

**ORIGINAL**

GEORGE B. BACON  
Director  
Idaho Department of Lands  
300 N. 6<sup>th</sup> 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-884B )  
)  
Leslie Wood and Glenn Harvey )  
dba The Lodge at Sandpoint and )  
The Landings Restaurant )  
)  
Applicant. )  
\_\_\_\_\_ )

**FINAL ORDER**

**I. NATURE OF PROCEEDINGS/ISSUES**

A public hearing was held on May 8, 2008 at 6:00 pm at the Sandpoint Community Center in Sandpoint, Idaho. Mike Murphy served as Hearing Coordinator. The Hearing Coordinator issued his Recommendation on June 6, 2008.

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 Sandpoint, Idaho on May 8, 2008.
- 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 docks, placed on the navigable waters, require a permit issued by the Department of Lands pursuant to the requirements of Title 58, Chapter 13, 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 the Pend Oreille Supervisory Area of IDL should approve Applicant's request for a navigational encroachment permit for a commercial marina with the condition that the construction of the docks be limited to December, January and February, as recommended by the Idaho Department Fish and Game (as a means of minimizing the impact to spawning or migrating species), or within a timeframe otherwise agreed upon by the Idaho Department Fish and Game.

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 6 day of June, 2008.

  
\_\_\_\_\_  
GEORGE B. BACON  
Director

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 9<sup>th</sup> day of June, 2008, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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MIKE MURPHY

IDL Bureau Chief of Surface and Mineral Resources

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GEORGE B. BACON, DIRECTOR  
EQUAL OPPORTUNITY EMPLOYER

**STATE BOARD OF LAND COMMISSIONERS**

*C. L. "Butch" Otter, Governor  
Ben Yursa, Secretary of State  
Lawrence G. Wasden, Attorney General  
Donna M. Jones, State Controller  
Tom Luna, Sup't of Public Instruction*

June 6, 2008

**ORIGINAL**

**MEMORANDUM**

TO: George B. Bacon, Director

FROM: Michael Murphy, Bureau Chief of Surface and Mineral Resources

SUBJECT: Public Hearing – Commercial Marina - Leslie Wood and Glenn Harvey dba  
The Lodge at Sandpoint and The Landings Restaurant  
L-96-S-884B

**I. INTRODUCTION**

The following 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 a commercial marina on Lake Pend Oreille, 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 December 21, 2007, Leslie Wood of The Lodge at Sandpoint and The Landings Restaurant (Applicant) submitted to IDL an encroachment permit application (L-96-S-884B) requesting the approval to expand an existing commercial marina on Lake Pend Oreille. Lisa Ailport was identified in the application as an authorized agent of Applicant. The application is 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). On February 1, 2008 and February 8, 2008, IDL published the required Notice of Application in the Bonner County Bee for the encroachment permit application submitted by Applicant. The Notice of Application is incorporated into this document by reference.

3. In a letter dated January 29, 2008, IDL notified the following parties of the encroachment permit application submitted by 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 - CDA
- Panhandle Health District
- Bonner County Planning and Zoning

- Bonner County Public Works
- Bonner County Marine Division
- Lakes Commission
- Tri-State Water Quality Council
- Idaho Conservation League
- Adjacent neighbors

The letter is incorporated into this document by reference.

4. IDL received written responses from the Bonner County Planning Department, Idaho Department of Fish and Game and an objection letter from Patti and Michael Sterling. These letters are incorporated into this document by reference.

- a. A letter date February 7, 2008 was submitted to IDL by the Bonner County Planning Department. The letter provided no objections to the proposed encroachment permit and indicated the need for permitting related to upland issues.
- b. A letter dated March 6, 2008 was submitted to IDL by the Idaho Department of Fish and Game. The letter provided no objections to the proposed encroachment, but recommended that related construction should occur during December, January and February to avoid migrating and spawning periods.
- c. A letter dated March 12, 2008 was submitted to IDL by Patti and Michael Sterling objecting to the proposed encroachment and requesting a public hearing.



The letter identified the following concerns:

- impacts on use and enjoyment of property
- impacts on property values
- petroleum contamination
- debris
- erosion from large wakes
- noise pollution
- seaplane traffic
- hours of use
- navigational safety
- environmental concerns

5. Based on the request by Patti and Michael Sterling, and in accordance with IDAPA 20.03.04.030, IDL initiated a public hearing process for the proposed encroachment. On April 10, 2008 and April 17, 2008 IDL published the required Notice of Hearing in the Bonner County Bee. The public hearing was scheduled for May 8, 2008 at 6:00 pm at the Sandpoint Community Center - 204 South First Street, Sandpoint, Idaho. This Notice of Hearing is incorporated into this document by reference.

6. On May 8, 2008, IDL held a public hearing at 6:00 pm at the Sandpoint Community Center in Sandpoint, Idaho. Mike Murphy, Bureau Chief of Surface and Mineral Resources, coordinated the public hearing. In attendance were Ed Robinson, IDL Area Manager; Jim Brady, IDL Navigable Waters Specialist; Glenn Harvey (Applicant); Lisa Ailport (Agent of Applicant); Patricia Sterling (Objector); and five other members of the

public. The public hearing was recorded on audio tape and was subsequently transcribed. The transcript of the public hearing is incorporated into this document by reference.

- a. Lisa Ailport (Agent) provided an overview of the project, indicating that the project included the expansion of two existing docks and the placement of four mooring buoys. The project includes adding 29 feet of dock (waterward) to an existing 50 foot dock and adding 70 feet of dock (laterally) to an existing T-dock, all within the existing line of navigability. Ms Ailport referenced a letter dated March 18, 2008 that she wrote to IDL which attempted to address the concerns raised by the Objector. This letter is incorporated into this document by reference. The letter indicates Applicant's willingness to address trash issues, to encourage the establishment of a no wake zone, and to encourage the good stewardship practices of their patrons. Ms Ailport provided comments which mirrored Applicant's intentions stated in the letter.
  
- b. Patricia Sterling (Objector) provide testimony indicating her concerns related to overnight moorage, sewage spills, impacts on the osprey nests, milfoil and upland issues not related to the proposed encroachment permit (trees, building permits, and building moratoriums). Despite her objections provided in oral testimony and in the original objection letter, Ms. Sterling stated that as long as Applicant keeps the place clean, the noise down and the wakes down that she was not opposed to the project.

c. Lonnie Brew and Lou Goodness provided testimony in support of the proposed project.

d. Glenn Harvey (Applicant) provided testimony describing the need to expand the marina based on business/customer needs. Mr. Harvey indicated that a 200' no wake zone already is in place and that wakes will not be a concern.

e. Lisa Ailport provided additional testimony rebutting the issues raised by Objector.

### **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. Lake Pend Oreille is a navigable lake as defined by Idaho Code § 58-1302(a). Therefore encroachments of any kind on, in or above the beds or waters of Lake Pend Oreille require an encroachment permit prior to any encroachment on the lake. The Pend Oreille River was formerly a free flowing river, the bed of which is owned by the State of Idaho. Albeni Falls Dam impounded the Pend Oreille River and raised the level of Lake Pend Oreille creating an AHWM of 2,062.5.

3. IDAPA 20.03.04.011.02 states that encroachments of any kind on, in, or above the

beds of a navigable lake require a permit prior to encroaching on the lake.

4. 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.

5. 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.

6. Idaho Code § 58-1306(e) requires that in recognition of continuing private property rights in lands lying between the natural or OHWM and the AHWM, IDL 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 either a nonnavigational encroachment or a commercial navigational encroachment not extending below the natural or OHWM.

7. 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.

8. IDAPA 20.03.04.060.05 establishes a twenty-five (25) foot setback from adjacent littoral property for commercial docks. The applicant's dock will be 25 feet from the eastern property line and more than 300 feet from the western property line.

9. Idaho law, including Idaho Code § 58-1301 *et. seq.* (the Lake Protection Act), delegates no authority to IDL for the regulation of boats and water craft. Water craft are regulated by the United States Coast Guard through the Idaho Department of Parks and Recreation and local County Sheriff's Departments.

10. Idaho Code § 58-1306 identifies the proposed encroachments as encroachments in aid of navigation.

11. 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**

Objector identified a wide range of issues related to the proposed marina expansion. Most of the issues were general environmental stewardship issues which are impossible to connect to a relatively small expansion of an existing commercial marina and do not

warrant denial of the encroachment permit. Ultimately Objector stated during the public hearing that as long as the facility was kept clean, noise was controlled and wakes were controlled that she did not oppose the project. These issues (trash, noise, and wake control) are outside the regulatory authority granted to IDL through the Lake Protection Act. Applicant indicated a willingness to address these issues. Objector, however, did not identify any aspects of the project which are in conflict with Idaho law or any aspects which cause unreasonable adverse effects upon adjacent property or undue interference with navigation.

Based upon the information provided to me as the hearing coordinator and based upon the fact that the encroachment permit application for the commercial marina 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 should approve the requested encroachment permit with the condition that the construction of the docks be limited to December, January and February, as recommended by the Idaho Department Fish and Game (as a means of minimizing the impact to spawning or migrating species), or within a timeframe otherwise agreed upon by the Idaho Department Fish and Game.

DATED this 6th day of June, 2008.

  
\_\_\_\_\_  
MIKE MURPHY  
Hearing Coordinator

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 9<sup>th</sup> day of June, 2008, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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MIKE MURPHY

IDL Bureau Chief of Surface and Mineral Resources