

Thomas M. Schultz, Jr.
Director
Idaho Department of Lands
300 N. 6th Street, Suite 103
P. O. Box 83720
Boise, ID 83720-5956

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of Application for a Single Family Dock, Encroachment Permit No. L-96-S-2209)
DEAN AND COLLEEN DAVIS)
Applicant)

)

FINAL ORDER

I. NATURE OF PROCEEDINGS/ISSUES

An administrative hearing was held April 15, 2013, at 9:30 a.m. PDT at the Idaho Department of Lands Pend Oreille Lake Area Office in Sandpoint, Idaho. Joel Clark served as the Hearing Officer. The Hearing Officer issued his Recommendations on April 30, 2013.

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 contested case hearing conducted in Coeur d'Alene, Idaho on April 15, 2013.
- I have reviewed the record including all documents and exhibits.
- I have examined the Hearing Officer's Recommendations in light of the entire record.

Encroachments, including docks, placed on the navigable waters, require a permit issued by the Idaho Department of Lands pursuant to the requirements of Chapter 13, Title 58, 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 Officer.

III. CONCLUSIONS OF LAW

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

IV. FINAL ORDER

On the basis of the record, it is my order that Encroachment Permit L-96-S-2209 be approved by the Pend Oreille Lake 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 20.03.04.025.09.

DATED this 2nd day of May, 2013.



Thomas M. Schultz, Jr.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of May, 2013, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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Deputy Attorney General
Idaho Department of Lands
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Boise ID 83720-0050

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Renee Miller

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

April 30, 2013

MEMORANDUM

To: Tom Schultz, Director

From: Joel Clark, Detailing – Public Trust Lands Program Manager

Subject: Administrative Hearing - Navigational Encroachment L-96-S-2209,
Applicant – Dean and Colleen Davis

I. INTRODUCTION

The following document, which includes a recommendation for your consideration was prepared following an administrative hearing conducted by the Idaho Department of Lands (IDL). The hearing was conducted on April 15, 2013, in conjunction with the processing of an encroachment permit (L-96-S-2209) on the Pend Oreille River, a navigable water body in Idaho. The applicant proposes to construct a 240 square foot pier, replacing an existing dock that does not meet today's standards.

Jurisdiction in this matter rests with the 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 or about February 27, 2013, Dean and Colleen Davis (applicant) submitted to IDL an encroachment permit application (L-96-S-2209), requesting approval to replace an existing dock with a new pier on the Pend Oreille River adjacent to Tax Parcel RP00518000011AA, Section 35, Township 57 North, Range 3 West. The physical address of the property is 1941 Wooded Acres, Sagle, Idaho.
2. Application L-96-S-2209 proposes replacement of the existing dock with a new pier consisting of a 240 square foot pier with a boat lift on the northwest side of the pier. The application drawing shows the specific proposed dimensions.
3. IDL initiated the processing of Application L-96-S-2209 as a single family navigational encroachment pursuant to the Lake Protection Act (Idaho Code § 58-1305) and the associated Rules (IDAPA 20.03.04.025).

4. On March 20, 2013, the Idaho Department of Lands Pend Oreille Lake Supervisory Area office notified, via mail, the adjacent property owners, Greg Reese and Gayle Terry, to the northwest, and Andrew and Christopher Charnos, to the southeast, of Application L-96-S-2209.
5. On April 1, 2013, the Idaho Department of Lands Pend Oreille Lake Supervisory Area office received an adjacent property owner consent form dated March 27, 2013, from Andrew and Christopher Charnos, indicating no objection to the proposed encroachment.
6. In a letter dated March 25, 2013, in response to a Courtesy Notification of Application, Greg Reese, neighbor immediately to the northwest of Dean and Colleen Davis, objects to the placement of the new structure for the following reasons:
 - a. Navigation safety will be compromised due to placement of the dock and adjacent boat lift. The placement leaves little room for boats visiting and parking at our dock
 - b. Safety to grandchildren swimming in the area is a concern with decreased water area and risk of adjacent prop wash.
 - c. The crowding of our property with the proposed dock placement compresses the perceived shoreline and will decrease the shoreline appeal we now have and will negatively affect our property value.
 - d. With increased activity from boats due to closer dock proximity increased shoreline erosion may occur.
7. On approximately April 4, 2013, Jamie Brunner discussed with Greg Reese, IDAPA rules related to encroachments, some items specifically related to this situation, and stated that if the objections raised by Mr. Reese were not removed in writing, IDL would be required to schedule a hearing.
8. On April 15, 2013, at approximately 9:30 a.m., IDL held an administrative hearing at the Pend Oreille Lake Supervisory Area office in Sandpoint, Idaho. Mr. Joel Clark, Forest Hyrdologist/ Public Trust Lands Program Manager (Detailing) served as the hearing coordinator. Those attending included: Dean and Colleen Davis (applicants); Greg Reese, objector and co-owner of an adjacent littoral lot; Lance Lane, Lane Marine pier construction contractor for Dean and Colleen Davis; Edward Robinson, Pend Oreille Lake Supervisory Area Manager; Jim Brady, IDL Lands Resource Specialist Senior, Navigable Waters; and Matt Hicks, IDL Lands Resource Technician. The hearing was recorded on audio tape and was subsequently transcribed.
9. Dean and Colleen Davis were given opportunity to testify at the hearing. They testified that the application is to replace a dock, which has been in existence for many years and is now in disrepair, with a new pier; and that the application submitted met all IDL requirements for size and setbacks to property lines. They indicated that the planned encroachment was 15 feet from the Reese littoral right

line to the northwest (boat lift, where it has existed for numerous years), and the pier 40 feet from the Charnos littoral right line to the southeast, and that these dimensions were in accordance with the IDAPA 10-foot minimum setback rule. They indicated that the total size of the pier would be 240 square feet which was within the maximum size that IDL allows for a single family dock. Mrs. Davis submitted the following exhibits:

Exhibit A: Photo of the existing dock and northwesterly neighbors' piers and photo of the west Davis property line.

10. Greg Reese was given the opportunity to testify. Mr. Reese reiterated his concerns stated in his letter from March 27, 2013. Mr. Reese is concerned about how close the boat lift is to the Reese/Terry littoral line and the alignment of the new pier needing to be perpendicular to the shore as to not crowd the littoral line. Currently the existing Davis dock (shown in digital pictures – Exhibit 1) is not perpendicular to the shore.

11. The objector included the following exhibits:

Exhibit 1: photographs (digital- not submitted as evidence. Mr. Reese showed the applicant pictures he had taken on his laptop.)

12. The hearing coordinator and Jim Brady visited the site on Monday, April 15, 2013, to view the locale and the existing dock configurations and the general area as is shown in the Appendix 1 aerial photo.

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

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 waters in the state of Idaho. IDL is the administrative agency of the Board, Idaho Code § 58-119.
2. Lake Pend Oreille and the Pend Oreille River are navigable waters as defined by Idaho Code § 58-1302(a). Pursuant to IDAPA 20.03.04., encroachments of any kind on, in or above the beds of Lake Pend Oreille and River require a permit prior to encroaching on the lake or river. The applicant has littoral rights on the Pend Oreille River as required by IDAPA 20.03.04.
3. Pursuant to Idaho Code § 58-1301, lake encroachments must be regulated to protect property and the lake value factors of navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality and these values must be given due consideration and weighed against the navigational or economic

necessity or justification for, or benefit to be derived from, the proposed encroachment.

4. 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).
5. IDL shall 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.
6. Idaho Code §58-1302 (h) 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 of waters of a navigable lake.
7. Procedures, criteria and standards for single and two family docks are defined in Idaho Code § 58-1305 and IDAPA 20.03.04. The proposed encroachment meets the standards of IDAPA 20.03.04.
8. IDAPA 20.03.04.015.13.e states that it will be presumed, subject to rebuttal, that single family navigational encroachments will have an adverse effect upon littoral rights if located closer than ten (10) feet from littoral right lines. The proposed encroachment lies 15 feet from the Reese littoral line to the northwest, and is 40 feet to the Charnos littoral line to the southeast, it is thus presumed there will be no adverse impact.
9. The Applicant has 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

The applicants, Dean and Colleen Davis, have submitted an application for a single family navigational encroachment. The objection raised by Mr. Reese centers on safety issues related to the location of the proposed boat lift being fifteen (15) feet from the Reese littoral line and on perceived infringement of the Reese littoral rights.

Littoral rights are defined in IDAPA 20.03.04 as "The rights of owners or lessees of land adjacent to navigable waters of the lake to maintain their adjacency to the lake and make use of their rights as riparian or littoral owners or lessees in building or using aids to navigation but does not include any right to make any consumptive use of the waters of the lake."

As mentioned above, IDAPA 20.03.04.015.13.e states that encroachments will be presumed to have an adverse effect if located closer than ten (10) feet from the littoral right lines. The objector, Mr. Reese, has attempted to rebut this presumption by testimony and photographs (digital- not submitted as evidence) concerning the use of the waters in their littoral zone for boating and swimming, and the impact that the applicants might have on navigation and swimmer safety with the placement of the new pier and boat lift. Mr. Reese asserts that this should require the applicants to move their dock further away from the littoral zone of the Reese/Terry property.

IDAPA 20.03.04.015.01.d states that "Where feasible, all docks, piers or similar structures shall be constructed to protrude as nearly as possible perpendicular to the general shoreline." The Davis's application diagram shows the proposed pier to be constructed perpendicular to the shoreline and as it will be a pier and not a floating dock there is no risk of the structure changing location with flow patterns. Therefore, the pier and the associated boat lift would maintain the proper setback from the littoral line. In addition, the boat lift will be in the same location as it has existed and been utilized for numerous years.

Although IDL recognizes the safety concerns expressed with the objection, IDL's role in this matter is the regulation of lake encroachments. Boat and swimmer safety is not regulated pursuant to the LPA; that is the responsibility of the local authorities. The subject pier and boat lift exceeds the minimum 10-foot setback. IDL further notes that the Reese/Terry littoral area extends northwest of their dock (visible in Appendix 1) appearing to provide opportunity for swimming other than the area adjacent to the property line with the applicants. The Reese/Terry littoral rights do not grant exclusive use to the waters in their littoral area. Those waters remain open to the public for swimming, boating, fishing, etc. The public would have a right to navigate in this area. So long as the applicants use the reasonable care that is required of all boat operators on Idaho waters, IDL does not believe the new pier will create a safety hazard. The boat lift operation of "drive in and back out" should reduce the risk of prop wash directed at the Reese/Terry property and would not create anymore boat traffic in the immediate area than has existed for many years. In addition, the Reese/Terry property is protected from shoreline erosion with a rock/timber wall near the high water mark. IDL thus concludes that Mr. Reese has failed to rebut the presumption that the proposed dock will have an adverse impact on the Reese/Terry littoral rights.

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 Pend Oreille Lake Supervisory Area of IDL should **approve** encroachment permit application, L-96-S-2209, submitted by the Applicant.

Dated this 30 day of April, 2013



Joel Clark
Joel Clark
Hearing Coordinator

APPENDIX 1

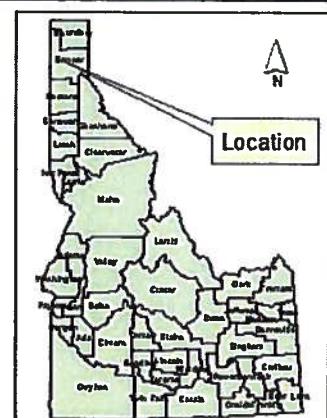
Navigational Encroachment L-96-S-2209

Township 57 N Range 03 W Section 35



Legend

Davis Dock (Proposed Pier) ←
Reese/Terry Pier →



0 25 50 100 Feet

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of April, 2013, I caused to be served a true and correct copy of the forgoing document, by the method indicated:

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Sagle, ID 83860

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- Hand Delivery
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