STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

_____
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

LAKE CDA INVESTMENTS, LLC and, *Plaintiffs*, vs. **IDAHO DEPARTMENT OF LANDS, et.al.,** *Defendants*.	Case No. **CV 2006 8728** **MEMORANDUM DECISION AND ORDER ON APPEAL**
CHRIS KEENAN, Plaintiff, vs. IDAHO DEPARTMENT OF LANDS, et.al., Defendants.	Case No. **CV 2007 4069** **MEMORANDUM DECISION AND ORDER ON APPEAL**

I. PRODECURAL BACKGROUND.

These are two consolidated cases where two landowners, Lake CDA Investments, LLC in CV 2006-8278, and Chris Keenan in CV 2007-4069, (hereafter referred to as "landowners"), filed petitions to review or appeal the decisions of the Idaho Department of Lands (IDL), pursuant to Idaho Code § 67-5273 (Idaho Administrative Procedures Act), and Idaho Code §§ 58-1305(e) and 58-1306(d) (Idaho Lake Protection Act). Both landowners own property which borders Lake Coeur d'Alene. The landowners' predecessor gave the State of Idaho through the Idaho Transportation Department (ITD) a

Right-of-Way Deed across each of the landowners' parcels for a public highway. This highway was known as Yellowstone Trail, and when I-90 was later relocated, this road was named Lake Coeur d'Alene Drive. That road traverses across landowners' parcels immediately adjacent to the shore of Lake Coeur d'Alene. If one was driving from west to east on Lake Coeur d'Alene Drive, you would first pass over ITD's right-of-way crossing the property of The Beach House Marina/Hagadone Corporation, then Rick and Jan Carr's parcel, then Keenan's parcel, then Lake CDA Investments' parcel, then Thomas Hudson's parcel. As Lake Coeur d'Alene Drive proceeds to the east across the Carr/Keenan/Lake CDA parcels toward Bennett Bay, it crosses many other private parcels of land. Along this route it parallels the shore of Lake Coeur d'Alene and is immediately adjacent to that shoreline. Only the Beach House Marina is located in between Lake Coeur d'Alene Drive and the shore of Lake Coeur d'Alene. Opening Brief of Petitioners/Appellants, Addendum 3. There are many private docks owned by the upland landowners adjacent to the shore and Lake Coeur d'Alene Drive as it proceeds from the Beach House Marina to Bennett Bay. *Id.*

The Right-of-Way deed to ITD was from both landowners' predecessor in interest, Vera and Jack Smith. On December 18, 1940, Vera and Jack Smith (then owners of the subject property) conveyed a 125-foot-wide highway right-of-way to the State of Idaho. R. 15; Exhibit 4. In each of the two cases the landowner sought to enforce their claimed littoral rights, as they had each applied for a single-family dock permit from the IDL. The IDL then denied both landowners' applications. The IDL Hearing Examiner denied the applications based on his finding that the landowners had no littoral rights, and he found the improvements made by ITD since the 1940 Right-of-Way deed essentially landlocked the landowners. R. p. 127; May 18, 2007 Memorandum (Consolidated Case Hearing

Recommendation) p. 10.

Littoral and riparian rights are defined as follows: "While a riparian owner is one whose land abuts upon a river and a littoral owner is one whose land abuts upon a lake (See 25A, Words and Phrases 34)…current usage…has made riparian an acceptable term as to land abutting upon either rivers or lakes." *Button v. State,* 69 Wash.2d 751, 754, 420 P.2d 352, 354, n.1 (1966). Because their land abuts Lake Coeur d'Alene, it is the landowners' littoral rights which are in dispute. However, at times, littoral rights may be referred to as riparian rights.

A. Lake CDA, Kootenai County Case No. CV 2006 8278.

Lake CDA Investments LLC, (Lake CDA) applied to IDL for a single-family dock lake encroachment permit on July 31, 2006. Lake CDA's parcel has as its immediately adjacent neighbor to the west, a lot owned by Keenan, and to the east, a lot owned by Thomas Hudson. Lake CDA claims that IDL requested comment from the State of Idaho through the Idaho Transportation Department (ITD), and that IDL did so in an untimely manner and even though the ITD owned no adjacent property. CV 2006 8728, Petition, p. 4, ¶ 13. The ITD filed an objection and Lake CDA requested a public hearing. *Id.,* ¶15. The IDL rejected Lake CDA's request for a hearing and summarily dismissed Lake CDA's application for a single-family dock. *Id.* About four months before Lake CDA made its application with IDL for a single-family dock, Tom Hudson, the neighbor adjacent to Lake CDA's parcel, made application with IDL for a single-family dock permit and was granted a permit from IDL, even though ITD had objected to Hudson's application. *Id.* p. 5, ¶¶ 16, 17. On November 22, 2006, Lake CDA filed its Petition for Review. On June 15, 2007, ITD filed its Motion to Intervene, and on July 10, 2007, both Lake CDA and IDL stipulated to ITD's intervention, and on July 10, 2007, this Court ordered such intervention.

/

B. Keenan, Kootenai County Case No. CV 2007 4069.

Chris Keenan (Keenan) applied to IDL for a single-family dock lake encroachment permit on November 17, 2006. Keenan's parcel has as its immediately adjacent neighbors to the west, a lot owned by Carr, and to the east, the lot owned by Lake CDA. CV 2007 4069, Petition, p. 2, ¶ 11. Keenan claims that IDL requested comment from the State of Idaho through the Idaho Transportation Department (ITD), and that IDL did so in an untimely manner and even though the ITD owned no adjacent property. *Id.*, p. 4, ¶ 13. The ITD filed an objection to Keenan's application. *Id.* The IDL denied Keenan's request for a single-family dock. *Id.,* pp. 4-5, ¶14. Keenan also notes the fact that Tom Hudson, the neighbor adjacent to Lake CDA's parcel, made application with IDL for a single-family dock permit and was granted a permit from IDL even though ITD had objected to Hudson's application. *Id.* p. 5, ¶¶ 15, 16. On June 7, 2007, Keenan filed his Petition for Review. On June 15, 2007, ITD filed its Motion to Intervene, and on July 10, 2007, both Lake CDA and IDL stipulated to ITD's intervention, and on July 10, 2007, this Court ordered such intervention.

On July 20, 2007, this Court ordered these two matters consolidated. All parties filed briefing and oral argument was held on February 5, 2008. The matter is at issue.

II. ANALYSIS.

A. Standard of Review.

Under the Idaho Administrative Procedure Act, IDL's decision must be affirmed unless the agency's findings and conclusions are:

(a) in violation of constitutional or statutory provisions
(b) in excess of the 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.

I.C. §67-5279. The role of this Court is to independently review the record for the agency's (IDL's) compliance with the Idaho Administrative Procedure Act. *Brett v. Eleventh Street Dock Owners Assn.,* 141 Idhao 517, 521, 112 P.3d 805, 809 (2005). "If these standards are not met, the agency action '…shall be set aside, in whole or in part, and remanded for further proceedings as necessary' in accordance with the Court's discretion…" *Id.*

B. The Landowners, not ITD, Possess the Littoral Rights.

The paramount question in this appeal is: "Did landowners' predecessor in interest (Vera and Jack Smith) lose their littoral rights when they executed a right-of-way deed granting 125 feet of right-of-way to the State of Idaho on December 18, 1940?" That question is answered by another question: "Did the landowners' predecessor in interest convey fee title or an easement to the State of Idaho for this highway?" If the landowners retained their littoral rights, the Court must then determine: "What is the effect on the landowners' littoral rights by the State's placing fill in Lake Coeur d'Alene at their shoreline boundary?"

1. The Landowners' Predecessor Conveyed Only an Easement.

Resolution of these appeals turns on whether the landowners retained their littoral rights or whether they gave away their littoral rights when their predecessors executed a right-of-way deed across their land to the State of Idaho to build this road. At oral argument, all counsel agreed this is the central issue on appeal. Idaho Department of Lands wrote: "The central holding of IDL's order was that the Petitioners/Appellants' littoral rights to construct docks in question were subordinate to, and effectively precluded by, a State of Idaho right-of-way running along and over the shoreline of the Petitioners/Appellants' properties." Defendants/Respondents' [IDL] Response Brief, p. 2. If

that central holding that the landowners' littoral rights were subordinate to and precluded by the ITD's right-of-way was correct, IDL's decision should be affirmed. If that central holding was wrong, and the landowners' retain their littoral rights, the decision of the IDL must be reversed.

If the landowners' predecessor in interest had sold all their land which bordered upon Lake Coeur d'Alene outright to ITD by deed, the result would likely be that the landowners no longer had any littoral rights, unless they specifically reserved those rights. *Rancho Santa Margarita v. Vail,* 81 P.2d 533, 538-39, (Cal. 1938); *Cortella v. Salt Lake City,* 72 P.2d 630 (Utah 1937). In other words, where the grantor conveys all the land the grantor owns, the grantor's failure to expressly reserve any littoral rights in the deed extinguishes any littoral rights in the grantor. As discussed *infra,* the rule is the opposite where one conveys only an easement. In conveying an easement, you retain your littoral rights *unless* you *specifically* give them away.

Obviously this was not an outright conveyance. In 1940, Vera and Jack Smith only conveyed an easement for a right-of-way. Exhibit 4. Under Idaho law, the use of the term "right-of-way" in the deed creates an easement, not a transfer in fee simple. In *Hash v. U.S.,* 403 F.3d 1308, 1320 (Fed.Cir. 2005), the United States Court of Appeals, Federal Circuit, citing *Neider v. Shaw,* 138 Idaho 503, 65 P.3d 525 (2003), held: "The Idaho Court held that when the term 'right-of-way' appears in the substantive portion of a conveyance instrument, the correct interpretation is that the deed conveyed only an easement and that the underlying land was not conveyed unless explicitly granted in the instrument."

There can be no doubt that the landowners' predecessor in interest, Vera and Jack Smith, had littoral rights. Both landowners' chain of title begins with Exhibit 1, a Warranty

Deed from Goodwin to Van Houden, dated January 23, 1887. That deed specifically states, at the end of the property description, that it conveys "…five (5) acres, and including all riparian rights." Exhibit 1, p. 1. Exhibit 2 is a June 8, 1911, agreement for a 99 year lease of right-of-way across the property of the landowners' predecessor in interest (Armstrong at this point), to Kootenai County. Exhibit 2, pp. 2, 4. Following the identical property description as contained in the 1887 deed, the 1911 right-of-way deed states the landowner owns "…five (5) acres, and including all Riparian rights." *Id.* Exhibit 3 is a February 24, 1925, Right-of-Way Deed across the property of the landowners' predecessor in interest (still Armstrong), which gives Kootenai County a 50-foot right-of-way (25 feet on each side of a center line) essentially at the edge of the property and the shore of Lake Coeur d'Alene. That Right-of-Way Deed is silent as to littoral or riparian rights. The only stated purpose for the right-of-way is "for the purpose of a public highway". Exhibit 3, p. 1. Exhibit 4 is the deed central to these appeals. Exhibit 4 is a Right-of-Way Deed dated December 18, 1940, from Vera and Jack Smith to the State of Idaho, for a 125-foot right-of-way (75 feet to the right and 50 feet to the left of a center line), which essentially includes or subsumes the right-of-way given in 1925 (as the Right-of-Way Deed references "New right of way required being approximately 0.920 acres of the 1,240 acres above described"), and which is also essentially at the edge of the property where it meets the shore of Lake Coeur d'Alene. The only purpose for this Right-of-Way Deed is "…for a right of way for a public highway…" That Right-of-Way Deed is silent as to littoral or riparian rights.

A right-of-way does not separate the upland landowner from that landowner's riparian rights. "Land which is separated from water by a highway or street in which *the public* holds the fee is not riparian land; however, land which is separated from water by a

highway or street in which *the landowner* holds the fee, is riparian land, regardless of whether the highway is dedicated to public use or to private use by a finite number of persons." 65 C.J.S. Navigable Waters § 82, *citing Thies v. Howland,* 424 Mich. 282, 380 N.W.2d 463 (1985). (italics added). The pertinent portion of *Thies* is as follows:

> "While there is some authority to the contrary, the majority of the courts have followed the rule that land which is separated from water by a highway or street the fee of which is in the public is not riparian land; but where the fee in the land covered by the highway or street is in the owner of the land, riparian rights remain in such owner." 78 Am.Jur.2d, Waters, § 273, p. 716.
>
> See also 79 Am.Jur.2d, Wharves, § 5, p. 179; 1 Farnham, Water & Water Rights, § 144, pp. 666-667; Plager & Maloney, *Multiple interests in riparian land, subdivision platting, and the allocation of riparian rights,* 46 U.Det.J.Urb.L. 41, 50 (1968).

424 Mich. 282, 290, 380 N.W.2d 463, 467. The December 18, 1940, Right-of-Way Deed (Exhibit 4) does not mention a fee simple estate is being conveyed to the State of Idaho. The clear language of the deed indicates that Vera and Jack Smith sold nothing more to the State of Idaho, than "…a right of way for a public highway, the following described parcel of land situated in Kootenai County…" *Id.* The legal description then is "A strip of land 125 feet wide, being 75 feet on the right side and 50 feet on the left side of the following described center line of said highway as surveyed and shown on the official plat as revised 12/10/40 of the Yellow Stone Trail (M.P. 761) State Highway Survey on file in the office of the Department of Public Works of the State of Idaho…" Exhibit 4.

As recognized in *West v. Smith,* 95 Idaho 550, 511 P.2d 1326 (1973):

> It is clear that prior to their predecessors execution of the right of way deed, the landowners enjoyed littoral rights. The littoral owner's right of access to the lake, free from unreasonable interference, attaches to all points of his shoreline,

95 Idaho 550 at 555, 511 P.2d 1326 at 1331, *citing: Johnson v. Jeldness,* 85 Or. 657, 167 P. 798, 799 (1917); *Peck v. Alfred Olsen Construction Co.,* 238 N.W. 416, 89

A.L.R. 1132 (Iowa 1931). The reason the landowners' predecessors had littoral rights is based on their deed which specifically stated Goodwin conveyed to VanHouden "…five (5) acres, and including all riparian rights." Exhibit 1, p. 1. As stated in *Ace Equipment Sales v. Buccino,* 273 Conn. 217, 229, 869 A.2d 626, 634 (Conn. 2005)

> When a deed conveying property abutting a body of water specifically delineates and describes the boundaries of the property, such as by metes and bounds, and that description includes a portion of the land beneath the water, that portion is owned in severalty. See Black's Law Dictionary (8th Ed.2004) (Defining "severalty" as "[t]he state or condition of being separate or distinct"; defining "metes and bounds" as "[t]he territorial limits of real property as measured by distances and angles from designated landmarks and in relation to adjoining properties. Metes and bounds are [usually] described in deeds and surveys to establish the boundary lines of land."). By contrast, when a deed generally describes the abutting property as bounded by the body of water, title to the bed is based on littoral ownership, and each littoral owner impliedly owns the land under the water to the center of the body and each abutting owner is entitled to common use of the entire body. *Mill River Woolen Mfg. Co. v. Smith,* 34 Conn. 462, 463 (1867) ("[i]t is well settled that where land is bounded, in a deed, in general terms, on or by a river or stream not navigable, the grant extends to the center of it"); see 78 Am.Jur.2d 391-92, Waters § 34 (2002) ("In the case of a lake suitable for domestic or recreational uses, a littoral owner has a right to make such use of the lake over its entire surface, in common with all other abutting owners ....

As stated in *Mianus Realty Company, Inc. v. Greenway,* 193 A.2d 713, 151 Conn. 128, 131-32 (Conn. 1963):

> Ordinarily, the owner of uplands extending to the highwater mark is presumed to possess riparian rights, including the right to wharf out. *Walz v. Bennett,* 95 Conn. 537, 542, 111 A. 834. Such rights are freely alienable, and they may be separated from the ownership of the uplands and separately conveyed, and, conversely, the ownership of the uplands may be conveyed exclusive of such riparian rights as may formerly have been attached thereto. *Barri v. Schwarz Bros. Co,* 93 Conn. 501, 506, 107 A. 3; *Simons v. French*, 25 Conn. 346, 353.
>
> Whether or not riparian rights are conveyed along with the grant of the uplands depends largely upon the intent of the grantor. Such intent is to be determined from the language of the deed and surrounding circumstances. *Barri v. Schwarz Bros. Co., supra; Simmons v. French, supra,* 507. One factor to be considered is the delineation of the land contained in any map which may be incorporated into or attached to the deed.

In this case the deed to the landowners' predecessor in interest explicitly conveys littoral rights to Lake Coeur d'Alene, as the deed from Goodwin to VanHouden conveys "…five (5) acres, and including all riparian rights." Exhibit 1, p. 1. Even though the property described has a metes and bounds description (instead of a description that one side of the property follows the high water mark of the lake), the deed expressly conveys littoral rights to Lake Coeur d'Alene. As noted by landowners in their brief, all these parcels:

> …were carved from the same "parent parcel," i.e., Government Lot 2. As the Court is aware, government lots were utilized by the general land office for purposes of measuring the upland quantity (acreage size of waterfront parcels as the same did not fit 'neatly' into the traditional "section" method of surveying that was otherwise utilized for non-littoral properties.

Opening Brief of Petitioners/Appellants, p. 11. Although no citation is given for this proposition, landowners are correct, as noted by the Idaho Court of Appeals in *Currie v. Walkinshaw,* 113 Idaho 586, 590, 746 P.2d 1045, 1049 (Ct.App. 1987):

> Government lots are portions of square-mile sections surveyed and established by the United States Government because they do not conform to the ordinary standards for quarter-quarter sections. *See* BUREAU OF LAND MANAGEMENT, MANUAL OF INSTRUCTION FOR THE SURVEY OF THE PUBLIC LANDS OF THE UNITED STATES § 3-79 (1973). *See generally* F. CLARK, A TREATISE ON THE LAW OF SURVEYING AND BOUNDARIES Ch. 11 (J. Grimes 4th ed. 1976). Such fractional sections often are remainders or oversized areas resulting from laying a flat grid system upon a round planet. In other cases they result where section lines lie near bodies of water. There, fractional lots are created so boundaries lie along and follow the curves of the shoreline, thus providing as many lots as practical with substantial water frontage. F. CLARK, *supra* § 214.

As the landowners noted at page 12 of their Reply Brief of Petitioners/Appellants, citing C. WHITE, A HISTORY OF THE RECTANGULAR SURVEY SYSTEM, 2d Ed. (1991), p. 6, supports this, as does ITD's own expert Mr. Roeller. Tr. pp. 189-90. Thus, there are two reasons why landowners' predecessor in interest have littoral rights: 1) their deed says so, and 2) their land was conveyed via Government Lot. The next issue is "Did the landowners'

predecessor in interest convey those littoral rights in executing the right-of-way deeds?"

As mentioned above, there is no language discussing littoral rights in any of the three right-of-way deeds at issue. In fact, the express purpose of the right-of-way granted is specifically limited in each right-of-way deed. Exhibit 2 is the June 8, 1911, agreement for a 99 year lease of right-of-way across the property of the landowners' predecessor in interest (Armstrong at this point), to Kootenai County, for the expressed purpose of "…securing a right-of-way for a public highway to run in an easterly and westerly direction across the said above described land." Exhibit 2, pp. 2, 4. (emphasis added). The description of that land is the same as in the 1887 Warranty Deed conveying the parcel, and following that identical property description the 1911 right-of-way easement document states the landowner owns "…five (5) acres, and including all Riparian rights." *Id.* Exhibit 3 is a February 24, 1925, Right-of-Way Deed across the property of the landowners' predecessor in interest (still Armstrong), which gives Kootenai County a 50- foot right-of-way (25 feet on each side of a center line) essentially at the edge of the property and the shore of Lake Coeur d'Alene. That Right-of-Way Deed is silent as to littoral or riparian rights. The only stated purpose for the right-of-way is "for the purpose of a public highway". Exhibit 3, p. 1. (emphasis added). Finally, Exhibit 4 is the December 18, 1940, Right-of-Way Deed from Vera and Jack Smith (then owners of the subject property), where they conveyed a 125-foot-wide highway right-of-way to the State of Idaho for the expressed purpose of "…a right of way for a public highway, the following described parcel of land situated in Kootenai County…" *Id.* (emphasis added).

As stated by the New York Supreme Court: "The riparian rights are an incident to the ownership of the upland; i.e., property rights which cannot be taken, except by consent or proper compensation." *Nevins v. Friedauer,* 184 N.Y.S. 894, 897 (N.Y. 1920). To hold

otherwise would convert the riparian landowner from a littoral owner to an inland owner. *Id.*

All parties to these consolidated appeals cite *West v. Smith,* 95 Idaho 550, 511 P.2d 1326 (1973). In *West v. Smith,* the Idaho Supreme Court found the county had a right-of-way that "extends to the water's edge" of Lake Coeur d'Alene. 95 Idaho 550, 555, 511 P.2d 1326, 1331. The Idaho Supreme Court held: "However, the fact that a public roadway adjoins waters on which the public has a right to navigate, does not give one member of the public, acting solely for his private benefit [Smith, who had a houseboat tied to piers at the terminus of the county road], the right to install a fixed structure from the roadway into the water, which permanently interferes with the littoral owner's right of access to the lake from that point." *Id.* Looking at that quote in isolation, it is not clear who has the littoral rights, the upland landowner, or the county through its roadway. A review of that case in its entirety shows it was the upland landowner (West) to whom the Idaho Supreme Court attaches littoral rights. First of all, the county was not a party to that lawsuit. Second, the Smiths had no littoral rights. All they had was a houseboat moored to pilings at the end of the county road, which road traversed West's property. Third, the above quote ends with footnote 11. Footnote 11 cites two cases: *Knight v. Ciarlone,* 200 N.Y.S.2d 805 (N.Y. 1959), and *Musgrove v. Cicco,* 96 N.H. 141, 71 A.2d 495 (1950), both of which indicate the Idaho Supreme Court was referring to the upland landowner as having littoral rights, not the county through its roadway. In *Knight v. Ciarlone,* Knight owned land that bordered Lake George. There was an easement across his land for a public highway and that easement ran across his land at water's edge. Ciarlone, a nearby landowner who had no littoral rights, tried building a dock in front of Knight's property, arguing that he had the right since he was a member of the public, and there was a public right-of-way across Knight's property. The New York Supreme Court held:

The title to the bed of Lake George is in the People of the State of New

> York and its waters are public waters. However, the plaintiff in this action [Knight] as the owner of the upland has not only title of the land to the low water mark but also the right of access to and from the waters of the lake and the right to build such docks and piers from such lands into the water as will not interfere with navigation. This right is only an appurtenance or easement to the ownership of the uplands. The defendants [Ciarlone], whose property does not adjoin the lake waters, can not, therefore, build a structure which interferes with the littoral right of the owner of the upland. To permit them to do so would justify others similarly to build to the end that eventually the plaintiff would be entirely cut off from having access to the lake (*Chism v. Smith*, 138 App.Div. 715, 123 N.Y.S. 691; *Johnson v. May,* 189 App.Div. 196, 178 N.Y.S. 742; *Town of Brookaven v. Smith,* 188 N.Y. 74, 80 N.E. 665, 9 L.R.A., N.S., 326; *Barnes v.Midland R.R. Terminal Co.,* 193 N.Y. 378, 85 N.E. 1093).

200 N.Y.S.2d 805, 806. In *Musgrove,* the Supreme Court of New Hampshire held "the plaintiffs' rights to erect a wharf or other structures into the lake is superior to that of the defendants if the latter have only the rights of a member of the public." 96 N.H. 141, 142-43, 71 A.2d 495, 496. Thus, it is beyond dispute that when the Idaho Supreme Court in *West* discussed littoral rights, they were referring to the littoral rights of the adjacent upland landowner, and not the county via their road right-of-way. The pertinent holding from *West* is: "The littoral owner's right of access to the lake, free from unreasonable interference, attaches to all points of his shoreline, and in the case before us, the district court came to the undisputed conclusion that appellants' right to access to the lake was not extinguished by the county roadway easement." 95 Idaho 550, 555, 511 P.2d 1326, 1331.

The Supreme Court of Wisconsin in *Mayer v. Grueber,* 29 Wis.2d 168, 138 N.W.2d 197 (Wisc. 1965) held:

> *Allen v. Weber,* [80 Wis. 531, 536, 50 N.W. 514, 515 (Wis. 1891)] *supra,* holds that riparian rights do not necessarily follow as a matter of course the ownership of the adjacent land. In this respect, Wisconsin follows the general rule as set forth in Burby, Real Property (Hornbook Series), p. 46, sec. 18:
>
> > '* * * the owner of the upland is presumed to possess riparian rights. * * * Such rights are freely alienable and may be separated from upland ownership. Whether or not

> riparian rights are conveyed along with the grant of the uplands depends largely upon the intent of the grantor, with particular reference to the language in the deed.'
>
> *See also Bright v. City of Superior,* 163 Wis. 1, 156 N.W. 600 (Wis. 1916).

29 Wis.2d 168, 175, 138 N.W.2d 197, 203. The Supreme Court of Wisconsin went on to clarify that the landowners' predecessors could convey away their riparian rights, but in order to do that, the deed would have to be clear:

> A perusal of the cited cases shows that the owner of property on a stream presumptively holds title to the middle of the water course. The cases, however, are in accord that the riparian rights and title to the land under the water are severable *if the deed makes that limitation clear*.

29 Wis.2d 168, 176, 138 N.W.2d 197, 204. (emphasis added). In the present case, there is absolutely no mention of littoral rights being given to Kootenai County or to the State of Idaho in any of the three applicable right-of-way documents. To the contrary, the right-of-way lease and the two right-of-way deeds each specifically limit the purpose for building a "public highway." Exhibit 2, 3 and 4.

After stating: "We conclude that the overriding principle in determining the consequence of a conveyance of land insofar as riparian rights are concerned is the intention of the parties to the conveyance", the California Court of Appeal in *Murphy Slough Association v. Avila,* 27 Cal.App.3d 649, 657-58, 104 Cal.Rptr. 136, 143-44 (Ct.App. 5th Dist. Cal. 1972) (emphasis added) held:

> In the instant case the transaction involved landowners who were concerned with the control of flood waters on the slough and river and with development of levees abutting on their property so as to reclaim their land south of the levees. The grantee, a newly formed reclamation district, announced its express purpose to be that of constructing and maintaining new and existing levees contiguous to the river and slough and at no time was there evidence of an expressed or implied intention to acquire a fee ownership or riparian rights or to administer or furnish water to the grantor landowners. (Compare *Copeland v. Fairview Land etc. Co.* (1913) 165 Cal. 148, 131 P. 119; *Arroyo D. and W. Co. v. Baldwin* (1909) 155 Cal. 280, 100 P. 874; *Carlsbad etc. Co. v. San Luis Rey etc. Co.* (1947) 78

> Cal.App.2d 900, 178 P.2d 844.)
>
> The grant deeds in 1917 and 1926 by Laguna Lands, Ltd., a corporation, one of the grantors in the 1908 deed, which recite that the parcels conveyed are subject to rights of way for reclamation levees, irrigation and drainage canals, and include proportionate riparian rights in the waters of Kings Rivers, unmistakably reflect the belief on the part of the grantor, Laguna Lands, Ltd., that in 1908 it had retained riparian rights to the land south of the levee and that its grantee acquired only a right of way for reclamation purposes. Subsequent acts of the parties to the transaction which disclose the interpretation given to the conveyance by themselves is strong evidence of the interest conveyed. (*Fresno Irr. Dist. v. Smith,* (1943) 58 Cal.App.2d 48, 58, 136 P.2d 382; *City of Santa Cruz v. Younger,* (1963) 223 Cal.App.2d 818, 821, 36 Cal.Rptr. 253.) Also, the evidence is uncontradicted that respondents have been taking water from the Murphy Slough continuously for the past 30 years and appellant at no time has sought to intervene to prevent such taking.
>
> Considering the above facts, all taken into account by the trial court in reaching its decision, it would appear that the language of the deed is susceptible to an interpretation that the interest conveyed was a right-of-way rather than a fee interest. Being a grant of a right-of-way, the deed neither conveyed a riparian interest to the grantee nor severed riparian rights from the grantors' remaining lands south of the levee. (*Forgeus v. County of Santa Cruz* (1914) 24 Cal.App. 193, 199, 140 P. 1092.) Every incident of ownership not inconsistent with the easement and its enjoyment is reserved to the grantor. (*Dierssen v. McCormack* (1938) 28 Cal.App.2d 164, 170, 82 P.2d 212; *Pasadena v. California-Michigan etc. Co.* (1941) 17 Cal.2d 576, 579, 110 P.2d 983; *Colegrove W. Co. v. City of Hollywoood* (1907) 151 Cal. 425, 429, 90 P. 1053; Rest., Property, § 486; 2 Witkin, Summary of Cal. Law, Real Property, § 182, p. 1021.)
>
> Even if the trial court had concluded that the deed conveyed a fee interest to the grantee, it seems clear to us such a conveyance would have no effect on the riparian rights of the grantors' remaining lands not included in the conveyance, absent some expression to the contrary. (*Rancho Santa Margarita v. Vail, Supra,* 11 Cal.2d 501, 538-539, 81 P.2d 533; *Hudson v. Dailey, Supra,*156 Cal. 617, 105 P. 748; Hutchins, Cal. Law of Water Rights (1956), pp. 189-192.)

Just as the court noted in *Murphy Slough Association* where “The grantee, a newly formed reclamation district, announced its express purpose to be that of constructing and maintaining new and existing levees contiguous to the river and slough…”, Kootenai County’s intent as set forth in the 1911 lease (Exhibit 2) and the 1925 Right-of Way Deed (Exhibit 3), as well as the State of Idaho’s intent as set forth in the 1940 Right-of-Way Deed (Exhibit 4), is for the express purpose of a right-of-way for a “public

highway", and nothing more.

In this right-of-way lease and in the right-of-way deeds, just as in *Murphy Slough Association,* "… at no time was there evidence of an expressed or implied intention to acquire a fee ownership or riparian rights …" The deeds in the present case simply read: "…for the purpose of a public highway…" (Exhibit 3), "…a right of way for a public highway…" (Exhibit 4). The deeds do not read: "a right-of-way and for a public highway and riparian/littoral rights to be given to the State of Idaho".

As mentioned in *Murphy Slough Association*: "Subsequent acts of the parties to the transaction which disclose the interpretation given to the conveyance by themselves is strong evidence of the interest conveyed." In the present cases, for the sixty-seven years from 1940 until last year, the actions of the State of Idaho in allowing property owners up and down this stretch of road to build docks out from the shoreline, is compelling evidence that the State of Idaho at all times up until these applications, considered the landowners adjacent to Lake Coeur d'Alene retained their littoral rights. The evidence of ITD's subsequent acts goes well beyond decades of ITD not objecting to property owners who applied to IDL to build docks. The ITD's attorney handling this appeal, who argues a contrary position in this appeal, acknowledged in a letter (involving a different dock application) that the State *only has an easement* as opposed to a fee interest:

> I wish to point out that ITD is not asserting title to the subject right-of-way. Until March 4, 1953, Idaho Code § 39-301 stated that by taking or accepting land for a highway, the public acquired only a right-of-way and not fee simple. This law was changed in 1953 to establish that the State acquires fee simple when it acquires land for a right-of-way. 1953 Idaho Sess. Laws, Chapter 100. Since the right-of-way was granted in 1941, while the former Idaho Code § 39-301 was in effect, ITD makes no claim to title.

R. pp. 15-16; July 28, 2005 letter from Steven J. Schuster to attorney Edward Anson,

RE: Morrell/Cook dock. Opening Brief of Petitions/Appellants, p. 9. Tom Baker, ITD's District Engineer in 1995 advised IDL regarding the docks in this area:

> In reference to our recent discussions, the Department [ITD] has no objection to Idaho Department of Lands issuing dock permits on this section of roadway for those private properties where there is evidence that the property lines originally extended to the lakeshore and riparian rights exist. These are properties across which the ITD now holds an easement for the old Highway.

R. p. 4; June 23, 1995 letter from Tom Baker to W. R. Pitman, Administrator, IDL Idaho Lake Protection Act; Opening Brief of Petitions/Appellants, p. 10.

As noted in *Murphy Slough Association:* "Being a grant of a right-of-way, the deed neither conveyed a riparian interest to the grantee nor severed riparian rights from the grantors' remaining lands south of the levee." In the present case, ITD's rights are in the nature of a right-of-way easement, not a fee interest in the land. Exhibits 2, 3, and 4.

The right-of-way deed in these two cases on appeal listed the specific and singular purpose of creating a highway. The rights given up by the landowners' predecessors in interest via that instrument was nothing more than "…a right of way for a public highway." Exhibit 4. Nothing in that Right-of-Way Deed specifies, let alone implies, that the landowners' predecessors in interest were giving up their littoral rights or even sharing their littoral rights with the State of Idaho. As the Supreme Court of Connecticut noted in *Ace Equipment Sales v. Buccino,* 273 Conn. 217, 869 A.2d 626 (Conn. 2005):

> In the present case, the Buccinos' easement was granted for industrial purposes only. Thus, there is no basis on which we could conclude that the easement entitles them to any use beyond said purposes. See *Lynch v. White,* 85 Conn. 545, 551, 84 A. 326 (1912) (concluding that lower court properly had held that defendants were precluded from using land "for an entirely different purpose than that for which the easement was granted"); *Ladies' Seamen's Friend Society v. Halstead,* 58 Conn. 144, 151, 19 A. 658 (1889) (holding that where express grant was specifically limited, it cannot be presumed that grantor intended to convey any additional riparian right beyond that limited grant); see also *Mianus Realty Co. v.*

> *Greenway,* 151 Conn. 128, 132, 193 A.2d 713 (1963) ("[W]hether or not riparian rights are conveyed along with the grant of the uplands depends largely upon the intent of the grantor. Such intent is to be determined from the language of the deed and surrounding circumstances."); *Miller v. Lutheran Conference & Camp Assn.,* supra, 331 Pa. at 247, 200 A. 646 (applying common-law rule and holding that deed that granted right to fish and to boat, but did not mention bathing rights, did not include bathing rights; "[t]his omission may have been the result of oversight or it may have been deliberate, but in either event the legal consequence is the same"); *Mayer v. Grueber,* supra, 29 Wis.2d at 174, 138 N.W.2d 197 ("one who acquires land abutting a stream or body of water may acquire no more than is conveyed by his deed").

273 Conn. 217, 233-34, 869 A.2d 626, 636-37. The language in the Right-of-Way Deed in the present case is for "…a right of way for a public highway", and nothing else. Exhibit 4. As stated in *Ace Equipment Sales,* "it cannot be presumed that grantor intended to convey any additional riparian right beyond that limited grant" (in the present case **no** riparian right was conveyed, so this Court should not presume **any** riparian right was given). To give the State of Idaho through the ITD the exclusive littoral rights (or even shared littoral rights) to Lake Coeur d'Alene would be contrary to "the intent of the grantor, contrary to "the language of the deed", contrary to "the surrounding circumstances", as set forth in *Ace Equipment Sales,* and it would be contrary to ITD's course of conduct for the past sixty-seven years. Perhaps most importantly, it would be contrary to the statute that existed at the time the right-of-way deed was conveyed in 1940. Up until 1953 Idaho Code § 39-301 stated that by taking or accepting land for a highway, the public acquired only a right-of-way and not fee simple. This law was changed in 1953 to establish that the State acquires fee simple when it acquires land for a right-of-way. However, rights acquired prior to 1953 remain unchanged. To hold otherwise would amount to an uncompensated taking of appellants' land.

Factually similar to the present case is *Veach v. Culp,* 92 Wash.2d 570, 599 P.2d 526 (Wash. 1979). In that case, littoral landowners brought suit against a railroad,

seeking to have the railroad restrained from interfering with their use of land on the railroad's right-of-way. The railroad crossed two parcels near the shore of Lake Whatcom. The trial court held the railroad owned the strip of land in question in fee simple title, and the Washington Court of Appeals affirmed. *Veach v. Culp,* 21 Wash.App. 454, 585 P.2d 818 (Wash.App. 1978). The Washington Supreme Court in an *en banc* decision, held the railroad only had an easement, not fee title, and that plaintiffs' use of the easement did not materially interfere with the railroad's use thereof. Just as in the present case, the Washington Supreme Court recognized resolution of the lawsuit hinged on whether a fee simple interest or only a right-of-way was conveyed by the quitclaim deed: "The controlling question is the nature of the interest conveyed by the 1901 deed." 92 Wash.2d 570, 572, 599 P.2d 526, 527. The pertinent language of the quitclaim deed in that case was:

> (T)he said party of the first part, for and in consideration of the sum of Two Hundred and Twenty-five Dollars, . . . do by these presents remise, release and forever quit claim unto said party of the second part, and to its assigns, all that certain lot, piece, or parcel of land situate in Whatcom County . . . to-wit:
> "A right-of-way one hundred feet wide, being fifty feet on each side of the center line of the B.B. & Eastern R.R. as now located through that portion of lot 6, Section 22, Township 37 North Range 4 East, lying east of Fir St. Blue Canyon and also Lot Seven (7) same Section excepting all rights for road purposes that may have heretofore been conveyed to Whatcom County…

92 Wash.2d 570, 572-73, 599 P.2d 526, 527. The Washington Supreme Court's analysis of this language is as follows:

> The parties in fact describe what was being conveyed: a right-of-way one hundred feet wide, being fifty feet on each side of the center line of the railroad. Language like this has been found to create an easement, not a fee simple estate. *Polk v. Ball,* 149 F.2d 263, 264 n.2 (5th Cir. 1945) ("A Right of way over and across . . . the center line of said railway As now located"); *Daugherty v. Helena & Northwestern Ry.,* 221 Ark. 101, 102-03, 252 S.W.2d 546, 547 (1952) ("a strip of land . . . for a right of way . . . being fifty feet in width on each side of the center of the main track of said railroad as the same is now, or may hereafter be, located . . .").

> In *Swan v. O'Leary,* 37 Wash.2d 533, 537, 225 P.2d 199, 201 (1950), this court clarified the holding of *Morsbach [v.Thurston County,* 152 Wash. 562, 568, 278 P. 686 (1929)] by stating:
>
> > "(I)t is clear that we adopted the rule that when the granting clause of a deed declares the purpose of the grant to be a right of way for a railroad the deed passes an easement only, and not a fee with a restricted use, even though the deed is in the usual form to convey a fee title."
>
> The majority of other jurisdictions follow the rule declared in *Swan v. O'Leary*. Annot., 6 A.L.R.3d 973, 1013-1024 (1966).
>
> Given the language of the deed explicitly describing the conveyance of a right-of-way and given the rule of *Swan v. O'Leary, supra,* and *Morsbach v. Thurston County, supra,* we conclude the deed conveyed an easement, not a fee title.

92 Wash.2d 570, 572-73, 599 P.2d 526, 527. The present cases are even more factually compelling than *Veach,* because in *Veach,* the conclusion that only an easement right-of-way was given was reached even though a *quitclaim* deed was given…a quitclaim deed gives all rights the landowner had. In the present case, the landowners executed only a right-of-way deed (not a quitclaim or warranty deed). The "title" of the document itself limits what was given to the State of Idaho and ITD by the landowners' predecessor in interest.

Another case where the trial court determined a fee simple was conveyed, only to be overturned by the appellate court, is *Gregg Neck Yacht Club, Inc. v. County Com'rs of Kent County,* 137 Md.App. 732, 769 A.2d 982 (Md.Ct.Special App. 2001). In that case, the Maryland Court of Special Appeals described the facts as follows:

> On July 6, 1950, J. Early Wood and his wife, Mary, executed a conveyance to the County of a 40 foot wide "right of way or strip of land," recorded in the land records, "to be used in the extension, construction, improvement and maintenance of [a] County road." The 1950 Deed did not mention riparian rights, nor did it use the words "in fee simple." The Deed stated, in part:
>
> WHEREAS the State Roads Commission of Maryland proposes to extend and improve the County road leading from Route 290 (Galena to Sassafras) into Gregg Neck Subdivision in Kent County, and whereas the extension and improvement of said County road will be a material benefit to the adjoining landowners and useful to the general public.
>
> NOW, THEREFORE, THIS DEED WITNESSETH that in consideration

> of the premises, we do hereby give and grant unto the County Commissioners of Kent County to be used in the extension, construction, improvement and maintenance of the aforesaid County road, a *right of way* or strip of land forty (40) feet in width and more particularly described as follows:

137 Md.App. 732, 741, 769 A.2d 982, 987. The appellate court's analysis of that deed language follows:

> The word "grant," the phrase "bargain and sell," in a deed, or any other words purporting to transfer the whole estate of the grantor shall be construed to pass to the grantee the whole interest and estate of the grantor in the lands therein mentioned, unless there be limitations or reservations showing, by implication or otherwise, a different intent.
>
> To support its claim that Wood merely gave an easement to the County, appellant observes that when Wood wanted to convey a fee simple estate, as opposed to an easement, it was expressly stated in the language of the document. GNYC states: "The inference as to the intent of the 1950 deed is inescapable: That the grant of a right-of-way to the County was an easement for the specified purpose of a road, nothing more." Further, appellant argues:
>
> > [O]nly one of two conclusions can be reached: 1) That the conveyance to the County was an easement and, therefore, did not include the area beyond the end of the road or riparian rights; OR, in spite [of] the considerable evidence that supports the above conclusion, 2) That the conveyance was a fee simple estate, but did not include the area beyond the end of the road or riparian rights. In either event, the trial Court erred in holding that the conveyance was in fee simple and/or included the area beyond the end of the road and riparian rights, thereby permitting the County's action with regard to the GNYC pier and should be reversed.
>
> Looking at the 1950 Deed as a whole, and applying the principles outlined above, we are persuaded that the court erred in concluding that Wood conveyed a fee simple interest to the County in the right-of-way. The Deed conveyed a right-of-way for a specified use; that term, and the context in which it was used, are consistent with the conveyance of an easement. *See Chevy Chase,* 355 Md. at 124-126, 733 A.2d 1055; *Desch,* 253 Md. at 311, 252 A.2d 815;*Hodges v. Owings,* 178 Md. 300, 305, 13 A.2d 338 (1940); *Public Serv. Comm.,* 162 Md. at 312, 159 A. 758. As we noted earlier, the terms "easement" and "right-of-way" are generally considered "synonymous." *Chevy Chase,* 355 Md. at 126, 733 A.2d 1055. Moreover, the 1950 Deed omitted any mention of the term "fee simple" or riparian rights. Although those omissions are not dispositive, they are certainly noteworthy, particularly when we compare the 1950 Deed to the later deeds.

137 Md.App. 732, 761, 769 A.2d 982, 999. That court then considered extrinsic parol evidence, regardless of whether or not the deed was ambiguous. One of the factors considered was the fact that: "…the road itself ends short of the water, and riparian rights were not needed to construct or maintain the roadway." 137 Md.App. 732, 763, 769 A.2d 982, 1000. The public highway across landowners' property in these appeals does not run under or into Lake Coeur d'Alene. As noted in *Mandes v. Godiksen,* 57 Conn.App. 79, 87-88, 747 A.2d 47, 52 (Conn.App. 2000): "The seven and one-half foot right-of-way…is not described as running to beneath the waters of Long Island Sound." In the present case, there is no evidence that riparian rights were needed to construct or maintain this roadway. The Maryland Court of Special Appeals in *Gregg Neck* then concluded its analysis as follows:

> In reaching our conclusion, *Chevy Chase,* 355 Md. 110, 733 A.2d 1055, is helpful. There, the Court concluded that the 1911 deed granting a right-of-way to the railroad conveyed only an easement. *Id.* at 118, 733 A.2d 1055. The Court reasoned:
>
> > The use of the 'right-of-way' language provides a strong indication that the parties intended to convey an easement as opposed to an estate in fee simple absolute. We find nothing in the deed to indicate that anything more than a right of passage was intended, particularly in light of the deed's separate grant 'in fee simple' of other land.... Our conclusion is confirmed by the circumstances of the conveyance, including the 20 year existence of the railway....
>
> *Id.* Even if the conveyance constituted the grant of a fee simple interest, the outcome would not change. We explain.
>
> IV.
>
> Regardless of whether the County obtained a fee simple interest in the land that is now Mill Road, appellees argue that the 1950 conveyance constituted a dedicated street that extended into the waters of Mill Creek, and thus, by implication, included riparian rights. Therefore, appellees claim the right to the pier. They point to the testimony of the surveyor, who said the description of the conveyance fell within the waters of Mill Creek, and the plats prepared for the subdivision at its inception, which showed that the road extended to the waters of Mill Creek. Further, appellees contend that a dedicated road that runs to a body of water necessarily includes the right to build a wharf or pier at its end. Additionally, they assert that, as a municipality, the County had the right to control the area in issue. Appellant counters that, in the circumstances of this case, the

grant of the easement did not include riparian rights or the right to construct a pier.

The court acknowledged that the 1950 Deed did not "mention the River, or Creek". The court also found one or two mistakes "of the calls." But, the court determined that the conveyance "went into the creek by the way it's described.... It goes right to the River and ceases."

As we observed, a riparian owner is "one who owns land bordering upon, bounded by, fronting upon, abutting or adjacent and contiguous to and in contact with a body of water such as a river, bay, or running stream." *Gwynn v. Oursler, supra,* 122 Md.App. at 497, 712 A.2d 1072; *see Kirby,* 347 Md. at 389, 701 A.2d 397;*Becker v. Litty,* 318 Md. 76, 82, 566 A.2d 1101 (1989); *Owen v. Hubbard,* 260 Md. 146, 155, 271 A.2d 672 (1970). A fundamental aspect of riparian rights is access to water. *Becker,* 318 Md. at 82, 566 A.2d 1101; *People's Counsel for Baltimore County v. Maryland Marine Mfg. Co., Inc.,* 316 Md. 491, 501-02, 560 A.2d 32 (1989). Those who have riparian rights are entitled to construct "wharves, piers, and landings that are connected to the waterfront and built out into the water." *Gwynn,* 122 Md.App. at 497-98, 712 A.2d 1072; *see Holiday Point Marina Partners v. Anne Arundel County,* 349 Md. 190, 206, 707 A.2d 829 (1998)(stating that the County had the authority to regulate through zoning " 'the exercise of the riparian right to wharf out because, under law dating back for more than 200 years, this right, when exercised, is nothing more than an extension of the shore land.'" (citations omitted)).

Gwynn v. Oursler, supra, 122 Md.App. 493, 712 A.2d 1072, which involved a dispute concerning the scope of an easement, riparian rights, and the right to build a dock, is instructive here. In that case, we considered whether a right-of-way extending to a body of water included, by implication, riparian rights as well as the right to erect a pier.

In *Gwynn,* two families who owned adjoining parcels of waterfront property quarreled over whether the appellants "had a riparian right-of-way ... across the land of appellees," *id.* at 495, 712 A.2d 1072, which "was intended to give them access to a dock" on the Patuxent River. *Id.* at 497, 712 A.2d 1072. The deed in issue was silent as to piers, nor did it mention riparian rights. It did provide, however, that it was "for ingress and egress only." *Id.* at 496, 712 A.2d 1072. At the time of the deed, a pier was located at the end of the right-of-way. After it was destroyed by hurricane, however, it was rebuilt at another location, and was no longer situated at the end of the right-of-way.

The Court concluded that an easement across two waterfront parcels does not, as a matter of law, include riparian rights that would entitle appellants to construct, use, and maintain a pier at its end. Thus, we agreed with the trial court that a "right-of-way to the shore of a navigable river does not, by implication, create riparian rights." *Id.* at 495, 712 A.2d 1072. Relying on decisions from other jurisdictions, we also said that, generally, a deed granting a "right-of-way to a body of water, alone, does not entitle the grantee [to] the right to construct a dock or a pier." *Id.* at 500, 712 A.2d 1072.

In *Gwynn,* we emphasized the importance of ascertaining the grantor's intent, based on the language used for the conveyance. We said:

> [O]nce a court is faced with a deed granting a right-of-way to a body of water, the court must undertake a two-part analysis to determine whether the grantor intended to allow the grantee the right to construct a pier or dock. First, the court must examine the deed alone to determine whether, on its face, it grants or denies the riparian rights. If the deed itself contains an express grant or denial of that intent, the language of the deed controls. If, however, the deed is ambiguous as to the intent of the grantor, the court must undertake the second part of the analysis and may consider parol or other extrinsic evidence to discover the grantor's intent.
>
> *Id.* (internal citations omitted).
>
> For the reasons articulated earlier, we are satisfied from the 1950 Deed, on its face and as supplemented by the parol evidence, that Wood's conveyance of a right-of-way to the County did not include riparian rights.

137 Md.App. 732, 763-66, 769 A.2d 982, 1000-01. In a railroad right-of-way case, the New York Court of Appeals held:

> The established law in this regard is that, when a railroad company acquires a right of way which intervenes between a navigable body of water and the adjacent upland, the owner of the upland retains all the riparian rights which he had before the railroad was built. In such a case the railroad right of way, whether acquired by proceedings in invitum or by deed in fee, is held only for the specific purposes served by the construction and operation of railroad tracks, and does not include the riparian rights which are incident to the ownership of uplands as that term is generally understood.

In Re City of Buffalo, 206 N.Y. 319, 329, 99 N.E. 850, 853 (Ct.App.N.Y 1912).

The ITD cites *Heise v. Village of Pewaukee,* 92 Wisc.2d 833, 345, 285 N.W.2d 859, 864 (Wisc. 1979), for the proposition "…if a public street or highway exists so that its boundary line and the waters of a navigable lake or river meet, the riparian rights incident to the land composing the street belong to the public." Idaho Transportation Department's Response Memorandum, p. 18. While the quote is accurate, ITD ignores the fact that in *Heise,* the Wisconsin Supreme Court specifically found that town **owned** the land upon which the road traversed in fee simple, and stated the "Village of Pewaukee has title to the land by virtue of its ownership of Lake Street up to the original

shoreline." *Id. Heise* has no applicability to the instant case where all the State of Idaho has is an *easement* across landowners' property.

> The ITD cites a few cases for the proposition that:
>
> The question of whether the road is owned by the State, or not, is a red herring. Other cases support the assertion that this distinction is irrelevant.

Idaho Transportation Department's Response Memorandum, p. 18. That statement by the ITD is simply false. One of the cases cited by the ITD is *City of Daytona Beach v. Tuttle,* 630 So.2d 586, 588 (Fla.App. 1993). First of all, nothing in *Tuttle* says anything of the sort claimed by ITD. Who owned the land under the road that paralleled a river was very important in *Tuttle*. *Tuttle* dealt with a subdivision plat where the person creating the plat gave no indication that he intended to reserve any littoral rights in himself when he dedicated this road to the public. The court found very important the fact that the boundary of lot 6 (owned by the person claiming littoral rights), did not extend across the street easement to the high water mark of the river (in other words the street was the border of lot 6). Ownership of the land was central to the *Tuttle* decision. Second, *Tuttle* has not been cited as authority by any other court in any other jurisdiction. The ITD cited *Flynn v. Beisel,* 257 Minn. 531, 102 N.W.2d 284, 289-90 (Minn. 1960). The facts of that case demonstrate *Flynn* has no bearing on the present cases on appeal. In *Flynn* the lot owner held his land "subject only to an easement in the public for the right of passage only, to be enjoyed with the plaintiffs, from the public road to Lake Koronis". 257 Minn. 531, 533 102 N.W.2d 284, 287. Public use of the public road "…included parking cars on the roadway and using it as an access to the lake for a swimming, boating, and landing boats where the easement abuts on the lake." 257 Minn. 531, 535, 102 N.W.2d 284, 288. That is the crucial difference, in *Flynn,* the

landowner's land, through the developer's dedication to the public, had an easement across part of it "from the public road *to Lake Koronis*", and in the instant case, the State of Idaho has an easement for a "public highway", and that is it. There is no mention of the public, the State of Idaho or any other person or entity acquiring any right *to Lake Coeur d'Alene* through the 1940 Right-of-way deed for a public highway. Finally, the ITD claims the distinction as to who owns the road is "irrelevant" and cites *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.,* 109 U.S. 672, 681-87, 3 S.Ct. 445, 27 L.Ed. 1070 (1884), to support that claim. A reading of *Potomac Steamboat Co.* shows ITD's reliance is misplaced.. In that case, the United States had ownership of the streets of the District of Columbia, and as a result of a compact between Maryland and Virginia, all the shores of the Potomac vested in the citizens of those states, and then the United States government. Thus, the United States "owned" all that was in dispute in that case, and the majority of the United States Supreme Court opinion discusses that ownership, concluding: "The decisive circumstance in the present case is that the United States became the riparian proprietor, and succeeded to all the riparian rights of Notley Young, by becoming the owner in fee-simple absolute of the strip of land that adjoined the river and intervened between it, and what remained to the original proprietor, Notley Young, after that conveyance; and the successors to his title had no other or greater rights in Water street, or the land on which it was laid out and eventually made, than any other individual members of the public." 3 S.Ct. 445, 450-51, 109 U.S. 672, 682. The ITD is just plain wrong in arguing that who owns the roadway is "irrelevant."

In the present case the landowners' predecessor in interest did not expressly convey their littoral rights. To convey such a valuable right, it must be specified in the

instrument; it cannot be implied. This Court finds, as a matter of fact and law, that the landowners' predecessor in interest (Vera and Jack Smith) conveyed only an easement to the State of Idaho. Accordingly, the landowners have at all times retained their littoral rights, and the State of Idaho has acquired no littoral rights. This finding and legal conclusion is based upon: 1) the express language in that Right-of-Way Deed (Exhibit 4) limiting its purpose to "…a right of way for a public highway…"; 2) the fact that the Right-of-Way Deed is silent as to littoral rights; 3) the fact that this was originally a Government Lot; 4) the fact in 1940 when the Right-of-Way Deed was conveyed, and up to 1953, Idaho Code § 39-301 mandated that by taking or accepting land for a highway, the public acquired only a right-of-way and not fee simple; 5) the actions of the State of Idaho from 1940 to the present; and 6) the case law discussed above.

2. The Landowners Retain Their Littoral Rights Following ITD's Placing Fill in Lake Coeur d'Alene at the Landowner's Shoreline Boundary.

The second question to be answered in order to resolve this appeal is: "How does the State's placing fill in Lake Coeur d'Alene at the landowner's shoreline boundary affect their littoral rights?" After reviewing the following cases, this Court is convinced the fill has no effect on the landowners' littoral rights. They retain their littoral rights.

To begin with, we again need to turn to the language of the Right-of-Way Deed, for which the only stated purpose was "…for a right of way for a public highway…", and which is entirely silent as to littoral or riparian rights. Exhibit 4. The ITD cannot unilaterally enlarge that easement or damage the landowners. An easement does not include the right to enlarge the use to the injury of the servient land. *Merril v. Penrod,* 109 Idaho 46, 52, 704 P.2d 950, 956 (Ct.App. 1985).

In *Bergh v. Hines,* 44 Mass.App.Ct. 590, 692 N.E.2d 980 (Mass. App.Ct. 1998),

the owners of an easement for a beach sued the servient littoral landowner for an injunction after the landowner put up a fence. The easement went down to the high water mark. The landowner essentially added fill to the beach, creating more land and a newly located high water mark. The landowner argued the owners of the easement were stuck with the original location of the easement which was now landlocked due to the fill the landowner placed which essentially moved the location of the beach. The court held the location of the easement remained the same; the boundary was still the old high water mark. However, since the easement was for access to the beach, the easement holders also had an easement over the area added by the landowner's filling in, in effect increasing the area of their easement.

> There is well-settled authority for the proposition that littoral (shoreline) boundaries are not fixed, because natural processes of accretion or erosion change them, and that easements, stated to run with such a boundary, ordinarily will follow the naturally changing line. See *Phillips v. Rhodes,* 7 Met. 322, 325, 48 Mass. 322 (1843). The judge, however, correctly concluded that "accretion by 'steam shovel' is not a recognized method of changing littoral boundaries." Unlike cases resolving issues of ownership of artificially created land with littoral boundaries,[FN8] we have found no case, nor has one been cited to us, which relates to the effect on an easement described by a littoral boundary where that boundary has been relocated by artificial means. In the absence of such authority, we conclude that the plaintiffs' easement was not relocated as a result of conditions created by the filling done by the owners of the servient estate.
>
> [FN8]See, e.g., *Michaelson v. Silver Beach Improvement Assn.,* 342 Mass. 251, 254, 173 N.E.2d 273 (1961) (in discussing accretions that change lines of ownership, the court stated: "Such accumulations need not be due entirely to natural causes, provided they are not caused by the littoral owner himself"); *Adams v. Frothingham,* 3 Mass. 352, 362 (1807) ("Whatever increase, therefore, happened from natural causes, or from a union of natural and artificial causes, within [the 'flats'], must be to the benefit of the owner of the upland.... This increase is of necessity gradual and imperceptible"). See also *County of St. Clair v. Lovingston,* 90 U.S. (23 Wall.) 46, 68-69, 23 L.Ed. 59 (1874) (whether the increases were affected by artificial means is immaterial, so long as they proximately were caused by the flow of water and occurred imperceptibly over time).

44 Mass.App.Ct. 590, 592-93, 692 N.E.2d 980, 982-93. The court discussed the fact that as long as it was the littoral landowner that adds land out into the water, and not the easement holder, the easement holder's rights follow the newly created boundary at the ordinary high water mark of the water. That court wrote:

> While the placement of fill in the formerly flowed tidelands created a new area over which the tide flows, that fill only served to expand the beach area available to the plaintiffs because, in the plain wording of the easement, their right of use for "bathing and sun bathing and to pass and repass thereon" was granted "back" to a fixed upland line. The meaning of the term "beach" is to be interpreted in the light of the relevant circumstances, and of the instruments creating the easement. *See Myers v. Salin,* 13 Mass.App.Ct. 127, 142, 431 N.E.2d 233 (1982), and cases cited.

44 Mass.App.Ct. 590, 594, 692 N.E.2d 980, 984.

In a case factually similar to the present cases on appeal, *State ex rel. Squire v. City of Cleveland,* 80 Ohio App. 83, 74 N.E.2d 438 (Ct.App.Ohio 1947) dealt with littoral landowners' rights when the "The Cleveland Memorial Shoreway" was built entirely upon filled in ground, extending outwardly into the lake from the original natural shoreline as defined by surveys in the year 1914. 80 Ohio App. 83, 87, 74 N.E.2d 438, 442. Part of that road was located at the edge of Lake Erie where the littoral landowner's property met the lake. The fills extended the littoral landowner's property out into the lake, and then the road was built over that fill. *Id.* The littoral landowners sought to enforce their rights to access Lake Erie, even though this roadway had been built at water's edge. The Court of Appeals for Ohio held: "The littoral owner is entitled to access to navigable water on the front of which his land lies, and, subject to regulation and control by the federal and state governments, has, for purposes of navigation, the right to wharf out to navigable waters." 80 Ohio App. 83, 106, 74 N.E.2d 438, 450. That court concluded: "The highway and roadway in question could be

maintained, operated and controlled, as hereinbefore indicated, and still permit free use by littoral owners of the area in question for purposes of wharfing out to navigable waters." 80 Ohio App. 83, 126, 74 N.E.2d 438, 459. Littoral owners have the right to erect wharves and other structures into the lake. *State v. Stafford & Sons, Inc.* 99 N.H. 92, 97, 105 A.2d 569, 573 (N.H. 1954).

In *State v. Gill,* 259 Ala. 177, 66 So2d 141 (Ala. 1953), the Supreme Court of Alabama held that the littoral owner rather than the state was entitled to artificial accretion to land mass resulting when the federal government dredged material from the bay and deposited it on the shoreline of the littoral owner. To hold otherwise would land lock the littoral owner. The Supreme Court of Alabama cited several precedent cases from the State of Alabama and also the United States Supreme Court case of *County of St. Clair v. Lovingston,* 23 Wall. 46, 23 L.Ed. 59, 64, 90 U.S. 46 (1874), in support of that ruling. A much more recent United States Supreme Court case is in accord. In *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313, 94 S.Ct. 517, 38 L.Ed.2d 526 (1973), the United States Supreme Court held:

> There are a number of interrelated reasons for the application of the doctrine of accretion. First, where lands are bounded by water, it may well be regarded as the expectancy of the riparian owners that they should continue to be so bounded. Second, the quality of being riparian, especially to navigable water, may be the land's "most valuable feature" and is part and parcel of the ownership of the land itself. *Hughes v. Washington, supra* 389 U.S., at 293, 88 S.Ct., at 440; *Yates v. Milwaukee,* 10 Wall. 497, 504, 19 L.Ed. 984 (1871). Riparianness also encompasses the vested right to future alluvion, which is an "essential attribute of the original property." *County of St. Clair v. Lovingston,* 23 Wall. 46, 68, 23 L.Ed. 59 (1874). By requiring that the upland owner suffer the burden of erosion and by giving him the benefit of accretions, riparianness is maintained. Finally, there is a compensation theory at work. Riparian land is at the mercy of the wanderings of the river. Since a riparian owner is subject to losing land by erosion beyond his control, he should benefit from any addition to his lands by the accretions thereto which are equally beyond his control. Ibid.

414 U.S. 313, 326, 94 S.Ct. 517, 526.

> The doctrine of accretion applies to changes in the river course due to artificial as well as natural causes. *County of St. Clair v. Lovingston, supra*, 23 Wall., at 64-69, 23 L.Ed. 59; *United States v. Claridge,* 416 F.2d 933 (C.A.9, 1969), cert. denied, 397 U.S. 961, 90 S.Ct. 994, 25 L.Ed.2d 253 (1970) (changes in the Colorado River's course, caused by the construction of Hoover Dam, are accretive). Where accretions to riparian land are caused by conditions created by strangers to the land, the upland owner remains the beneficiary thereof.[FN23]
>
> FN23. See sources collected at *Burns v. Forbes,* 412 F.2d 995, 997 n. 2 (C.A3, 1969); *cf. Beaver v. United States,* cert. denied, 383 U.S. 937, 86 S.Ct. 1067, 15 L.Ed.2d 854 (1966); *Esso Standard Oil Co. v. Jones,* 233 La. 915, 98 So.2d 236, aff'd on rehearing, 233 La. 940, 98 So.2d 244 (1957).

414 U.S. 313, 327, 94 S.Ct. 517, 526-27.

> The policies behind the doctrine of accretion are, however, fully applicable. That doctrine guarantees the riparian character of land by automatically granting to a riparian owner title to lands which form between his holdings and the river and thus threaten to destroy that valuable feature of his property.

414 U.S. 313, 329, 94 S.Ct. 517, 528. In *H. K. Porter Co., Inc. v. Board of Supervisors of Jackson County,* 324 So.2d 746 (Miss. 1975), the Supreme Court of Mississippi recognized *Bonelli Cattle Co.; Moore v. Kuljis,* 207 So.2d 604 (Miss.1967); *Harrison County v. Guice,* 244 Miss. 95, 140 So.2d 838 (1962), and *State v. Gill,* 259 Ala. 177, 66 So.2d 141 (1953), that “These cases correctly announce the law”, “…that when artificial accretions are cast upon the land of a landowner by either the Corps of Engineers or some stranger without the intervention of the upland owner such artificial accretion inures to the title of the upland owner.” 324 So.2d 746, 750. The riparian landowner cannot acquire accretions caused by artificial means created by the landowner. *Lakeside Boating and Bathing Inc., v. State,* 344 N.W.2d 217, 220 (Iowa 1984); *Natland Corporation v. Baker’s Port, Inc.,* 865 S.W.2d 52, 58 (Tex.App. 1993); *Brainard v. State,* 12 S.W.3d 6, 18, 43 Tex.Sup.Ct.J. 12 (Tex. 1999); *State v. Sause,*

217 Or. 52, 99, 342 P.2d 803, 826 (Or. 1959). However, a riparian owner acquires a right to dredge-fill land when placed there by a third party. *State v. Gill,* 259 Ala. 177, 66 So.2d 141 (Ala. 1953); *Michaelson v.Silver Beach Improvement Association,* 342 Mass. 251, 173 N.E.2d 273 (Mass. 1961); *Harrison County v. Guice,* 244 Miss. 95, 140 So.2d 838 (Miss. 1962); *DeSimone v. Kramer,* 77 Wis.2d 188, 252 N.W.2d 653 (Wis. 1977). *See also, Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd.,* 512 So.2d 934, 938 (Fla. 1987); *Lorusso v. Acapesket Improvement Association, Inc.,* 408 Mass. 772, 780, 564 N.E.2d 360, 367 (Mass. 1990); *Natland Corporation v. Baker's Port, Inc.,* 865 S.W.2d 52, 58 (Tex.App. 1993). Another case citing *Bonelli Cattle Co.* is *DeSimone v. Kramer,* 77 Wis.2d 188, 252 N.W.2d 653 (Wisc. 1977). That case makes it clear that as long as it was ITD in the present cases that added fill in front of the landowners' property, the landowners benefit from that artificial accretion.

> Defendants cite *Menominee River Lumber Co. v. Seidl,* 149 Wis. 316, 135 N.W. 854 (1912) for the proposition there can be no accretion where the deposit is artificially induced. But in that case formation of the made land was induced by the dredging of the riparian owner himself. The policy against allowing title to vest is found in this fact. "To sanction such a rule would be to hold that a riparian owner could by artificial means acquire title to the bed of a lake far below the shore which belonged to the state."149 Wis.2d at 320,135 N.W. at 856.
>
> In *Priewe v. Wisconsin State Land Improvement Co.,* 93 Wis. 534, 67 N.W. 918 (1896), by comparison, plaintiff's shore line was enlarged by the artificially caused drainage of the lake by a third party. * * *
>
> Insuring a riparian owner's access to the water is the most frequently cited rationale for the rule alluvion formed by accretion belongs to the owner of the upland to which it is contiguous. *Rondesvedt v. Running, supra,* 19 Wis.2d at 620, 121 N.W.2d 1.
>
> The rule reflects "the desirability of keeping land riparian which was riparian under earlier facts, thus assuring the upland owners access to the water and the advantages of this contiguity." 7 Powell on Real Property, §983, p. 610 (1975) citing *Lamprey v. Metcalf,* 52 Minn. 181, 53 N.W. 1139 (1893). * * *
>
> It appears to be the prevailing doctrine that the causing or hastening of gradual deposits by artificial constructions, made by persons other than the benefited and claiming owner, does not prevent the doctrine of

accretion from applying. 7 Powell on Real Property, supra, s 983 P. 614. 77 Wis.2d 188, 198-99, 252 N.W.2d 653. 657.

In *Florida v. Department of Natural Resources,* 400 So.2d 488, 491-92 (Fla.App. 1981), the District Court of Appeal of Florida, Fifth District held: "Under the doctrine of accretion and reliction, the added land belongs to the riparian owner, even as against the sovereign rights of the State. *Mexico Beach Corporation, v. St. Joe Paper Company,* 97 So.2d 708 (Fla. 1st DCA 1957), cert. denied, 101 So.2d 817 (Fla.1958)."

The above cases show the State of Idaho placing fill in Lake Coeur d'Alene at the landowners' shoreline boundary has no effect on the landowners' littoral rights.

C. Legal Arguments Posed by ITD and IDL.

The IDL Hearing Examiner stated: "It is established precedent in Idaho that a right-of-way can sever riparian rights. *Bowman v. McGoldrick Lumber, Co.,* 39 Idaho 30, 219 P. 1063 (1923)." R. p. 126. This Court agrees with the landowners that "The Hearing Examiner wholly misread and expanded [the *Bowman*] decision." Opening Brief of Petitioners/Appellants, p. 26. First of all, the Hearing Examiner didn't even get the citation right. *Bowman v. McGoldrick Lumber, Co.* is found in volume 38 of the Idaho Reports, not Volume 39. Second, and most importantly, *Bowman* concerned a federal railroad right-of-way (not a State highway right-of-way), and as noted right in *Bowman* by the Idaho Supreme Court, **a federal railroad right-of-way is more than a mere easement and has the attributes of a fee interest!** The Idaho Supreme Court in *Bowman, citing Oregon Short Line R.R. Co. v. Stalker,* 14 Idaho 371, 390 94 P. 59 (1908) wrote:

> "There [referring to *K.&T. Ry. Co. v. Roberts,* 152 U. S. 114, 14 Sup. Ct. 496, 38 L. Ed. 377] it is held that such grants [from the federal statute 3 Fed. Stat. Anno. 511, 30 Stat. at Large 990 (U. S. Comp. St. §§ 4181-4188)] **have the 'attributes of the fee, perpetuity and exclusive use and possession.'**" * * * Under said decision it is apparent that the nature of the grant made in this case as to the right of way and station grounds is a base, qualified, or limited fee and **is more than a mere easement**,

> giving the exclusive possession and right of use of the land for the purposes contemplated by the law;

38 Idaho 30, 33, 219 P. 1063, 64. (bold added). Incredibly, the ITD claims in its brief, the situation in *Bowman* "…is very similar to the situation at hand, where the undisputed evidence shows that ITD has obtained a right-of-way that extends waterward from the upland property, and that the current road is constructed on fill from near the edge of the upland property into the lake." (emphasis added). Idaho Transportation Department's Response Memorandum, p. 16. The situation in *Bowman* is not even remotely similar. In *Bowman,* the railroad's right-of-way was a **grant** from an **act of Congress** of the United States, and that **grant** was given to the railroad **before** Bertha Bowman received her patent from the government for her property.

The IDL is no less deceptive than the ITD. The IDL claims:

> IDL's acknowledgement that "[i]t is established precedent in Idaho that a right-of-way can sever riparian rights," Contested Case Hearing Recommendation at 11 (*citing Bowman v. McGoldrick Lumber, Co.,* 38 Idaho 30, 312 P. 1063 (1932)), does not change the fact that in this case IDL found only the Petitioners/Appellants' ownership interests were subordinated.

Defendants/Respondents' [IDL] Response Brief, p. 7. Aside from counsel for IDL's perpetuation of the incorrect cite for *Bowman,* and aside from IDL's (similar to the ITD's) ignorance of the fact that the railroad's right-of-way was a **grant** from an **act of Congress** of the United States given to the railroad **before** Bertha Bowman received her patent from the government for her property, nowhere in the *Bowman* decision is the word "subordinated" mentioned! Counsel for the IDL has adopted this "subordination" concept announced by its Hearing Examiner (R. p. 123, Contested Case Hearing Recommendation, p. 11), without realizing this "subordination" concept was made up out of whole cloth by the Hearing Examiner. *Bowman* certainly does not support that "subordination" concept. The IDL argues: "The IDL is free to consider *potential* legal

barriers to intended uses contemplated under encroachment permits in making its permitting decision." Defendants/Respondents' [IDL] Response Brief, p. 5. (emphasis added). While the IDL can consider "potential legal barriers", it is not free to make them up out of whole cloth.

The ITD argues: "The easement acquired by ITD for the highway in question in 1940 included an implied dedication of littoral rights to the public." Idaho Transportation Department's Response Memorandum, p. 2. There is no citation to any case or statute given for this bald claim by ITD. As shown above, such a claim of "implied dedication of littoral rights to the public" is directly contrary to the Idaho Supreme Court case of *West v. Smith,* 95 Idaho 550, 511 P.2d 1326 (1973), and contrary to all case law this Court has been able to find from other jurisdictions, *see Nevins v. Friedauer,* 184 N.Y.S. 894, 897 (N.Y. 1920); *Mayer v. Grueber,* 29 Wis.2d 168, 176, 138 N.W.2d 197, 204 (Wisc. 1965) ("The cases, however, are in accord that the riparian rights and title to the land under the water are severable *if the deed makes that limitation clear*.") (emphasis added); *Murphy Slough Association v. Avila,* 27 Cal.App.3d 649, 657-58, 104 Cal.Rptr. 136, 143-44 (Ct.App. 5th Dist. Cal. 1972); *Ace Equipment Sales v. Buccino,* 273 Conn. 217, 869 A.2d 626 (Conn. 2005); *Veach v. Culp,* 21 Wash.App. 454, 585 P.2d 818 (Wash.App. 1978); *Gregg Neck Yacht Club, Inc. v. County Com'rs of Kent County,* 137 Md.App. 732, 769 A.2d 982 (Md.Ct.Special App. 2001): *In Re City of Buffalo,* 206 N.Y. 319, 329, 99 N.E. 850, 853 (Ct.App.N.Y 1912). There simply is no implied dedication of littoral rights to the public.

D. Miscellaneous Issues.

A good portion of the briefing by all parties addressed the issue as to whether the ITD has standing, whether the IDL should have even given ITD notice of landowners'

applications to the IDL (under I.C. § 58-1305(b) it is the *adjacent* littoral property owners that are entitled to notice and comment, not the holder of a right of way easement), and whether ITD's objections to the landowners' applications were timely. Because this Court decides the IDL's decisions in each of these two cases was contrary to the law, this Court will not address the merits of these miscellaneous issues.

E. Conclusion.

While the ITD is correct in quoting: "A strong presumption of the validity favors an agency's actions", *Young Electric Sign Co. v. State,* 135 Idaho 804, 807, 25 P.3d 117, 120 (2001), and "The Appellants bear the burden of showing error on appeal", *Chisholm v. Idaho Dept. of Water Resources,* 142 Idaho 159, 163, 125 P.3d 515, 519 (2005) (Idaho Transportation Department's Response Memorandum, p. 14), the appellant landowners in these two cases on appeal have more than met their burden of showing error on appeal. The presumption of the validity of the IDL's decision has been more than met, as the IDL's decision finds no support in the law.

For all the reasons set forth above, the IDL's Hearing Examiner's May 18, 2007, "Memorandum" decision (R. pp. 118-130), and the IDL's May 21, 2007, "Final Order" (R. pp. 131-32) are, pursuant to Idaho Code § 67-5279: "(a) in violation of constitutional or statutory provisions, (b) in excess of the statutory authority of the agency, (c) made upon unlawful procedure, [and] (d) not supported by substantial evidence on the record as a whole." Additionally, since the IDL approved Hudson's application just before denying these two applications, the IDL's decisions are (e) "arbitrary, capricious, [and] an abuse of discretion" under Idaho Code § 67-5279.

III. ORDER.

IT IS HEREBY ORDERED the Final Order of the IDL dated May 21, 2007 (R. pp.

155-56) is **VACATED** (REVERSED) and the matter **REMANDED** to the IDL for further proceedings consistent with this Court's Memorandum Decision and Order on Appeal.

Entered this 24th day of March, 2008.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of April, 2008, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
John F. Magnuson	(208) 667 0500	C. Nicholas Krema	(208) 334 2297
Steven Schuster	(208) 334 4498	John F. Magnuson	(208) 667 0500

_____
Deputy Clerk