

GEORGE BACON
Interim Director
Idaho Department of Lands
954 W. Jefferson Street
P.O. Box 83720
Boise, Idaho 83720-0050

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of;)
)
Encroachment Permit No. L-96-S-1640A) **FINAL ORDER**
Sand Creek Byway)
Idaho Transportation Department)
)
Applicant.)
_____)

I. NATURE OF PROCEEDINGS/ISSUES

A public hearing was held on November 20, 2006 at 6:00 pm PST at the Sandpoint High School in Sandpoint, Idaho. Eric Wilson served as the Idaho Department of Lands Hearing Coordinator. The Hearing Coordinator issued his Recommendations on December 20, 2006.

My responsibility is to render a decision on behalf of the State Board of Land Commissioners based on the record reviewed in the context of my personal expertise gained through education, training and experience. In making this determination I have relied on the record provided. Specifically,

- I have read the transcript of the public hearing conducted in Sandpoint, Idaho on November 20, 2006.
- I have reviewed the record including all documents and exhibits.
- I have examined the Hearing Coordinator's Recommendations in light of the entire record.

Encroachments, including bridges, filling, and dredging, placed on, in, or above the navigable waters require a permit issued by the Department of Lands pursuant to the requirements of Chapter 13, Title 58, Idaho Code and the Rules for the Regulation of

Beds, Waters and Airspace over Navigable Lakes in the State of Idaho, IDAPA 20.03.04
as promulgated by the State Board of Land Commissioners.

II. FINDINGS OF FACT

I concur with the Findings of Fact presented by the Hearing Coordinator.

III. CONCLUSIONS OF LAW

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

IV. FINAL ORDER

On the basis of the record, it is my order that Encroachment Permit L-96-S-1640A be approved subject to the conditions in subsection 11 of the Hearing Coordinator's Findings of Facts and as amended by the Hearing Coordinator's Recommendation, and the permit be issued by the Pend Oreille Supervisory Area to the Applicant.

This is a final order of the agency. Any party may file a motion for reconsideration of this final order within twenty (20) days of the date of this final order. The agency will dispose of the petition for reconsideration within thirty (30) days of its receipt, in accordance with IDAPA 20.03.04.030.09.

DATED this 20th day of December, 2006.



GEORGE BACON
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of December, 2006, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

Nick Krema
Idaho Department of Lands
954 W. Jefferson
Boise, ID 83720-0050

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Dave Karsann
Idaho Transportation Department
600 W. Prairie Avenue
Coeur d'Alene, ID 83815

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Dave Butzier
Washington Group International
PO Box 73
Boise, ID 83729

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Charlie R. Spurgeon
City of Ponderay
PO Box 500
Ponderay, ID 83852

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Ray P. Miller
Mayor of Sandpoint
1123 Lake Street
Sandpoint, ID 83864

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Darrell W. Kerby
Mayor of Bonners Ferry
6540 Jackson Street
Bonners Ferry, ID 83805

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Shawn Keough
Idaho State Senator
PO Box 101
Sandpoint, ID 83864

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

James E. Risch
Governor of Idaho
State Capitol
Boise, ID 83720

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Mark Compton
610 W. Hubbard, Ste. 206
Coeur d'Alene, ID 83814

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Congressman Butch Otter
802 W. Bannock, Ste 101
Boise, ID 83702

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Maggie Mjelde
Mayor of Kootenai
101 Sprague
Kootenai, ID 83840

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Walt Kirby
Boundary County Commissioner
PO Box 419
Bonners Ferry, ID 83805

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Senator Larry Craig
225 North 9th Street, Ste 530
Boise, ID 83702

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Senator Mike Crapo
251 East Front Street, Ste.205
Boise, ID 83702

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Maggie Becker
City of Dover
25658 Highway 2
Dover, ID 83825

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

George Eskridge
Idaho House of Representatives
PO Box 112
Dover, ID 83825

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Karl Dye
Bonner County Commissioner
215 South First Ave.
Sandpoint, ID 83864

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Marcella Nelson
Ponderay Community
Development Corporation
PO Box 615
Ponderay, ID 83852

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Liz Sedler
North Idaho Community Action
Network
PO Box 1357
Sandpoint, ID 83864

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Pierre Bordenave
Association of Concerned
Sandpoint Businesses
PO Box 1724
Sandpoint, ID 83864

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Peter Cooper
Pan-American Railways
1671 E. Miles Ave.
Hayden Lake, ID 83835

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Eric Ridgeway
Long Bridge Swim
85 Bird Creek Lane
Sagle, ID 83860

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Steve Potter
Citizens for the Sandpoint Tunnel
212 North First Street
Sandpoint, ID 83864

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Richard Creed
North Idaho Bikeways, Inc.
206 North Fourth Avenue
Sandpoint, ID 83864

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Richard Hutter
Community Design Advisory
Committee
1212 Mathison Drive
Sandpoint, ID 83864

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

J.P. Carver
1904 Browning Way
Sandpoint, ID 83864

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Bill Lewis
37 Oak Street
Sandpoint, ID 83864

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Ed Bittner
4085 Bottle Bay Road
Sagle, ID 83860

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

David Dye
405 Brisboys Road
Sagle, ID 83860

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Bryan Eglund
219 Upland Lane
Sandpoint, ID 83864

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Jake Leedy
1515 South Center Valley Road
Sandpoint, ID 83864

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Aragon Miller
408 Sherwood Road
Sagle, ID 83860

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Lewis Rich
33639 Highway 200 East
Sandpoint, ID 83864

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

John McHugh
Idaho State Transportation Board
3348 E. Ponderosa Boulevard
Post Falls, ID 83854-9614

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Edward Robinson
Department of Lands
Highway 2
Sandpoint, ID 83864

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

George Bacon
Idaho Department of Lands
954 W. Jefferson
Boise, ID 83720-0050

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail



ERIC WILSON
IDL Program Manager - Navigable Waters and Minerals

**BUREAU OF SURFACE AND
MINERAL RESOURCES**
954 West Jefferson
Post Office Box 83720
Boise ID 83720-0050
Phone (208) 334-0200
Fax (208) 334-3698



GEORGE BACON, INTERIM DIRECTOR
EQUAL OPPORTUNITY EMPLOYER

STATE BOARD OF LAND COMMISSIONERS
James E. Risch, Governor
Ben Yursa, Secretary of State
Lawrence G. Wasden, Attorney General
Keith L. Johnson, State Controller
Marilyn Howard, Sup't of Public Instruction

December 20, 2006

MEMORANDUM

TO: George Bacon, Interim Director

FROM: Eric Wilson, Navigable Waters/Minerals Program Manager

SUBJECT: Public Hearing – Idaho Transportation Department Sand Creek Byway
L-96-S-1640A

I. INTRODUCTION

This document, which includes a recommendation for your consideration, was prepared following a public hearing conducted by the Idaho Department of Lands (IDL). The public hearing was conducted in conjunction with the processing of an encroachment permit for nonnavigational encroachments over and in Lake Pend Oreille, a navigable lake in Idaho. Jurisdiction in this matter rests with IDL pursuant to Idaho Code § 58-1303 and § 58-104(9), which empower the State Board of Land Commissioners to regulate, control and permit encroachments on, in, or above the beds or waters of the navigable lakes of Idaho. Jurisdiction in this matter also rests with the U.S. Army Corps of Engineers (COE) under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. Under these federal authorities a permit is required for the discharges of dredged or fill material into waters of the United States and for work in navigable waters.

II. FINDINGS OF FACT

1. On September 11, 2006, the Idaho Transportation Department (Applicant) submitted to IDL and COE an encroachment permit application (L-96-S-1640A) requesting the

approval to construct two bridges over the Sand Creek arm of Lake Pend Oreille and to place fill material and conduct dredging in this same waterway. The proposed construction is part of the US Highway 95 Sandpoint Bypass, or Sand Creek Byway. The application is incorporated into this document by reference.

2. Several documents pertaining to the project have been published. A Final Environmental Impact Statement (FEIS) for the Sand Creek Two-Lane Alternative was published on September 9, 1999, and a Record of Decision (ROD) was signed on May 23, 2000. An Environmental Assessment (EA) was prepared in August of 2002, and a Biological Assessment (BA) was completed on November 24, 2003 with a Finding of No Significant Impact (FONSI) issued for the BA on April 15, 2004. An application for encroachment permit #L-96-S-1640 was previously made on July 1, 2004 for the Sandpoint Bypass. Two previous decisions related to processing of that application were made by IDL, and those decisions added several conditions to the permit approval. The permit was then withdrawn in December of 2005 for additional design work. The EIS, ROD, EA, BA, FONSI, application for encroachment permit #L-96-S-1640, and previous IDL decisions on this permit are incorporated into this document by reference.

3. IDL initiated the processing of the encroachment permit application as a nonnavigational encroachment pursuant to the Lake Protection Act (Idaho Code § 58-1306) and the associated Rules (IDAPA 20.03.04.030). Due to the history of this project, and at the request of the Applicant, IDL determined that a public hearing was needed for processing this application. Consultation with the COE revealed that they would also require a public hearing for their permit processing. The two agencies agreed that a joint

public hearing would be more conducive to involvement by the general public and more efficient for permit processing, so a date was set for a joint public hearing to be conducted by IDL and COE.

4. On September 28, 2006 and October 5, 2006, IDL published a legal Notice of Application and Public Hearing in the Bonner County Daily Bee for the encroachment permit application submitted by the Applicant. The Notice of Application and Public Hearing is incorporated into this document by reference. The public hearing was scheduled for 6:00 pm on November 20, 2006 at the Sandpoint High School.

5. In a memo dated September 26, 2006, IDL notified the following parties of the encroachment permit application submitted by the Applicant and requested that the parties provide comments to IDL:

- Idaho Department of Fish and Game
- Idaho Department of Environmental Quality
- Idaho Department of Water Resources
- U.S. Army Corps of Engineers
- Bonner County Planning and Zoning
- Bonner County Commissioners
- Bonner County Public Works/Marine Division
- Panhandle Health District 1
- City of Sandpoint
- City of Ponderay
- Tri-State Water Quality Council

- Lakes Commission
- North Idaho Community Action Network (NICAN)
- Association of Concerned Sandpoint Businesses (ACSB)
- 30 adjacent landowners

The memo is incorporated into this document by reference.

6. On November 20, 2006 IDL held a public hearing at 6:00 pm at the Sandpoint High School. Mr. Eric Wilson, IDL Navigable Waters/Minerals Program Manager, and Lieutenant Colonel Anthony J. Hofmann, District Engineer of the COE Walla Walla District, coordinated the public hearing. In attendance were Mr. Edward Robinson, IDL Area Manager; Mr. Jim Brady, IDL Resource Specialist, Senior; Mr. C. Nicholas Krema, Deputy Attorney General representing IDL; Mr. A. Bradley Daly, COE Regulatory Division Chief at Walla Walla; Ms. Barbara Benge, COE Regulatory Project Manager for the Sand Creek Byway project; Ms. Kalmarie Black, COE Assistant District Counsel; Mr. Joe Saxon, COE Public Affairs Officer; Mr. Dave Butzier with Washington Group International representing the Applicant; and approximately 150 members of the public. 29 people testified. The public hearing was recorded on audio tape and was subsequently transcribed. Approximately 47 written responses were received by IDL and COE before, during, and after the public hearing through IDL's November 21, 2006 deadline for comments. The transcript of the public hearing and all written responses are incorporated into this document by reference.

7. The information obtained by IDL and COE from the November 20, 2006 public hearing and written responses received by November 21, 2006 indicate the proposed

project may have the following benefits:

- Improved public safety.
- Improved traffic flow through and around downtown Sandpoint.
- Improved livability of Sandpoint.
- Increased legal, public access to the east side of Sand Creek along the constructed pathway.
- Positive effect on economic growth of the area.
- Maintained navigation of Sand Creek.
- Multi-modal byway with the pathway along the shoreline of Sand Creek.
- Compliance with National Environmental Policy Act and the Clean Water Act.

The information obtained by IDL and COE from the November 20, 2006 public hearing and written responses received by November 21, 2006 indicate the proposed project may have the following negative effects:

- Loss of habitat functions and values, and wildlife use, in Sand Creek.
- Loss of aesthetics along Sand Creek.
- Loss of boating and other recreational uses of Sand Creek.
- Water quality of Sand Creek and Lake Pend Oreille could be endangered.
- Loss of enjoyment by the adjacent riparian owners.
- Failure to address traffic issues on U.S. 95 or in downtown Sandpoint.
- Economic damage to local communities.
- Loss of community linkage to the city park area and Lake Pend Oreille.
- Permanent loss of historical and archeological resources.

- Increased safety risk due to lack of separation between north and south bound traffic on the new highway.
- Releases of toxic materials during dredging.
- Failure of slopes or structures due to unstable soils.
- Increased erosion and deposition in Sand Creek due to the shape and alignment of the constructed channel and/or flood effects on the fills.

8. The objections raised by several groups and individuals are largely the same as those raised during the review of permit application #L-96-S-1640 in 2004 and 2005. These objections did not provide a basis for denying the permit at that time, although conditions were added to the permit approval. The application was subsequently withdrawn for further design work.

9. The revised application, #L-96-S-1640A, being considered now is largely the same application submitted as #L-96-S-1640. The only substantive change to the application is the addition of channel hydraulic dredging in Sand Creek west of the shoreline extension, or lightweight fill, north of Bridge Street. This dredging was added to address concerns raised about the effect of flooding on the fill when Lake Pend Oreille is drawn down and Sand Creek flows through the project area. The shoreline extension fill will cover a portion of the stream thalweg, so the Applicant proposes dredging to effectively enlarge this portion of the thalweg and allow the stream to flow past the fill more easily.

10. Objections new to this application and raised by several groups and individuals are centered on the channel hydraulic dredging. These objections relate to the channel

morphology, cross section, and construction, and water quality. Modeling and design constraints appear to have resulted in a channel alignment and shape with a low potential for excessive erosion and deposition within Sand Creek. The construction techniques and investigations described in the application appear to have addressed concerns regarding water quality.

11. Previous decisions by the Idaho Department of Lands on encroachment permit #L-96-S-1640 included the following conditions:

- ITD shall obtain ownership or easement rights to all uplands and submerged lands on which fill will be placed or above which bridges will be constructed prior to commencing work below the artificial high water mark of Sand Creek/Lake Pend Oreille. Failure to obtain ownership or easement rights will result in the nullification of the encroachment permit.
- ITD shall obtain for this project the necessary water quality certification from DEQ and resolve all issues raised by DEQ in their letter to the U.S. Army Corps of Engineers, dated August 30, 2004.
- ITD shall comply with fish and wildlife mitigation measures described in the EIS documents and as requested by Idaho Fish and Game set forth in their letter to the U.S. Army Corps of Engineers to ensure that the proposed mitigation meets or exceeds existing habitat conditions in the project area (see Idaho Fish & Game letter to U.S. Army Corps of Engineers dated August 9, 2004).
- ITD shall obtain a Section 404 of the Clean Water Act permit from the U.S. Army Corps of Engineers.
- ITD shall prepare and implement a plan to monitor the effects of the shoreline

extension and habitat enhancement fills on adjacent private property along Sand Creek. If monitoring shows that there is damage or a potential for damage to adjacent private property, ITD shall take action to repair those damages or to implement measures to prevent potential or imminent damage from occurring.

The conditions precedent contained in the prior IDL permit approvals are incorporated by reference into the record and should be carried forward into all permit approvals for this project.

III. CONCLUSIONS OF LAW

1. The Idaho Board of Land Commissioners (Board) is designated in Idaho Code § 58-104(9) and § 58-1303 to regulate, control, and permit encroachments on, in, or above the beds of navigable lakes in the state of Idaho. IDL is the administrative agency of the Board, Idaho Code § 58-119.

2. Lake Pend Oreille is a navigable lake as defined by Idaho Code § 58-1302(a). Pursuant to IDAPA 20.03.04.011.02, encroachments of any kind on, in, or above the beds of Lake Pend Oreille require a permit prior to encroaching on the lake.

3. Pursuant to Idaho Code § 58-1301, lake encroachments must be regulated to protect property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality, and these values must be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from, the proposed encroachment.

4. Pursuant to IDAPA 20.03.04.030.02, encroachments not in aid of navigation in

navigable lakes will normally not be approved by the department and will be considered only in cases involving major environmental, economic, or social benefits to the general public. Approval under these circumstances is authorized only when consistent with the public trust doctrine and when there is no other feasible alternative with less impact on public trust values. The proposed project is intended to bring major economic and social benefits to the general public, as documented in the FEIS, ROD, and other documents incorporated by reference. These benefits include a resolution of traffic concerns in the City of Sandpoint, increased public safety, and increased public access along the east side of Sand Creek. The proposed project is not intended to bring major environmental benefits, but it is intended to at least maintain the existing environment. Short term environmental impacts should be expected, as with any construction project, but erosion control and sediment containment is part of the project and no long term impacts are expected. Other agencies' permit approvals, such as the Idaho Department of Environmental Quality (DEQ) water quality certification and the COE 404 permit, and previously approved documents such as the FEIS, will help ensure that detrimental environmental impacts are avoided. Conditioning the encroachment permit on the Applicant obtaining approval from DEQ and COE ensures that environmental concerns will be appropriately addressed.

5. Pursuant to IDAPA 20.03.04.060.04, an excavated or dredged channel or basin to provide access to navigable waters may be authorized only when the applicant can show that it will provide a clear environmental, economic, or social benefit to the people of the state and will not result in any appreciable environmental degradation. The main purposes for the dredging in this permit are to provide working platforms as needed for road construction and to maintain flow capacity in the stream thalweg past the shoreline

extension. The purpose for the dredging is not to provide access to navigable waters because the access already exists. As a result, this Rule does not apply in this instance. If this rule did apply, however, the standards of benefit to the public and no appreciable environmental degradation appear to have been met as described previously.

6. Pursuant to Idaho Code § 58-1306(e), in recognition of continuing private property ownership of lands lying between the natural or ordinary high water mark and the artificial high water mark, the board shall consider unreasonable adverse effect upon adjacent property and undue interference with navigation the most important factors to be considered in granting or denying an application for a nonnavigational encroachment, a commercial navigational encroachment, or a community navigational encroachment not extending below the natural or ordinary high water mark.

7. Impacts on private property have not appreciably changed since this project was first evaluated in 2004. Unreasonable adverse effects on adjacent property, as used in Idaho Code § 58-1306(e), are interpreted to relate primarily to an impact on adjacent riparian or littoral property rights as outlined in IDAPA 20.03.04.060.05. This rule states that it will be presumed, subject to rebuttal, that commercial navigational encroachments, community docks or nonnavigational encroachments will have an adverse effect upon adjacent riparian property if located closer than twenty-five (25) feet to adjacent riparian property lines. The Recommendation dated March 30, 2005 from the reconsideration hearing held for encroachment permit #L-96-S-1640 did find that the proposed project will be within twenty-five (25) feet of the marina. This information is in Section 4.3 of the Findings of Fact, and it is again stated in some of the written comments submitted for application #L-96-S-1640A.

To be more specific, the encroachment near the marina is a bridge that will be higher above the water than the existing railroad bridge over Sand Creek. As a result, no adverse effect upon the adjacent marina property is expected following construction. During construction, a temporary pier will be within the winter pool area of Sand Creek, but it will be further than twenty-five (25) feet from the marina property. No other riparian or littoral property owners have stated an objection based on the project being within twenty-five (25) feet of adjacent riparian property lines. As a result, no unreasonable adverse effects on adjacent property are anticipated.

8. Undue interference with navigation is the second point to consider under Idaho Code § 58-1306(e). The fills in Sand Creek, particularly the shoreline extension north of Bridge Street, will narrow the navigable channel of Sand Creek. One commenter, however, stated that he was able to navigate up and down Sand Creek outside of the proposed fill area with no problem. This seems plausible given the water depths and remaining channel width. With the additional channel hydraulics dredging west of the shoreline extension, navigation following construction should be no more difficult than it is at the current time. Two permanent piers will be added to the lower end of Sand Creek, but they will be next to the railroad right of way and are not anticipated to unduly interfere with navigation. During construction, a temporary pier will limit the size of the navigable channel near the bridges for one winter season. Few boats navigate Sand Creek in winter, so overcrowding should not be an issue. The temporary bridge supported by the temporary pier will be lower in elevation than the permanent bridge, but the type of boats using Sand Creek at this time of year should have sufficient clearance to access Lake Pend Oreille.

9. Idaho Code § 58-1306(e) also states that if the board determines that the benefits, whether public or private, to be derived from allowing such encroachment exceed its detrimental effects, it shall grant the permit. The benefits of the encroachment include increased public access to the east side of Sand Creek and an alternate driving route through the town of Sandpoint. In this instance, the benefits of the project do outweigh any detrimental or adverse effects upon adjacent property and undue interference with navigation.

10. IDL shall make decisions on proposed encroachments in accordance with the Public Trust Doctrine as set forth by the Idaho Supreme Court in Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085 (1983) and subsequent cases and Idaho Code §§ 58-1201 through 1203. The Public Trust Doctrine applies to the beds and banks of navigable waterways below the ordinary high water mark.

Since the proposed project involves land between the ordinary high water mark of 2051 feet and the artificial high water mark of 2062.5 feet, the Public Trust Doctrine in this instance relates to how the project will affect the portion of Lake Pend Oreille below 2051 feet. This portion of the lake begins just east of the proposed bridges approximately where the railroad bridge is located. As described previously, public use and enjoyment of Sand Creek and the lake in the project area will not be significantly impacted during or after construction. This project does not appear to be contrary to the Public Trust Doctrine.

11. Pursuant to Idaho Code § 58-1306(a), applications for nonnavigational, community navigational, or commercial navigational encroachments must be submitted or approved by the riparian or littoral owner. The applicant, Idaho Transportation Department, is in the

process of purchasing or obtaining easement rights to the parcels necessary to complete the overall project. These acquisitions, when completed, will establish the necessary riparian or littoral rights or approvals for the encroachment permit. Issuance of the encroachment has been, and continues to be, conditioned on the Applicant obtaining the necessary riparian or littoral rights or approvals.

12. The Applicant and IDL satisfied all procedural requirements in the processing of the application included in Idaho Code § 58-1306 and IDAPA 20.03.04.

IV. HEARING COORDINATOR CONCLUSIONS AND RECOMMENDATIONS

Based upon the information provided to me as the hearing coordinator and based upon the fact that the encroachment permit application for the bridges, fills, and dredging meets all the requirements of Idaho Code § 58-1301 *et. seq.* (the Lake Protection Act) and IDAPA 20.03.04, I recommend that the Director of IDL issue a Final Order stating that the Pend Oreille Supervisory Area of IDL should approve Applicant's request for a nonnavigational encroachment permit for two bridges, permanent and temporary fills, dredging, habitat enhancement, and other construction activities in the Sand Creek arm of Lake Pend Oreille subject to the first four conditions from the previous decisions and an amended fifth condition as follows:

- ITD shall prepare and implement a plan for ITD to monitor the effects of the shoreline extension and habitat enhancement fills on adjacent private property along Sand Creek. A monitoring report shall be prepared and given to IDL every January following the start of construction, through the construction period, and for two (2) years following construction. If monitoring shows that there is damage or a

potential for damage to adjacent private property, ITD shall take action to repair those damages or to implement measures to prevent potential or imminent damage from occurring.

DATED this 20th day of December, 2006.



ERIC WILSON
Hearing Coordinator

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of December, 2006, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

Nick Crema
Idaho Department of Lands
954 W. Jefferson
Boise, ID 83720-0050

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Dave Karsann
Idaho Transportation Department
600 W. Prairie Avenue
Coeur d'Alene, ID 83815

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Dave Butzier
Washington Group International
PO Box 73
Boise, ID 83729

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Charlie R. Spurgeon
City of Ponderay
PO Box 500
Ponderay, ID 83852

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile: _____
- Statehouse Mail

Ray P. Miller
Mayor of Sandpoint
1123 Lake Street
Sandpoint, ID 83864

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Darrell W. Kerby
Mayor of Bonners Ferry
6540 Jackson Street
Bonners Ferry, ID 83805

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Shawn Keough
Idaho State Senator
PO Box 101
Sandpoint, ID 83864

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James E. Risch
Governor of Idaho
State Capitol
Boise, ID 83720

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Mark Compton
610 W. Hubbard, Ste. 206
Coeur d'Alene, ID 83814

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Congressman Butch Otter
802 W. Bannock, Ste 101
Boise, ID 83702

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Maggie Mjelde
Mayor of Kootenai
101 Sprague
Kootenai, ID 83840

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Walt Kirby
Boundary County Commissioner
PO Box 419
Bonners Ferry, ID 83805

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Senator Larry Craig
225 North 9th Street, Ste 530
Boise, ID 83702

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Senator Mike Crapo
251 East Front Street, Ste.205
Boise, ID 83702

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Maggie Becker
City of Dover
25658 Highway 2
Dover, ID 83825

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- Statehouse Mail

George Eskridge
Idaho House of Representatives
PO Box 112
Dover, ID 83825

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Karl Dye
Bonner County Commissioner
215 South First Ave.
Sandpoint, ID 83864

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Marcella Nelson
Ponderay Community
Development Corporation
PO Box 615
Ponderay, ID 83852

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Liz Sedler
North Idaho Community Action
Network
PO Box 1357
Sandpoint, ID 83864

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Pierre Bordenave
Association of Concerned
Sandpoint Businesses
PO Box 1724
Sandpoint, ID 83864

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Peter Cooper
Pan-American Railways
1671 E. Miles Ave.
Hayden Lake, ID 83835

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Eric Ridgeway
Long Bridge Swim
85 Bird Creek Lane
Sagle, ID 83860

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Steve Potter
Citizens for the Sandpoint Tunnel
212 North First Street
Sandpoint, ID 83864

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Richard Creed
North Idaho Bikeways, Inc.
206 North Fourth Avenue
Sandpoint, ID 83864

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Richard Hutter
Community Design Advisory
Committee
1212 Mathison Drive
Sandpoint, ID 83864

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J.P. Carver
1904 Browning Way
Sandpoint, ID 83864

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Bill Lewis
37 Oak Street
Sandpoint, ID 83864

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Ed Bittner
4085 Bottle Bay Road
Sagle, ID 83860

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David Dye
405 Brisboys Road
Sagle, ID 83860

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Bryan Egland
219 Upland Lane
Sandpoint, ID 83864

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Jake Leedy
1515 South Center Valley Road
Sandpoint, ID 83864

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Aragon Miller
408 Sherwood Road
Sagle, ID 83860

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- Statehouse Mail

Lewis Rich
33639 Highway 200 East
Sandpoint, ID 83864

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- Statehouse Mail

John McHugh
Idaho State Transportation Board
3348 E. Ponderosa Boulevard
Post Falls, ID 83854-9614

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- Facsimile: _____
- Statehouse Mail

Edward Robinson
Department of Lands
Highway 2
Sandpoint, ID 83864

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- Facsimile: _____
- Statehouse Mail

George Bacon
Idaho Department of Lands
954 W. Jefferson
Boise, ID 83720-0050

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- Statehouse Mail



ERIC WILSON
IDL Program Manager - Navigable Waters and Minerals