

GEORGE BACON
Director
Idaho Department of Lands
300 N 6th St Ste 103
P.O. Box 83720
Boise, Idaho 83702-5956

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of;)
)
Encroachment Permit No. L-97-S-1104) **FINAL ORDER**
JD Lumber)
)
Applicant.)
_____)

I. NATURE OF PROCEEDINGS/ISSUES

A public hearing was held on March 30, 2007 at 10:00 am PST at the Idaho Department of Lands, Mica Supervisory Area Office in Coeur d'Alene, Idaho. Mike Murphy served as Hearing Coordinator. The Hearing Coordinator issued his Recommendations on November 9, 2007.

My responsibility is to render a decision on the 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 Coeur d'Alene, Idaho on March 30, 2007.
- I have reviewed the record including all documents and exhibits.
- I have examined the Hearing Officer's Recommendations in light of the entire record.

Encroachments, including docks, placed on 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-97-S-1104 be denied by the Priest Lake Supervisory Area.

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 9 day of November, 2007.



GEORGE BACON
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9 day of November, 2007, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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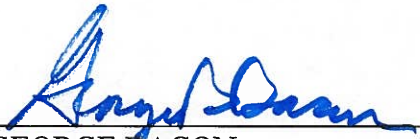
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EQUAL OPPORTUNITY EMPLOYER

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Ben Ysursa, Secretary of State
Lawrence G. Wasden, Attorney General
Donna M. Jones, State Controller
Tom Luna, Sup't of Public Instruction*

November 5, 2007

MEMORANDUM

TO: George B. Bacon, Director

FROM: Mike Murphy, Bureau Chief, Surface and Mineral Resources

SUBJECT: Reconsideration Hearing – JD Lumber, Inc. - L-97-S-1104

I. INTRODUCTION

The following document, which includes a recommendation for your consideration, was prepared following a reconsideration hearing conducted by the Idaho Department of Lands (IDL) on March 30, 2007. This hearing was conducted in conjunction with the processing of an encroachment permit for a sewer line on the bed of Priest Lake, a navigable lake in Idaho. Jurisdiction in this matter rests with IDL pursuant to Idaho Code § 58-1303, which empowers 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.

II. FINDINGS OF FACT

1. On May 22, 2006; September 7, 2006; and November 2, 2006, JD Lumber, Inc. (Applicant) submitted to IDL revisions to an encroachment permit application (L-97-S-

1104) requesting the approval to construct a sewer line from Twin Island to the shore on Priest Lake. The applications are incorporated into this document by reference.

2. IDL initiated the processing of the encroachment permit application as a navigational encroachment pursuant to the Lake Protection Act (Idaho Code § 58-1306) and the associated Rules (IDAPA 20.03.04.030). A "Notice of Application" was published in the Priest River Times on May 24, 2006; May 31, 2006; September 13, 2006; and September 20, 2006. Comments received from the public and government agencies are incorporated into this document by reference.

3. IDL submitted a letter to JD Lumber, dated November 7, 2006 denying the permit request. The letter cites comments from the public and government agencies; the high standard set for non-navigational encroachment; the potential for a release from the system into the lake; and the lack of a major benefit to the public as the basis for the denial. Although not obligated by Idaho law, IDL did offer a reconsideration process for the application.

4. In a letter dated November 27, 2006, Ms. Janet Robnett (attorney for Applicant) submitted a letter to IDL requesting reconsideration hearing. This letter is incorporated into this document by reference.

5. A letter dated February 23, 2007 was submitted to Applicant and to the parties previously providing comments on the application indicating that a reconsideration

hearing would be held on March 30, 2007 at the IDL office in Coeur d'Alene, Idaho at 10:00am. This letter is incorporated into this document by reference.

6. A reconsideration hearing for this application was held on March 30, 2007. Mr. Mike Murphy, IDL Bureau Chief of Surface and Mineral Resources, served as the hearing coordinator. In attendance were Mick Schanilec, IDL Area Manager; Mr. Carl Ritchie, IDL Navigable Waters Specialist; representatives of Applicant; and invited members of the public. Testimony was given by Applicant and several attendees. The transcript of the hearing is incorporated into this document by reference.

7. The following points summarize the testimony in opposition to the application from the reconsideration hearing held on March 30, 2007; the written comments submitted to the Department during the application process; and the written comments submitted during the open comment period associated with the reconsideration hearing. The comments identified the following concerns related to the proposed encroachment:

- Threats to water quality, vegetation, fish and aquatic vegetation from leaks,
- sewer system alarm breakdowns,
- phone and electricity interruptions impacting the system,
- engineering flaws,
- impacts to navigation and fishing,
- maintenance and testing,
- lack of public benefit,
- use of a suspect drainfield,

- permitting on the uplands,
- benefit not outweighing the risk, and
- development of the island.

8. During the reconsideration hearing Applicant, Ms. Janet Robnett (attorney for Applicant) and Mr. Eric Eldenburg (consultant for Applicant) provided testimony in support of the application and lengthy testimony related to the safety measures put in place in the design of the proposed sewer system. Additionally, Ms. Robnett argued that the application is not inconsistent with other non-navigational encroachments previously approved by the IDL. With one exception, the encroachments were all related to waterlines. Ms. Robnett also argued that the proposed encroachment represents a relatively low level of risk compared to other activities on the lake.

9. At the conclusion of the reconsideration hearing it was determined that changes to the application had been made on the uplands, ostensibly outside of the jurisdiction of IDL, that prompted hearing attendees to request additional time to review and comment on the changes. The hearing coordinator allowed until May 1, 2007 for additional comments. Additional comments were received by IDL from hearing attendees and from Applicant. The comments in opposition to the project were consistent with those provided during the reconsideration hearing. Eric Eldenburg provided additional information in a letter dated May 18, 2007. Ms. Robnett provided additional information and further argued the legitimacy of the application in a letter to IDL dated May 18, 2007. These letters are incorporated into this document by reference.

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, as per Idaho Code § 58-119.

2. Priest Lake 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 a navigable lake require a permit prior to encroaching on the lake.

3. Pursuant to Idaho Code § 58-1301, lake encroachments must be regulated to protect property and the lake value factors of navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. 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. IDL shall make decisions on proposed encroachments in accordance with the Public Trust Doctrine as set forth in Idaho Code § 58-1201 through 1203. This statute protects the property rights of private land owners, including the ability to utilize their riparian rights as a means to access the waters of the navigable lakes of Idaho.

5. IDL shall also make decisions on proposed encroachments in accordance with

the Public Trust Doctrine as explained by the Idaho Supreme Court in Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085 (1983) (KEA) and subsequent cases. The court in KEA stated that encroachment permits and submerged land leases remain subject to the public trust, and are not irretrievable commitments. The court in KEA also stated that mere compliance of IDL with its' legislative authority is not sufficient to determine if their actions comport with the requirements of the public trust doctrine.

6. IDAPA 20.03.04.030.02 states that 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.

7. 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

The Administrative Rules associated with the Lake Protection Act (IDAPA 20.03.04) set a high standard for the approval of non-navigational encroachments. In an effort to protect public trust lands, non-navigational encroachments are not normally approved

by the Department and are considered only in cases involving major environmental, economic, or social benefits to the general public (IDAPA 20.03.04.030.02).

Based on my review of the record, Applicant, despite diligent and respectable efforts to design a "fool-proof" sewage disposal system has failed to demonstrate that a major benefit to the general public will be produced by the approval of the proposed encroachment. If approved, Applicant would clearly benefit from a serviceable sewer line and an appreciable increase in property use and property value. The benefit to the general public would likely be limited to the increased property taxes associated with a developed Twin Island. The cost to the general public, however, would be the risk associated with a sewer line serving only one property owner. The sewer line would require some level of regular maintenance; would represent some level of environmental risk; and would cross a navigational pathway. Significant time and effort could be placed on assessing the veracity and magnitude of that risk; however, the discussion is moot in light of the much higher standard set by existing Idaho law. No major benefit to the public has been demonstrated by Applicant therefore no further discussion of the actual risk associated with application is warranted. Additionally, other feasible alternatives with less impact on public trust values are available to Applicant.

Applicant argued that other non-navigational encroachments have been approved (primarily waterlines) and that the proposed encroachment should be treated equally. Waterlines, however, are not inconsistent with public trust values, are encroachments recognized in the IDAPA Rules, and represent a historical publically accepted means of

obtaining water. The same does not hold true for sewer lines placed on the bed of a navigable lake.

Based upon the information provided to me as the hearing coordinator and based upon the fact that the encroachment permit application does not meet the standards established in IDAPA 20.03.04.030.02, I recommend that the Director of IDL issue a Final Order stating that the Priest Lake Supervisory Area of IDL should **deny** Applicant's request for a non-navigational encroachment permit.

DATED this 9th day of November, 2007.



MIKE MURPHY
Hearing Coordinator

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9 day of November, 2007, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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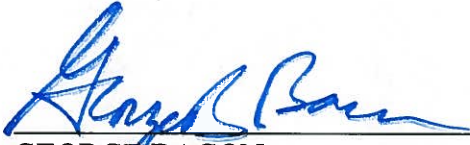
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