

Edl, Michele

From: Cooley-Denney, Suzy
Sent: Wednesday, August 25, 2010 8:44 AM
To: Baxter, Garrick; Edl, Michele
Subject: RE: Gem Lake Harbor
Attachments: Strack to Watkins 5-23-06 - Navigability of Gem Lake Harbor.pdf; Strack to Watkins 7-2-09 - Navigability of Gem Lake Harbor.pdf

Garrick & Michele ~

Please find attached a copy of a letter May 23, 2006 letter, along with a follow-up letter dated July 2, 2009. I was finally able to track these down at the Department of Lands.

~ Suzy

From: Baxter, Garrick
Sent: Wednesday, August 11, 2010 7:22 AM
To: Edl, Michele
Cc: Cooley-Denney, Suzy
Subject: RE: Gem Lake Harbor

Suzy,
Will you contact Steve or Dallas as see if they can provide us a copy of the opinion?
Thanks,
Garrick

From: Edl, Michele
Sent: Tuesday, August 10, 2010 6:37 PM
To: Baxter, Garrick
Cc: Cooley-Denney, Suzy
Subject: RE: Gem Lake Harbor

One of my talents is persistence.

I have found some more info to help you locate the opinion, written by Dep AG Steven Strack, released ~June 2, 2006. Here's a link to an article on the IDF&G news releases web page.

<http://fishandgame.idaho.gov/apps/releases/search.cfm?action=SearchDetail&NewsID=3241&keywords=Gem lake>

I printed the IDF&G summary in case this link doesn't launch for you.

Garrick,
The permit and field exam I am reviewing is for a water right to waters in this Gem lake. I don't know if issuing a license would be in opposition to this opinion. If Suzy can find the opinion, Shelley Keen would like to see and read it. I suspect I will need a translation and probably an appointment with either you or Shelley to apply it appropriately to this water right process.
Michele

From: Baxter, Garrick
Sent: Tuesday, August 10, 2010 3:39 PM



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

July 2, 2009

Dane H. Watkins, Jr.
Bonneville County Prosecuting Attorney
605 North Capital Ave.
Idaho Falls, ID 83402

Re: Navigability of Gem Lake Harbor

Dear Mr. Watkins:

You asked if I could reexamine the analysis in my letter of May 23, 2006, regarding the public right of navigation to Gem Lake Harbor, in light of the recent acquisition by BRP, Inc., of a water right in the amount of 25.80 cfs for recreational purposes at Gem Lake Harbor. The water is diverted from the Snake River upstream of Gem Lake Harbor, then flows through Gem Lake Harbor and exits through a navigable outlet that connects Gem Lake Harbor to Gem Lake, which is a navigable water of the state of Idaho consisting of water held behind Gem State Hydroelectric Dam on the Snake River.

Daniel Beck, in a letter dated May 21, 2008, asserts that the above described water right, in combination with a prior water right for 1.0 cfs, covers "all of the water flowing through Gem Lake Harbor," and cites a hydraulic analysis by Brockway Engineering concluding that water flows through the Harbor at a rate of 10.63 cfs. Brockway's analysis, however, does not support the conclusion that all of the water in Gem Lake Harbor consists of water diverted by BRP pursuant to its two water rights. The outlet or connecting channel between Gem Lake and Gem Lake Harbor is approximately 100 feet wide. A flow of 10.63 cfs distributed over a 100 foot wide channel would result in a water depth of several inches, at most. Therefore, the facts, as stated, do not support the conclusion that the water rights held by BRP are the sole source of water in the Harbor. Rather, much of the water in the Harbor may be the result of water being held behind Gem Lake Hydroelectric Dam and entering the Harbor through the navigable channel. If such were the case, it is unlikely that a reviewing court would conclude that the water in

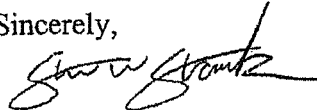
Dane H. Watkins, Jr.
July 2, 2009
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Gem Lake Harbor constitutes "private waters" for purposes of Idaho Code § 42-212 or is the sole property of BRP pursuant to Idaho Code § 42-110.

I should also note that in addition to the "private waters" provision of Title 43, Idaho Code Title 36 includes provisions defining "private ponds," and prohibiting trespass upon such ponds. Idaho Code §§ 36-706, 36-707. To qualify as a private pond the waterway cannot intersect a natural waterway containing wild fish, and must be screened to prevent the entry of wild fish into the pond. As I understand the facts, Gem Lake Harbor, with its navigable connection to the Snake River, would not be considered a private pond for purposes of the trespass provisions of Idaho Code § 36-707.

As stated in my prior letter, my analysis is not intended as a formal legal opinion nor should it be construed to assert any right or claim on behalf of the state. Rather, this response is an informal and unofficial expression of the views of the author addressing the legal questions you presented based on certain factual assumptions. Resolution of this issue would require a detailed factual analysis of the sources of water for Gem Lake Harbor.

Sincerely,



STEVEN W. STRACK
Deputy Attorney General
Natural Resources Division

SWS/pb

cc: Kathleen Trever, IDFG
Daniel Beck



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

May 23, 2006

Dane H. Watkins, Jr.
Bonneville County Prosecuting Attorney
605 North Capital Ave.
Idaho Falls, ID 83402

Re: Navigability of Gem Lake Harbor

Dear Mr. Watkins:

You asked this office to determine whether: (1) Gem Lake Harbor is subject to the public right of navigation for recreational and fishing purposes; and (2) whether individuals accessing Gem Lake Harbor through the outlet can be cited for trespass.

Gem Lake Harbor is a man-made water body adjacent to Gem Lake, a reservoir on the Snake River consisting of water backed up by the City of Idaho Falls' Gem State Hydroelectric Dam. Gem Lake Harbor is a former gravel quarry. After cessation of gravel mining, the area around the gravel pit was subdivided, and the developer applied for a water right for the purpose of creating a private lake for the subdivision.

The water right held by the developer permits a diversion of one cubic foot per second (cfs) for recreation purposes. According to applications filed by the developers, the water is diverted through a headgate and returned to the river by an open channel approximately one hundred feet in width. The channel is deep enough to accommodate motorized watercraft.

From available information, it does not appear that the headgate is the sole source of water for Gem Lake Harbor. As previously noted, Gem Lake Harbor is connected to Gem Lake Reservoir by a 100 foot wide channel deep enough for motorized watercraft. From satellite photos and other information, it appears that the water elevations in Gem Lake Reservoir and Gem Lake Harbor are identical. In other words, the "outlet" does not function solely to allow return of the small amount of water (1 cfs) diverted at the

headgate.¹ Rather, it also allows water impounded by Gem State Hydroelectric Dam to inundate the former quarry, which forms Gem Lake Harbor. Given the navigable outlet and the uniform water surface, Gem Lake Harbor is, for all practical purposes, an extension of the impounded Snake River.²

Assuming the above facts, the issue presented is whether Gem Lake Harbor is navigable under Idaho law. The fact that the bed of the Harbor is privately owned is irrelevant to the determination of navigability. Idaho Code § 58-1302(a) provides as follows:

“Navigable lake” means any permanent body of relatively still or slack water, not privately owned and not a mere marsh or stream eddy, and capable of accommodating boats or canoes and includes man-made reservoirs except where the jurisdiction thereof is asserted and exclusively assumed by a federal agency.³

Section 1302 states that the term “navigable lakes” includes man-made reservoirs but excludes privately owned bodies of water. While the term “privately owned,” is not defined in Title 58 of the Idaho Code, Title 42 defines “private waters” to include any lake “not exceeding five (5) acres in surface area at highwater mark . . . which is located or situated wholly or entirely upon the lands of a person or corporation.” Idaho Code § 42-212. While Idaho Code § 42-212 defines private waters for purposes of describing which waters are subject to appropriation by others, it is likely that the two statutes would be interpreted *in pari materia*, since they both differentiate water bodies subject to public use from water bodies subject exclusively to private use.

¹ If the 100 foot wide channel functioned solely to return the one cfs of diverted water to the river, it would be less than an inch deep.

² The existence of a navigable channel between the Snake River and Gem Lake Harbor is a critical fact in the analysis contained herein. The analysis would differ considerably if the “outlet” simply functioned to return outflow to the Snake River and was not itself navigable.

³ The quoted language is from the current version of Idaho Code section 58-1302. The section was amended in the 2006 legislative session, and as of July 1, 2006, will read as follows:

“Navigable lake” means any permanent body of relatively still or slack water, including man-made reservoirs, not privately owned and not a mere marsh or stream eddy and capable of accommodating boats or canoes. This definition does not include man-made reservoirs where the jurisdiction thereof is asserted and exclusively assumed by a federal agency.

Gem Lake Harbor does not qualify as a “privately owned” body of water. First, it appears to exceed five acres in size. Second, and more importantly, the waters within the Harbor are not the sole property of the corporation that holds title to land under the Harbor. Rather, the water in the Harbor is indistinguishable from the public waters of the Snake River, the water of which is backed up into the Harbor by means of the Gem State Hydroelectric Dam. As such, Gem Lake Harbor qualifies as a man-made reservoir. Under Idaho law, when the water of a natural waterway is impounded in a man-made reservoir, the impounded waters are subject to the public right of navigation even where the underlying lands are privately owned. This expansive view of navigability has been adopted by several states. The seminal case is *Village of Pewaukee v. Savoy*, 79 N.W. 436 (Wis. 1899). The Wisconsin court held that if a landowner constructs a dam and causes water to overflow his lands, “such land immediately became subject to use by the public as a part of the natural lake bed, not by permission of the owner of the paper title, but by the same right that the public used any part of the lake.” *Id.* at 438. Some states even recognize that maintenance of such use, if uninterrupted and continuous for a number of years, may dedicate the submerged lands to public use, resulting in state title to the artificially submerged lands. *Id.* at 437-38.

Idaho adopted the holding of *Village of Pewaukee* in *Burrus v. Rutledge Timber Co.*, 34 Idaho 606 (1921). In *Burrus*, the court held that the owner of a meadow alleged to be inundated by the construction of Post Falls Dam in 1906 could not maintain an action for trespass against a company that had placed log booms on the overlying waters, since such waters were subject to a the public right of navigation. For authority, the court cited the following quotation from *Pewaukee v. Savoy*, 79 N.W. 436 (Wis. 1899):

If a person artificially raises the level of the waters of a navigable lake, the public rights therein are correspondingly extended so long as such artificial level is maintained.

79 N.W. at 436 (headnote). The *Burrus* court actually went beyond the holding in *Pewaukee*, since the landowner, Burrus, was not responsible for the flooding of his lands. Thus, in Idaho, the public right of navigation extends to artificially submerged lands even if the inundation is the result of action by another.

This principle was affirmed 50 years later in the case of *West v. Smith*, 95 Idaho 550 (1973). There, a littoral property owner sought to prevent the mooring of a houseboat on submerged lands inundated as a result of the Post Falls Dam. The littoral property owner asserted that the houseboat was trespassing on his property, which he

alleged extended down to the natural high water mark. The court held that it did not need to resolve the littoral landowner's claims of title to the lakebed between the natural high water mark and the artificial high water mark, since "the public has the right to navigate on the waters of a navigable lake regardless of who holds title to the land under a particular part of the water." *Id.* at 555.

The cases cited by the court in *West* are instructive. The primary case cited by the court was *Wilbour v. Gallagher*, 462 P.2d 232 (Wash. 1969). *Wilbour* addressed title to the beds of Lake Chelan, which in its natural state rose to 1,079 feet elevation, but had been raised to 1,100 feet elevation three months a year as the result of a hydroelectric dam. The land between 1,079 and 1,100 feet was the subject of overflow easements held by the hydroelectric company. *Gallagher*, a littoral landowner, sought to fill his inundated land to a height 5 feet above the artificial high water mark, an action challenged by *Wilbour*, a neighboring landowner. After noting that the rights of the public follow the water in a naturally fluctuating lake, the court held that:

[W]here the waters of a navigable body are periodically raised and lowered by artificial means, the artificial fluctuation should be considered the same as a natural fluctuation with the rights of the public being the same in both situations, i.e., the public has the right to go where the navigable waters go, even though the navigable waters lie over privately owned lands.

....
[W]e hold that when the level of Lake Chelan is raised to the 1,100 foot mark . . . that land is subjected to the rights of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters. When the level of the lake is lowered so that the defendants' land is no longer submerged, then they are entitled to keep trespassers off their land, and may do with the land as they wish consistent with the right of navigation when it is submerged.

....
It follows that the defendants' fills, insofar as they obstruct the submergence of the land by navigable waters at or below the 1,100-foot level, must be removed. The court cannot authorize or approve an obstruction to navigation.

The other case cited by the *Smith* court was *People v. Kraemer*, 164 N.Y.S.2d 423 (1957). There, the owners of land underlying an artificial harbor open to the waters of Long Island Sound sought to prevent members of the public from mooring their boats in the harbor. The court held: "In a majority of jurisdictions where the question has arisen the courts have held that the public right of navigation followed the public waters when, by act of God or man, they were made to submerge private land . . . [thus a] man who creates, or allows to continue, a condition whereby his land is submerged by navigable waters . . . should be required to accept the public right of navigation as a legal concomitant of that condition." *Id.* at 431-32.

The principles from the above cases apply not only where the landowner causes or allows his lands to be inundated through the impoundment of water, but also where he expands an existing navigable waterway through excavation. In *Klingeisen v. Dep't. of Natural Res.*, 472 N.W.2d 603 (Wis. App. 1991), a landowner constructed a channel and three artificial lagoons, and caused them to be connected to Green Bay, a navigable waterway. The court held that the artificial waterways became navigable waters upon their connection to Green Bay:

The waters are public because the channel, although artificially created, is connected to and maintained by the waters of Green Bay. The channels have no existence independent of Green Bay. Wisconsin courts have addressed the same situation in early cases where a navigable waterway was artificially raised over private property. The principle from these cases is well settled: If the volume or expanse of navigable waters is increased artificially, the public right to use the water is increased correspondingly. Green Bay, clearly a navigable waterway, was artificially expanded over privately owned land when the channels were constructed. Thus, the public has a right to use the waters and the waters are public.

Id. at 605-06 (citations omitted). Although the above decision is from Wisconsin, it would likely be followed by the Idaho courts, since it is an application of the Wisconsin court's earlier decision in *Pewaukee v. Savoy*, which was adopted by the Idaho Supreme Court in *Burrus v. Rutledge Timber Co*, discussed *supra*. Moreover, in *Smith*, the Idaho Supreme Court cited with approval the decision in *Kraemer*, which recognized that the public right of navigation extended to an artificial harbor, a situation remarkably similar to that presented here.

One Supreme Court decision, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), merits discussion, for it appears, at first glance, to be contrary authority. There, the

United States brought an action to determine if a private marina was subject to the federal navigational servitude. The marina was a former fishpond of less than two feet in depth. Kaiser Aetna acquired the fishpond, dredged it, and constructed a channel connecting it to the ocean. It then subdivided the surrounding land. *Id.* at 166-68. The Court held that the United States could not require the owners to allow public navigation of the marina without paying just compensation. *Id.* at 180.

Kaiser Aetna, however, is distinguishable from the present case. In *Kaiser Aetna*, the court turned to state law to determine the owners' "expectancies embodied in the concept of 'property.'" *Id.* at 179. Under Hawaiian law, the pond remained private property, so that imposition of the federal navigational servitude would interfere with the owner's "'right to exclude,' so universally held to be a fundamental element of the property right." *Id.* at 179-80. Here, the owners of Gem Lake Harbor should have been aware that under Idaho law the public right of navigation follows navigable waters. Given these long-standing background principles defining property rights to lands covered by navigable waters, extension of the public navigation right to the voluntarily-inundated property would not be construed as a "taking." See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028-29 (1992) (no taking occurs where servitude is part of the "background principles of the State's law of property . . . already in place upon land ownership").

Kaiser Aetna is also distinguishable because it only addressed the *federal* navigational servitude, which is an outgrowth of Congress' power to regulate interstate commerce. Unlike Idaho's doctrine of public navigation, the federal navigational servitude was traditionally viewed as "a natural servitude, confined to such streams as, in their ordinary and natural condition, are navigable in fact, and confined to the natural condition of the stream." *United States v. Cress*, 243 U.S. 316, 325 (1917). The federal navigational servitude does not preclude states from adopting a broader view of public navigation rights. See *Southern Idaho Fish & Game Ass'n v. Picabo Livestock, Inc.*, 96 Idaho 360, 363, 528 P.2d 1295, 1298 (1974) (the "federal test of navigability involving as it does property title questions, does not preclude a less restrictive state test of navigability establishing a right of public passage wherever a stream is physically navigable by small craft").⁴

⁴ *Southern Idaho Fish & Game Ass'n* addressed the navigability of a privately owned *natural* stream for recreational purposes, and did not address public navigation of private property inundated through artificial means. It establishes, however, that the state is not limited by the federal navigational servitude when establishing the scope of public navigation rights.

Dane H. Watkins, Jr.
May 23, 2006
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In short, Idaho statutes and decisions recognize that where a landowner causes or allows his land to be inundated by navigable waters, the public right of navigation follows the water. The owners of Gem Lake Harbor voluntarily allowed the inundation of their property by the navigable waters of the Snake River, and must accept the public rights that are inseparable from navigable waters.⁵ Therefore, persons accessing Gem Lake Harbor by means of the navigable "outlet" are not trespassing on private property. The public right of access, however, applies only to the water itself. The adjacent property owners may exclude persons from entering upon any portion of the upland property.

Sincerely,



STEVEN W. STRACK
Deputy Attorney General
Natural Resources Division

SWS/pb

cc: Dallas Burkhalter
Denise Mills
Mark Fuller

⁵ Although not raised in your letter, it should be noted that as the public right of navigation follows the water, so does the state's authority to regulate encroachments placed below the artificial high water mark, even though the underlying lakebed is privately owned. Idaho Code § 58-1302. Docks and other encroachments upon navigable waters require an encroachment permit from the Idaho Department of Lands.