

permission in 1993.

The western shoreline of Lee's Bay is fairly straight from where it meets the main body of Hayden Lake at one end, to the point of the "V" at the other end. Robideauxs' Lot 111 is to the right of Lovitts' Lot 112. The left (again, looking from land toward the bay) boundary line of Lovitts' Lot 112 is the common boundary with Lot 111. The right boundary line of Lot 112 runs out to the main body of Hayden Lake, just past the mouth of Lee's Bay. There is a "point" where the western shore of Lee's Bay meets the main body of Hayden Lake. It is just out from that "point" that Robideauxs' Point Dock is located. Keeping in mind that Lovitts' dock is located directly in front of the shoreline of their Lot 111, the Robideauxs' Point Dock is located to the left of Lovitts' dock. In other words, Robideauxs' Point Dock is located on the other side of Lovitts' dock. By any common way of looking at the layout, Robideauxs' Point Dock is further from Robideauxs' Lot 112 than is the Lovitts' dock. The common boundary between Lot 111 and 112 does not run perpendicular to the western shoreline of Lee's Bay; it runs at an angle to the shoreline, more toward the mouth of Lee's Bay and the main body of Hayden Lake. If an imaginary line were projected out into the water which followed the common boundary line on land between Lot 111 and 112, the dock permitted to Robideauxs' Lot 112 would be just to the right of that imaginary line, or on Lovitts' side of that line. If an imaginary line were projected out perpendicular from the shore at the common boundary to Lot 111 and 112, the dock permitted to the Robideauxs' Lot 112 would be very far over that line, well onto Lovitts' side of that line.

The permit for the Point Dock remained in the name of Robideauxs' predecessor until it was transferred to Robideauxs on January 15, 1993. The activity that transferred with the permit was for a single-family dock encroachment located as nearly as possible

at right angles to the shoreline in front of Lot 112. Washburn Affidavit, ¶¶ 12, 13, 14, R. p. 109. Thus, historically docks were located out in front of the lot to which it attached. The Robideauxs' attorney, then Edward F. Wroe, submitted a letter to the IDL in 1994, requesting a modification such that the dock not be at right angles (*Id.* ¶ 17, R. p. 110), and the drawing shows it in no way is located in front of the applicable Lot 112. Exhibit G to Washburn Affidavit, R. p. 120. Thus, the request for modification itself described Robideauxs' Point Dock as being located in front of Lovitts' Lot 111. Robideauxs did not submit an application for the Point Dock to the Idaho Department of Lands (IDL), but rather requested a modification to the location of their encroachment through letters submitted by their attorney. The drawing attached to Robideauxs' request for modification depicted the dock placement nearly *parallel* to the shoreline, appearing to infringe on the Lovitts' littoral rights. Robideauxs did not obtain the Lovitts' written consent or provide them with actual notice of their request for modification. Modification was granted by the IDL on July 23, 1997.

Consequently, the Lovitts filed suit against Robideauxs to establish Lovitts' littoral rights. That case went to trial before District Judge James Michaud. Judge Michaud concluded that he could not determine the littoral rights of either party. Lovitts appealed and Robideauxs cross-appealed, and the Idaho Supreme Court filed its opinion on September 29, 2003. *Lovitt v. Robideaux*, 139 Idaho 322, 78 P.3d 389 (2003). On appeal, the Idaho Supreme Court found that the evidence before Judge Michaud showed that "the Robideauxs' proposed placement of the dock would, at very least, appear to infringe on the Lovitts' statutory littoral rights." 139 Idaho at 327, 78 P.3d at 394. Accordingly, the Idaho Supreme Court held that since notice required by statute was not provided by the Robideauxs to the Lovitts, a valid permit was not issued on July

23, 1997. “Without written consent from, or notice to, the Lovitts as required by the Act, the Department could not have validly issued the Robideauxs a permit on July 23, 1997.” *Id.*

After the Idaho Supreme Court’s ruling, the IDL sought to revoke Robideauxs’ encroachment permit number L-95-S-1530A. The process started with a letter from IDL to Robideauxs notifying them of the IDL’s intent to revoke that permit. Robideauxs requested a contested case, which was granted. Board of Land Commissioners Case No. L-LP-03-006. A hearing was held in December 2004, and on August 19, 2005, Curtis Fransen, hearing officer for the IDL, issued his “Recommended Findings of Fact, Conclusions of Law and Order”. R. pp. 752-764. Fransen found that the plans Robideauxs submitted to IDL in 1997 (the Meckel survey drawing), “...indicated the proposed location of the point dock encroachment might infringe on the riparian or littoral rights of the Lovitts.” R. p. 759. Since Lovitts’ littoral rights “may” be infringed upon, Idaho Code § 58-1305(b) required notice to be sent to Lovitts. R. pp. 754, 759. That finding, which was found by the Idaho Supreme Court, essentially resolves the administrative appeal before this Court. Lovitts’ littoral rights “may” have been infringed back in 1997, they were required by statute to be given notice, and they were not given such notice. Fransen also mentioned the permit allowed back in 1997 did not comport with IDL “regulations, policies, procedures and practice which generally required dock encroachments to be adjacent and perpendicular to the general shoreline of the applicants['] property in order to avoid infringing on the riparian or littoral rights of adjacent landowners.” R. p. 759. Robideauxs argue such policies are not in writing and complain that the IDL now implements them. Any violation of IDL policy is not relevant, because there has been an undisputed violation of the statute, Idaho Code § 58-

1305(b). On October 27, 2005, Winston A. Wiggins, Director of the IDL, issued his “Final Order”. R. pp. 766-772. That Final Order revoked Robideauxs’ permit (R. p. 770) because it was not valid due to the fact that the plans submitted by Robideauxs to obtain such permit back in 1997 (the Meckel survey drawing) showed Lovitts’ riparian or littoral rights might be infringed upon by the proposed location of Robideauxs’ Point Dock. R. p. 769. This appeal results from that decision of the IDL revoking Robideauxs’ encroachment permit.

Robideauxs claim in their appeal that the IDL’s decision to revoke their encroachment permit was in excess of its statutory authority, not supported by evidence on the record as a whole, is arbitrary, capricious, and an abuse of discretion. Robideauxs argue the IDL made the determination of their littoral rights when it granted them the encroachment permit in 1993 and approved the modification in 1997. Robideauxs further assert the IDL should now be estopped from asserting a contrary position.

Conversely, the IDL requests this Court affirm its decision to revoke the Robideauxs’ encroachment permit because its decision was based on substantial and competent evidence from the record and was not arbitrary, capricious, nor an abuse of discretion.

II. POSITIONS OF THE PARTIES.

Robideauxs claim that when the IDL issued their encroachment permit, the IDL in essence determined the littoral rights of the parties. Robideauxs claim such determination of the parties’ littoral rights showed their Point Dock was located within their littoral rights, and as such, no notice was required to the Lovitts. Robideauxs

argue that from July 1996 to January 2002 the IDL continuously maintained Robideauxs were not infringing on the littoral rights of the adjacent landowners. Robideauxs argue that since nothing has changed since January 2002, IDL's recent decision to revoke the encroachment permit was not based on changed facts or an application of Idaho law, but rather based on policy. Robideauxs assert that revocation of their encroachment permit based on that policy was arbitrary, capricious and unlawful.

The Idaho Department of Lands claims the decision to revoke Robideauxs' encroachment permit was based on findings made by the Idaho Supreme Court and substantial evidence in the record which demonstrated the Robideauxs' proposed dock back in 1997 at the very least appeared to infringe on the littoral rights of the adjacent landowners. Following the holding of the Idaho Supreme Court, the IDL determined the permit was invalid because it was issued contrary to I.C. §58-1305(b). Therefore, IDL claims the revocation was not arbitrary, capricious, nor without basis in fact or law.

III. STANDARD OF REVIEW.

When reviewing an appeal from an agency decision, the court should place great weight on the agency's interpretation of its own rules. *Angstman v. City of Boise*, 128 Idaho 575, 917 P.2d 409 (1996). An agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. *Price v. Payette County Bd. of County Com'rs*, 131 Idaho 426, 958 P.2d 583 (1998). "Substantial evidence" which supports an agency's factual determination is "relevant evidence that a reasonable mind might accept to support a conclusion." *Pearl v. Bd. of Professional Discipline of Idaho State Bd. of Medicine*, 137 Idaho 107, 44 P.2d 1162

(2002).

Additionally, under the Idaho Administrative Procedures Act, a court shall affirm an agency's decision on appeal unless "substantial rights of the appellant have been prejudiced" or the court finds that the agency's findings, inferences, conclusion or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion.

Idaho Code §67-5279(3)-(4).

There is limited Idaho case law defining "arbitrary" and "capricious". *Brett v. Eleventh Street Dock Owners*, 141 Idaho 517, 112 P.3d. 805 (2005) provides some guidance. In *Brett*, the Idaho Supreme Court held the IDL's decision was not arbitrary and capricious since it was "sufficiently detailed to demonstrate that it considered applicable standards and reached a reasoned decision... based on substantial evidence in the record." *Id.* at 523.

IV. ANALYSIS.

A. IDL's Revocation of the Point Dock Permit Was Lawful.

The IDL's decision to revoke Robideauxs' permit is supported by substantial evidence from the record as a whole, including: permits, permit applications, surveys, diagrams, lake elevations at low and high water, deeds, testimony, correspondence, photographs, and a site visit. Specifically, the IDL's decision as to the need for notice, and lack thereof requires its decision be affirmed. Despite the fact that there may be conflicting evidence before the IDL, there is more than sufficient relevant evidence that

a reasonable mind might accept to support the conclusion that Robideauxs' proposed Point Dock appeared to infringe on the littoral rights of the adjacent property owner. Therefore, as further discussed below, IDL's determination to revoke Robideauxs' permit is affirmed by this Court.

Under Chapter 13, Title 58 of the Idaho Code, the Idaho Department of Lands approves applications for construction permits with minimal procedural requirements. I.C. §58-1305(a). However, "the department may institute an administrative action to revoke a lake encroachment permit for violation of the conditions of a permit, or any other reason authorized by law." IDAPA20.03.04.040. "A holder of a valid encroachment permit cannot locate a dock in a manner that infringes upon an adjacent landowner's littoral right." *Lovitt v. Robideaux*, 139 Idaho 322, 326, 78 P.3d 389, 393 (2003). "Where feasible, all docks... shall be construed so as to protrude as nearly as possible at right angles to the general shoreline and shall be constructed as not to interfere with docks, piers, or similar structures presently existing or likely to be installed to serve adjacent properties." IDAPA 20.03.04.060.02. See also I.C. §51-1305(b) and IDAPA 20.03.04.015(d).

In *Driesbach v. Lynch*, 71 Idaho 501, 234 P.2d 446 (1951), the Court established general guidelines to determine the littoral lines between adjacent property owners: "if the shoreline is straight or substantially so, the littoral lines are to be extended from the divisional lines on the shore into the water perpendicular to the shoreline; in the event the shoreline is concave, converging lines shall be run from the divisional shorelines to the line of navigability..." 71 Idaho at 509, 234 P.2d at 454. Although general rules can be established, "no one rule or formula could be invoked to determine the littoral boundaries which would apply in all cases." 71 Idaho at 508-509, 234 P.2d at 453-54.

In fact, the only thing that uniformly applies is that courts strive to ensure that the shoreline owners have a “proportional share of deep water frontage.” 71 Idaho at 509, 234 P.2d at 454.

Idaho Code § 58-1305(b) specifically requires “If the plans of the proposed encroachment indicate such infringement [upon the littoral rights of an adjacent landowner] will or ***may*** occur, the board shall require that the applicant secure the consent of such adjacent owner or that he be given notice of the application by personal service or by certified or registered mail...” (emphasis added). Thus, under the statute, if the permit application infringes *or appears to infringe* on the littoral rights of an adjacent landowner, the applicant ***must*** obtain written consent from the adjacent landowner or *provide actual notice of the application.*

Applications for navigational encroachments must have plans attached that “describe the extent, nature and approximate location of the proposed encroachment and the proposed method of accomplishing the same.” I.C. §58-1302(k). During the processing of the application, the IDL relies on the drawings that accompany an application for the proposed location of the dock. Drawings that accompany the application are made part of the permit for an encroachment because the permit is issued based on the encroachment depiction in the drawing. Affidavit of Washburn, ¶¶ 6, 7.

Robideauxs argue the IDL did in fact determine Robideauxs were within their littoral rights when they issued the encroachment permit back in 1997. Robideauxs then argue that because they were within their littoral rights they did not have to provide the Lovitts with notice nor obtain their consent. Finally, Robideauxs argue that because they were within their littoral rights, the IDL’s revocation of their encroachment permit on

October 27, 2005, was based on policy, not fact or law.

The first problem with Robideauxs' argument is even if IDL determined littoral rights of the parties back in 1997, petitioners ignore the undisputed fact that Lovitts did not receive notice that IDL was about to make such a determination. The second problem with Robideauxs' argument is it would elevate the IDL's 1997 decision to an infallible status. The IDL can be wrong. The IDL was wrong in issuing Petitioners their permit back in 1997 without requiring petitioners to give Lovitts notice. The IDL "admits" it was wrong in issuing a permit for a dock that was not adjacent to and perpendicular to the general shoreline of the applicants' property. Curt Fransen's Recommended Findings of Fact, Conclusions of Law and Order, p. 8, Finding of Fact ¶ 9. R. p. 759-60. The undisputed fact that Lovitts received no notice is all that is necessary to determine the outcome of this appeal. Lack of notice was the basis for the IDL's decision to revoke the permit. Lack of notice was the basis for Curt Fransen's Recommended Findings of Fact, Conclusions of Law and Order at Page 10, ¶¶ 1 and 2, R. p. 761. Lack of notice was the basis for Director Wiggins' decision in the Final Order. Final Order, Findings of Fact, ¶¶ 1-3, Conclusions of Law, R. p. 768-770.

Robideauxs' argument that since they were within their littoral rights they did not have to provide the Lovitts with notice back in 1997 is based on a very faulty premise. The argument is based on the premise that because Robideauxs received a permit for their Point Dock, they thus received an adjudication of their littoral rights, and since petitioners' Point Dock was within Robideauxs' littoral rights they did not need to give notice to the Lovitts. The premise is faulty because it ignores the statutory requirement that "**notice of the application**" must be given to the adjoining landowner. Idaho Code § 58-1305. Thus, notice must be given **before** a dock permit is approved, and **before**

the IDL can adjudicate littoral rights, the adjoining landowner must be given **notice**.

The adjoining landowner must be given notice of the application. Not only is the premise faulty, the premise ignores the correct legal standard. The legal standard is not that you only give notice to those whose littoral rights are in fact impacted; the legal standard is that you give **actual notice** to any adjacent landowner that the permit application infringes **or appears to infringe** on their littoral rights. Idaho Code § 58-1305(b). Assuming for the sake of argument that Robideauxs somehow had their littoral rights determined by the IDL back in 1997, it would have been an adjudication without notice to Lovitts. Since any adjudication was without notice to the Lovitts, and since any reasonable objective observer would think that such a dock location *would* be in contravention of Lovitts' littoral rights, Lovitts are still entitled to notice under the statute.

The IDL asserts that since Robideauxs' proposed dock at the very least **appeared** to infringe on the littoral rights of the adjacent landowners, they were required by statute to either obtain the consent of the adjacent landowners or notify them about the application. Since Robideauxs did not comply with either of these requirements, the IDL argues their revocation was lawful. This Court agrees. Robideauxs' Point Dock is further away from Robideauxs' parcel than Lovitts' dock. That undisputed fact would cause any objective observer to feel that such a dock location "may" infringe upon Lovitts' littoral rights. That undisputed fact placed Robideauxs in a situation in 1997 where, under Idaho Code § 58-1305(b), "If the plans of the proposed encroachment indicate such infringement [upon the littoral rights of an adjacent landowner] will or **may** occur, the board shall require that the applicant secure the consent of such adjacent owner or that he be given notice of the application by personal service or by certified or registered mail..."

Robideauxs argue that Washburn was wrong when he testified the “code” requires the dock to be set at a 90-degree angle to the shoreline. Appellants’ Brief, p. 6, citing Hearing Transcript, Testimony of Carl Washburn, p. 296, L. 19 – p. 297, L. 1. Robideauxs are correct that the Idaho Code does not contain such a requirement. However, while the IDL noted the Point Dock was parallel to shore (Fransen’s Findings of Fact, Conclusions of Law and Order, p. 8, Finding of Fact ¶ 9, R. p. 759), that was not the basis for IDL’s decision to terminate Robideauxs’ permit. The basis for IDL’s decision to terminate Robideauxs’ permit was clearly the lack of notice given to Lovitts in 1997. *Id.*, pp. 10, Findings of Law ¶¶ 1-3, R. p. 762. This Court need not decide the issue of 90-degree placement of a dock. This Court need not determine whether the littoral line between Robideauxs’ and Lovitts’ parcels proceeds perpendicular to the shore at high water. This Court need not determine the elevation of the high water mark. What is being appealed from is the October 27, 2005, decision of IDL Director Wiggins to terminate Robideauxs’ Point Dock permit. That decision to terminate was based upon a lack of notice to the Lovitts back in 1997.

A final reason the IDL’s decision must be affirmed is the doctrine of “law of the case”. That doctrine mandates that the rule of law necessary to the Court’s decision on appeal must be adhered to throughout the case’s subsequent progress, both in the trial court and upon subsequent appeal. *Union Pacific v. Idaho State Tax Commission*, 139 Idaho 572, 575, 83 P.3d 116, 119 (2004); *citing Suitts v. First Sec. Bank of Idaho*, 110 Idaho 15, 21, 713 P.2d 1374, 1380 (1985). Where the case is remanded to the trial court, the case “must be tried in light of and in consonance with the rules of law as announced by the appellate court in that particular case.” *Union Pacific v. Idaho State Tax Commission*, 139 Idaho 572, 575, 83 P.3d 116, 119 (2004); *citing Creem v.*

Northwestern Mut. Fire Ass'n of Seattle, Wash., 58 Idaho 349, 352, 74 P.2d 702, 703 (1937). This Court has reviewed the Idaho appellate cases interpreting “the law of the case” doctrine. The “law of the case” doctrine is applied to legal “principles” and “rules of law”, and not findings of fact made by the appellate court. In this case, the Idaho Supreme Court made a finding of *fact* that: “Based on the exhibits provided at trial, it is evident the Robideauxs’ proposed placement of the dock would, at the very least, appear to infringe on the Lovitts’ statutory littoral rights.” 139 Idaho at 327, 78 P.3d 389 at 394. This Court is not bound by that factual finding of the Idaho Supreme Court. However, this Court is convinced that this finding is not only correct, but that there can be no other interpretation of the facts...Robideauxs’ proposed placement at the very least *appears* to infringe on Lovitts’ statutory littoral rights. This Court is bound by the factual determination of the IDL, and the IDL found that “The plans indicated the proposed location of the ‘point dock’ encroachment might infringe on the riparian or littoral rights of the Lovitts.” R. p. 769. This Court *is* bound by the IDL’s factual determination as it is more than supported by substantial competent evidence. An agency’s factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. *Price v. Payette County Bd. of County Com’rs*, 131 Idaho 426, 958 P.2d 583 (1998). The Idaho Supreme Court then made the following conclusion of *law*: “As a result [of appearing to infringe on Lovitts’ statutory littoral rights], the Robideauxs had an obligation to obtain written consent or provide notice to the Lovitts so they could choose to request a hearing before the Department.” That is a rule of law that is binding on this Court under the doctrine of “law of the case”.

B. IDL's Revocation of the Point Dock Permit Was Not Arbitrary or Capricious.

Robideauxs' argument regarding IDL's decision being arbitrary and capricious, is based on two claims. First, Robideauxs' argue that IDL's claim that a "V" shaped bay is different than a "U" shaped bay is unsupported. Petitioners' Response Brief to Idaho Department of Lands Brief, pp. 1-2. This is simply not relevant. The shape of the bay is clearly a reason to deviate from the stated Idaho Supreme court preference that on shorelines that are straight, the littoral rights proceed out from the property boundary out into the lake at right angles to the shoreline. *Driesbach v. Lynch*, 71 Idaho 501, 508-09, 234 P.2d 446, 453-54 (1951). But even if the shape of Lee's Bay allowed substantial deviation, an objective observer would note that the proposed Point Dock location was such that it "may" infringe on Lovitts' littoral rights. That is what is relevant according to Idaho Code § 58-1305(b). Thus, any IDL policy regarding "V" shaped bays versus "U" shaped bays cannot be arbitrary or capricious, as it is simply not relevant.

Robideauxs' second argument regarding IDL's arbitrary and capricious conduct is based on the fact that IDL's Acting Bureau Chief Fank E. Waterman wrote a letter on January 9, 2002, to Lovitts' attorney, Harvey Richman, stating that: "The Robideaux dock (Encroachment Permits No. ERL-95-S-1530 and ERL-95-S-1530A) is located on the owners side of the littoral line and does not infringe on the adjacent Lovitt littoral area. Petition, Exhibit C. According to Waterman, his conclusions were based on the Meckel Survey. Robideauxs claim that Waterman made a factual finding as to Robideauxs' littoral rights. Petitioners' Response Brief to Idaho Department of Lands Brief, pp. 2-3. This Court certainly understands Robideauxs' frustration that such was not disclosed to the Idaho Supreme Court. This January 9, 2002, letter of Waterman clearly existed before the April 2003 oral argument in *Lovitt v. Robideaux*, 139 Idaho

322, 78 P.3d 389 (2003), let alone the September 29, 2003, Idaho Supreme Court opinion in that case. The Lovitts should have disclosed that to the Idaho Supreme Court in that case. However, the letter, or what it says, is simply not relevant. The relevant issue is whether or not, back in 1997, Robideauxs' proposed Point Dock location "may" interfere with Lovitts' littoral rights. What was written five years later by Waterman is simply not relevant to the fact that where Robideauxs placed the dock on their 1997 proposal, by any objective view, appears such that it "may" interfere with Lovitts' littoral rights. As such, Lovitts were entitled to notice in 1997 of Robideauxs' pending request before the IDL. Robideauxs argument regarding the January 9, 2002 Waterman letter, again raises a piece of IDL correspondence to the level of "infallibility". That argument ignores the fact that under IDAPA 20.30,04.040.01, the IDL can revoke an encroachment permit for a violation of the permit, or for any other reason *authorized by law*. Finally, the argument ignores the fact that back in 1997, Lovitts did not receive the notice to which they were entitled.

C. Estoppel.

The doctrine of estoppel is articulated in *McKay v. Owens*, 130 Idaho 148, 937 P.2d 1222 (1997):

"[W]here a litigant, by means of such sworn statements, obtains a judgment, advantage, or consideration from one party, he will not, thereafter, by repudiating such allegations and by means of inconsistent and contrary allegations or testimony, be permitted to obtain a recovery or right against another party, arising out of the same transaction or subject matter."

Id. at 152. Robideauxs argue the IDL should be estopped from asserting that the permit should be revoked. However, they fail to develop this argument and merely provide the Court with case law regarding the doctrine of estoppel.

The IDL argues it should not be estopped from asserting its position since its

position has not changed. This Court does not agree with that claim by IDL that it has been consistent at all times. IDL claims its position throughout this litigation has always been to accommodate littoral neighbors to the best of its ability according to Idaho law. That may or may not be the case depending on how it is viewed. The IDL has clearly changed its position during the last nine years. The IDL has admittedly made mistakes. But for purposes of estoppel, that is not relevant. What is relevant is, as the IDL argues, the fact that the IDL has not derived judgment, advantage or consideration from issuing Robideauxs' encroachment permit since it is a state agency charged with issuing encroachment permits.

Again, this Court understands Robideauxs' frustration in not having the January 9, 2002, Waterman letter during the appeal in *Lovitt v. Robideaux*. And this Court certainly understands Robideauxs being perplexed that at one time they had a permit, and now they do not. However, the doctrine of estoppel is not applicable in this case since the IDL did not obtain a judgment, advantage, or consideration when it issued the Robideauxs' encroachment permit. Again, under IDAPA 20.30,04.040.01, the IDL can revoke an encroachment permit for a violation of the permit, or for any other reason *authorized by law*. This allows the Department to revoke a permit to ensure the rights of other property owners when that permit was previously issued in violation of the statute. Since the Petitioners did not obtain consent from nor provide notice to the Lovitts as required by statute, a lawful permit was never issued. Since a lawful permit was never issued, the IDL's position (of issuing permits in conformity to the law) did not change, and therefore the IDL should not be estopped from asserting its claims.

D. Quasi-Estoppel.

The standard for the doctrine of quasi-estoppel was expressed by the Court in

KTVB, Inc. v. Boise City, 94 Idaho 279, 486 P.2d 992 (1971):

[Quasi estoppel] precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him. This doctrine applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit.

Id. at 281. Robideauxs assert the IDL should be estopped under the theory of quasi estoppel because IDL maintained the same position for five years, i.e. that Robideauxs were within their littoral rights, and then changed that position without justification.

The IDL argues the doctrine of quasi-estoppel does not apply in this case because it did not take an inconsistent position, it did not accept a benefit by issuing and then revoking the Robideauxs' permit, and it could not acquiesce to Robideauxs' assertion of littoral rights because it could not waive the Lovitts' littoral rights.

The IDL did take seemingly inconsistent positions, at least from the standpoint of whether a permit was issued or revoked. The IDL claims that their position that permits should only be issued in compliance with the laws of Idaho has not changed. That may or may not be the case, but an agency, just as a person, may be wrong. The IDL was wrong in issuing a permit to Robideauxs without notice going to Lovitts. Nothing will change that fact. The reason the IDL reached different conclusions as to whether a permit was issued or revoked was because the IDL realized it was wrong in issuing a permit in the first place due to a lack of notice. There is no evidence that the IDL accepted any sort of benefit by issuing and then later revoking Robideauxs' permit. Since Petitioners never obtained the consent from, nor give notice to, the Lovitts as required by law, a lawful permit was never issued. Also, the IDL did not determine Robideauxs' littoral rights when it issued the encroachment permit. The determination of littoral rights was made after the Lovitts filed a complaint and the Department

reviewed substantial evidence. Only the Lovitts could consent to an infringement on their littoral rights, which was not done with requisite notice.

V. CONCLUSION.

The Idaho Department of Land's decision to revoke the Robideauxs' encroachment permit is **affirmed**. Since the IDL relied on substantial evidence in the record in deciding to revoke the Robideauxs' permit, and the Idaho Supreme Court also concluded that the proposed dock appeared to infringe on the adjacent property owners' littoral rights, the IDL's determination must be affirmed. It is undisputed that the Robideauxs failed to provide notice to, or get consent from, the Lovitts, which is in direct violation of Idaho Code § 58-1305(b). This violation gives IDL a lawful reason to revoke the encroachment permit. IDL is allowed to revoke pursuant to IDAPA 20.30,04.040.01. Therefore, the IDL's decision to revoke the Robideauxs' permit was within the IDL's statutory authority, it was supported by substantial evidence on the record, it was not arbitrary, it was not capricious nor was it an abuse of its discretion. The IDL is not estopped from making its decision to revoke the Robideauxs' permit, since it is not a contradiction of their position that permits should only be issued in compliance with the laws of Idaho.

VI. ORDER.

IT IS HEREBY ORDERED the Idaho Department of Land's decision to revoke the Robideauxs' encroachment permit is **AFFIRMED**.

ENTERED this 10th day of October, 2006.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of October, 2006, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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