

STATE BOARD OF LAND COMMISSIONERS

June 20, 2023
Regular Agenda

Subject

Management of Bear Lake

Question Presented

Shall the Land Board issue an order outlining restricted activities on the exposed lakebed below the ordinary high watermark of Bear Lake in Idaho, and sign a memorandum of understanding with Bear Lake County for enforcement of the order?

Background

The State holds title to the beds and banks of navigable waters below the ordinary high water mark (OHWM) subject to the Public Trust Doctrine. Pursuant to Idaho Code § 58-104(9)(a), the State Board of Land Commissioners (Land Board) has authority to regulate and control the use or disposition of these lands.

5923.65 feet (UP&L datum) is the elevation of the OHWM for Bear Lake in both Idaho and Utah. Idaho claims ownership and regulatory authority of the bed of Bear Lake below the OHWM in Idaho.

In 1991, the Land Board issued an order limiting activities below the ordinary high watermark for Bear Lake in Idaho (Attachment 1).

This order restricted certain activities unless otherwise modified by Bear Lake County. This sentence clouded the authority of the Land Board, resulting in a lack of consistent management. The result has been damage to the exposed lakebed below the OHWM of Bear Lake in Idaho.

Discussion

After discussion with Bear Lake County, the Department recommends the Board provide a revised order (Attachment 2).

The revised order removes the "unless otherwise modified" statement found in the 1991 order. This will clarify the authority of the Land Board. The revised order prohibits the following activities on the exposed bed of Bear Lake below the ordinary high water mark:

- A. Driving or operating motorized vehicles parallel to the shoreline.
- B. Parking motorized vehicles within 100 feet of the water edge.
- C. Overnight parking or camping.
- D. Leaving litter, trash, or human waste.

- E. Unauthorized digging, removal of dirt or sand, or depositing any foreign materials.
- F. Use of tractors or other heavy equipment for phragmites control methods that are ineffective.
- G. Constructing new fences.
- H. Constructing new buildings.

After this order is issued, a memorandum of understanding (MOU) with Bear Lake County will be signed (Attachment 3).

This MOU states that Bear Lake County will adopt and enforce a revised Land Board order as a county ordinance.

If approved by the Land Board, the Department will provide the revised order to the Bear Lake County Commission as guidance and proceed to gather signatures on the MOU.

Recommendation

Adopt the revised order regarding prohibited activities on the bed and banks of Bear Lake below the ordinary high water mark and proceed with completing the memorandum of understanding with Bear Lake County Board of Commissioners.

Board Action

Attachments

1. 1991 Bear Lake Land Board Order
2. Revised Order Draft
3. 2023 Bear Lake Land Board MOU Draft

Before the Department of Lands
State of Idaho

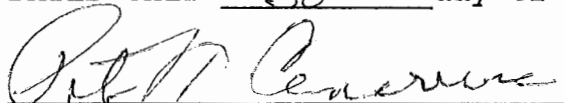
ORDER

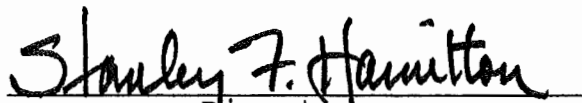
The State Board of Land Commissioners being fully advised, makes the following order:

The following activities are hereby expressly prohibited unless otherwise modified by the Bear Lake County Board of Commissioners on that portion of the bed of Bear Lake in Idaho, from the low water mark to the ordinary high water mark at an elevation of 5923.65 feet.

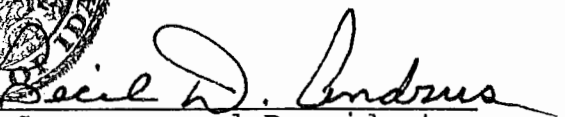
- A. Driving or parking of motorized vehicles except for:
1. Use of vehicles for launching of boats at authorized launch areas (no parking on the lake bed).
 2. Emergency, law enforcement, and government administrative vehicles.
 3. Other vehicles authorized by appropriate authority for specific purposes.
- B. All overnight camping.
- C. Leaving and/or depositing of litter, trash, or human waste.
- D. Unauthorized digging, removal of dirt or sand or depositing of any foreign materials.

DATED this 30th day of August


Secretary of State


Director




Governor and President
of the State Board of
Land Commissioners

ORDER RE: PROHIBITION OF CERTAIN ACTIVITIES ON THE BED
AND BANKS OF BEAR LAKE BELOW THE
ORDINARY HIGH WATER MARK

I.
BACKGROUND

1. Pursuant to the Equal Footing Doctrine, when Idaho became a state on July 3, 1890, the State took title to the beds and banks of navigable waters below the ordinary high water mark. *See Newton v. MJK/BJK LLC*, 167 Idaho 236, 242, 469 P.3d 23, 29 (2020).
2. The State holds that title subject to the Public Trust Doctrine, which traditionally protected the public’s right to navigate on the water but has expanded over time has expanded to include other public uses. *Id.* The Public Trust Doctrine is “solely a limitation on the power of the state to alienate or encumber title to the beds of navigable waters. I.C. § 58-1203(1).
3. Pursuant to Idaho Code § 58-104(9)(a), the Land Board has authority “[t]o regulate and control the use or disposition of lands in the beds of navigable lakes, rivers and streams, to the natural or ordinary high water mark thereof, so as to provide for their commercial navigational, recreational or other public use; . . .” *See also* I.C. § 58-1203(1).
4. Bear Lake is a navigable lake, located partly in Idaho and partly in Utah.
5. The Land Board has authority to regulate and control the use or disposition of those portions of Bear Lake that are located within the borders of the State of Idaho.
6. Based on elevation datum adopted by Utah Power & Light (UP&L), Idaho and Utah both use 5,923.65 feet as the elevation of the ordinary high water mark of Bear Lake. Idaho claims ownership of and regulatory authority over the bed of Bear Lake below that ordinary high water mark.
7. Due to the shallow gradient of the bed and shoreline of Bear Lake, it is not unusual for several hundred feet of the bed of Bear Lake below the ordinary high-water mark to be exposed, particularly during low precipitation years and the summer months. When that occurs, members of the public drive on the exposed lakebed in order to access the water and recreate. Unfortunately, some activities undertaken by the public on the exposed lakebed have resulted in physical damage, pollution, and other problems in the lake and lakebed.
8. The Board has determined that it is necessary to restrict certain activities on the bed of Bear Lake below the ordinary high water mark in order to protect the public trust lands.

II. ORDER

The State Board of Land Commissioners being fully advised, and to protect the public trust resources of the State of Idaho, hereby orders as follows:

The prior Bear Lake Order dated August 30, 1991 is hereby revoked.

The following activities are hereby expressly prohibited on that portion of the bed of Bear Lake in Idaho, from the low water mark to the ordinary high-water mark, which is at elevation 5923.65 feet (UP&L Datum).

- A. Driving or operating motorized vehicles parallel to the shoreline. All motorized vehicle travel must be perpendicular to the shoreline, i.e., the most direct route from the ordinary high-water mark to the water's edge as it exists on the day of travel. This prohibition does not apply to emergency, law enforcement, and government administrative vehicles.
- B. Parking motorized vehicles within one hundred (100) feet of the water's edge as it exists on the day of travel.
- C. Overnight parking or camping.
- D. Leaving and/or depositing litter, trash, or human waste.
- E. Unauthorized digging, removal of dirt or sand, or depositing of any foreign materials.
- F. Use of tractors or other heavy equipment for common reed (phragmites) control that does not follow best management practices for effective control.
- G. Constructing new fences.
- H. Constructing new buildings

Existing fills, roadways, fences, buildings, or other encroachments below the ordinary high water mark at an elevation of 5923.65 feet (UP&L Datum) must be either approved through an encroachment permit or removed.

DATED this ____ day of _____, 2023

President of the State Board of Land Commissioners
and Governor of the State of Idaho

Countersigned:

Phil McGrane, Secretary of State of Idaho

Dustin T. Miller, Director of Idaho Department of Lands

AGENDA ITEM 10
BEAR LAKE MANAGEMENT

ATTACHMENT 3 FOR THIS ITEM IS
PENDING AND WILL BE PROVIDED AS
SOON AS COMPLETE