encroachment site.

4. IDL initiated the processing of L-95-S-4840A as a commercial encroachment pursuant to the Lake Protection Act (Idaho Code § 58-1306) and the associated Rules (IDAPA 20.03.04.030). On December 9, 2010, IDL notified agencies and organizations of the encroachment permit application 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
- US Army of Corps of Engineers
- Benewah County Planning and Zoning
- Benewah County Waterways Committee

5. On December 10, 2010, the following adjacent landowners and neighbors were notified by IDL of the proposed application:

- Walter Patterson
- Ken Mills, Jr.
- Donald Hanks
- Potlatch TRS Idaho LLC

6. On December 15, 2010 and December 22, 2010, IDL published the required Notice of Application in the St. Maries Gazette Record newspaper for the encroachment permit application submitted by the Applicant.

7. IDL received a letter on January 11, 2011 from Betty Ellis, Marc and Pam Ellis (Objector), objecting to the application and requesting a hearing. The letter stated "We adamantly object to this project! We do request a hearing! This is recreational property and not to be used for commercial or developing a money making business!"

8. On January 14, 2011, IDL notified Betty Ellis, Marc and Pam Ellis that a publication fee of \$75 dollars was required as part of a request for a hearing. The required fee was submitted on January 24, 2011 with an additional letter from the Ellis's, stating that Janet Lake was also objecting to the application and was sharing the cost.

9. On January 27, 2011 Peter Nemeth requested a delay in the hearing due to his wife being under the care of a doctor and unable to travel. On April 8, 2011 Jim

Bennett spoke with Mr. Nemeth and was informed that they were ready to proceed with the application.

10. In accordance with IDAPA 20.03.04.030, IDL initiated a public hearing process for the proposed encroachment. The public hearing was scheduled for May 11, 2011 at 6:00 pm.

11. On April 27, and May 4, 2011 IDL published the required Notice of Hearing in the St. Maries Gazette Record.

12. A letter from IDL dated May 5, 2011 notified the following agencies of the scheduled hearing:

- Idaho Department of Fish and Game
- Idaho Department of Environmental Quality
- Idaho Department of Water Resources
- US Army of Corps of Engineers
- Benewah County Planning and Zoning
- Benewah County Waterways Committee

13. Prior to the hearing IDL received three letters from members of the public and two letters were submitted to Benewah County Commissioners, copies of which were forwarded to IDL. All five of these letters were in opposition to the encroachment application. The primary issues raised in these letters are: boat congestion on the river, pollution from the additional boats and users, additional noise, erosion of the river bank, swimmer and boater safety, and sanitation.

13. On May 11, 2011 IDL held a public hearing at 6:00 pm in the Federal Building in St. Maries. Mr. Sid Anderson, Program Manager of Navigable Waters, served as hearing coordinator. In attendance were Jim Bennett, IDL Navigable Waters Specialist who assisted with the recording equipment; Ken Ockfen, IDL St. Maries Supervisory Area Manager who assisted with registering public hearing attendees; Peter Nemeth (Applicant); Betty Ellis (Objector) and ten (10) other members of the public. The public hearing was recorded on audio tape and was subsequently transcribed.

14. Public testimony:

- a. Peter Nemeth (Applicant) provided a brief overview of the project he stated that they ranched and has also been operating an RV park that was approved over twenty years ago on this site. They own over a mile of river frontage on one side of the river and three quarters of a mile on the other side. They are one of only three owners along the St. Joe River that has riprapped the bank to help keep erosion down. There are four different locations that they would like to have the docks at and the rest of their land would remain in agricultural use. The RV Park has a sewer system with sealed outlets that is pumped as necessary so there is no risk to

water quality. The river is about 300 feet wide in the areas that the docks will be placed. The docks extend from sixteen to twenty feet from the shore line so they will not hamper boating activities. Mr. Nemeth stated they do not intend to put in 28 docks right away, it has taken them twenty years to get to where they are today with the RV park and it may take them twenty more before all of the docks are completed. They plan to add the docks as the market dictates. Peter also indicated that the RV Park was open to the public with spots rented on a daily or weekly bases, the rest of his sites are leased for the season with contracts being less than one year.

- b. Lieutenant John Adams, (Benewah County Sheriff's Department, Marine Department), stated that he was not for or against the proposal he was simply going to give information to be considered. Lieutenant Adams indicated that there were a few sharp corners in the river and placement of docks at the corner will restrict traffic flow. Additionally there is a no wake zone within one hundred feet of any dock. He added that if there gets to be too many docks it will be basically a no wake river or the sheriff's department will be writing a lot of tickets. Also of concern was the number of docks that break free and drift down stream. The sheriff's department secures these docks and many of them do not have identification numbers on them to identify who owns the docks.
- c. Allen Townsend, (Chairman Benewah County Waterways) stated he was asked by Benewah County Commissioners to speak about a few items. He said that if the land was subdivided it would be easier to put docks in and to track the individual docks. He also stated that rather than putting 28 docks all along the river maybe it would be better to put in a couple of areas where users come to, more typical of a commercial dock. Another issue of concern is that there are docks right now that float downstream with no way of tracking to whom they belong. Allen stated that the only other concern was safety. The more docks they get on the river, the closer they are to having a no wake zone.
- d. Betty Ellis, (Objector) stated that this scenic area promotes recreation and encourages visitors. She and her family oppose the application for 28 docks because they think it is contrary to what the State of Idaho and the Forest Service initially planned for the river. Building 28 docks is more synonymous to building a commercial business rather than promotion of Idaho's land laws regarding recreational property. She feels that the preservation of rivers is a challenge but a significant part of our ecosystem, these 28 docks does not fit into the preservation of the river. Betty then stated that she and her family opposed the application and quoted a Janet Lake article from the Spokane paper.
- e. The other three members of the public that testified were Mark P. Ellis,

Janet L. Lake, and Michael L. Fish, all of which testified in opposition. Their main areas of concern are: safety, navigation, boat congestion, river preservation, spacing of docks, sanitation and erosion.

- f. Peter Nemeth (Applicant) responded to the objecting comments. He stated that as far as erosion goes; he has ripraped and done everything that they can do to preserve this section of the river. Pertaining to pollution, Panhandle Health and the County has approved the sealed unit system that is in place on the uplands. Mr. Nemeth stated he could have a drain field out there but prefers to have holding tanks and have them pumped and the waste hauled to the treatment plant, so there is no contamination to seep into the river. He felt that he and his RV park patrons were good neighbors, in 20 years they have only had the sheriff out two times.

15. Two additional letters were submitted at the hearing one from Janet Lake, the other from Betty Ellis and family both of these letters cover the same concerns as expressed in their testimony at the hearing.

16. The application, notices, letters, transcript, file, documents referenced herein and all associated documents are incorporated into this record by reference.

III. CONCLUSIONS OF LAW

1. The State 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. Idaho Code § 58-119.
2. 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. The Lake Protection Act delegates no authority to IDL for the regulation of vessels. Vessels are regulated by the United States Coast Guard through the Idaho Department of Parks and Recreation, the local County Sheriff, and Title 67, Chapter 70, Idaho Code (Idaho Safe Boating Act).
3. Procedures and criteria for decisions on commercial encroachment applications are found in Idaho Code § 58-1306 and IDAPA 20.03.04.
4. IDL shall also make decisions on proposed encroachments in accordance with the Public Trust Doctrine as set forth in Idaho Code title 58, chapter 12, and 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 commerce, navigation, fish and wildlife habitat, recreation, aesthetic beauty, and water quality. The court in KEA also stated that mere compliance by IDL with its' legislative authority is not sufficient to determine if its actions comport with the requirements of the Public Trust Doctrine.

5. This portion of the St. Joe River is part of a navigable lake as defined by Idaho Code § 58-1302(a) and IDAPA 20.03.04.012.02.

6. Idaho Code § 58-1302(h) and 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.

7. IDAPA 20.03.04.010.09 defines a commercial marina as a navigational encroachment whose primary purpose is to provide moorage for rental or for free to the general public. IDAPA 20.03.04.010.10 defines a commercial navigational encroachment as a navigational encroachment used for commercial purposes. The proposed docks are not moorage facilities in the same sense as a typical commercial marina. However, the proposed encroachments facilitate access to water-dependent recreation activities (swimming, boating, fishing) associated with the rental of campsites and are thus commercial navigational encroachments.

8. IDAPA 20.03.04.015.03 requires that commercial marinas must be open to the general public either on a first come first serve basis for free or rent, or a rent or lease agreement for a period of time not to exceed one year. Commercial marinas that desire to change their operations and convert some of their moorage to private use must keep at least fifty percent (50%) of their moorage available for use by the general public. This change in operations must be approved by the department through a new encroachment permit prior to implementation of the change. As proposed, all of the encroachment dock space is open to the general public and thus complies with this standard.

9. IDAPA 20.03.04.013 (c) requires that docks be constructed so as to protrude as nearly as possible at right angles to the general shoreline, lessening the potential for infringement on adjacent littoral rights. The applicant's proposal complies with this requirement.

10. IDAPA 20.03.04.015.13(d) provides that docks, piers, or other works may extend to a length that will provide access to a water depth that will afford sufficient draft for water craft customarily in use on the particular body of water, except that no structure may extend beyond the normal accepted line of navigability established through use unless additional length is authorized by permit or order of the director. The existing line of navigability has been established for this section of river by previously approved encroachments and by existing uses. This line varies depending on the particular site in order to get sufficient draft for water craft generally used in this

area. Though the applicant's docks range in size and design, as proposed and as conditioned, they do not extend beyond the established line of navigability.

11. IDAPA 20.03.04.015.13 (e) establishes a presumption that a commercial encroachment located closer than twenty-five (25) feet from the adjacent littoral property will have an adverse effect. As conditioned the proposed docks shall not be less than twenty five (25) feet from the adjacent littoral property and it is thus presumed there will be no adverse impact.

12. IDAPA 20.03.04.60.04. Limits the time for the construction of all activities authorized within the scope of the encroachment permit to three (3) years of issuance date. If the activities are not completed within three (3) years, the permit shall automatically expire unless it was previously revoked or extended by the department. As conditioned the applicant has three (3) years to construct the proposed encroachments.

13. Standard Terms for Encroachments term (7) states: that this permit is not valid until the identification number is displayed on the outermost area of the encroachment. As conditioned the applicant shall display the permit number on the outermost part of each dock.

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

15. Applicant has littoral rights on the St. Joe River as required by ADAPA 20.03.04.

16. Idaho Code title 67 chapter 65 establishes the authority of city and county governments to establish and enforce local planning and zoning laws to govern uses above the high water mark.

17. The Idaho Safe Boating Act is Idaho Code title 67, chapter 70 this chapter gives the County authority to regulate use of waterways.

IV. HEARING COORDINATOR CONCLUSIONS AND RECOMMENDATIONS

The applicant has submitted an application for a commercial navigational encroachment. Such an operation in this location can provide a service to members of the public outside of those who possess littoral rights.

Congestion and overcrowding of the river was one of the main concerns raised in both written and oral comments. IDL's role, as identified in Idaho law, is to regulate encroachments over the beds of navigable lakes. Included in that same Idaho law are procedures allowing the permitting of commercial navigational encroachments. The proposed encroachments meet those requirements. Idaho law does not give IDL the authority to decide how many encroachments are appropriate for a water body. If the threat of over-commercialization exists for a community, the local government has legal

authority and the most effective tools, including comprehensive upland planning and zoning, to address and control this issue. IDL did not receive formal information from the commissioners or the Planning and Zoning department indicating that the applicant did or did not have approval for a commercial operation on the uplands.

Safety was also a primary concern raised throughout the comment period. Local government has legal authority to adopt and modify safety and boating rules pursuant to Idaho code title 67 chapter 70. The docks assure upland users will have safe access to the river. The proposed docks are located within the line of navigability, as past approved encroachments has established it. As proposed, the four dock locations are not on either of the two river bends adjacent to the Nemeth property.

Several comments related to navigation also implied that the proposed docks will have an impact on the navigation by asserting that perhaps too many boats utilize the St. Joe River area or that the river will be restricted. The docks are relatively small ranging from 71 to 228 square feet; none extend beyond the line of navigability. Idaho law does not give IDL the authority to regulate boat traffic. If the community wishes to diminish or otherwise regulate boating activities, specific action is needed by the local jurisdiction.

Additional boat traffic causing erosion was another concern raised. Although boat traffic may be a cause of erosion, it is only one of the causes, along with ice scour, high water, current and others. Which cause is more erosive likely varies by season, year and location. The applicant has rip-rapped and stabilized both of the riverbanks to control erosion. Additionally the docks will be used for a wide range of water activities including swimming, fishing and boat access both non-power and power. There has been no evidence submitted that these additional docks will cause additional erosion in the area.

Docks breaking way and floating down stream without any identifications on them was another concern brought up by objectors. One of the standard terms for an encroachment permit is that the permit is not valid until the identification number is displayed on the outermost area of the encroachment. If the County or other regulatory authority wants to utilize these numbers to identify docks they can obtain the upland owners information from IDL. Furthermore, as conditioned, the applicant will be required to remove the docks and store them safely on the uplands during the winter.

There were multiple people concerned with sanitation and health issues; however the sewer system is not below the high water mark and does not bear on the issuance of an encroachment permit. It is the Department of Health and Welfare and the county that regulate sanitation.

Although IDL recognizes the concerns expressed during the hearing process, IDL must manage the public trust waters for the entire public, not just those who own lands along the waterways. The proposed docks look like single family docks consistent with what is in the area; however they will be utilized in a manner more consistent with a commercial/public dock and provide water access opportunities to the general public.

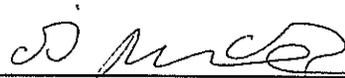
The hearing coordinator finds that the application meets the requirements of Idaho Code § 58-1301 *et. seq.* (the Lake Protection Act) and IDAPA 20.03.04

Based upon the information provided to me as the hearing coordinator, the findings of fact and the conclusions of law contained herein, I recommend that the Director of IDL issue a Final Order stating that the St. Maries Supervisory Area of IDL should **approve** the encroachment permit application submitted by Applicant with the following conditions:

Conditions of Approval

1. The applicant or owner shall maintain a submerged lands lease with IDL.
2. The applicant or owner shall remove docks and store them safely during winter months.
3. No dock may extend beyond the line of navigability.
4. Docks cannot be located within 25 feet of adjacent littoral property owner lines.
5. All encroachments must be constructed within 3 years of issuance of the encroachment permit.
6. The encroachment permit number must be clearly displayed on the outermost part of each dock.

DATED this 14th day of June 2011.



SID ANDERSON
Hearing Coordinator