

JUN 18 2008

PEND OREILLE LAKE

GEORGE B. BACON
Director
Idaho Department of Lands
300 N. 6th 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-205F)	FINAL ORDER
)	
Sourdough Point Owners Association)	
)	
Applicant.)	
_____)	

I. NATURE OF PROCEEDINGS/ISSUES

A public hearing was held on May 12, 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 11, 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 12, 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

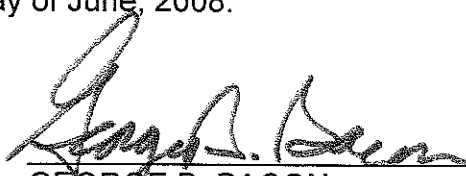
I concur with the Conclusions of Law presented by the Hearing Coordinator.

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 the expansion of an existing community dock upon resolution of the issues raised by Panhandle Health District 1 related to sewage disposal and issuance of the Army Corps of Engineers permit.

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 11 day of June, 2008.



GEORGE B. BACON
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th 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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Idaho Department of Lands
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| Mr. Kenneth Beresford
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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 Ysursa, Secretary of State
Lawrence G. Wasden, Attorney General
Donna M. Jones, State Controller
Tom Luna, Sup't of Public Instruction

June 11, 2008

MEMORANDUM

TO: George B. Bacon, Director

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

SUBJECT: Public Hearing – Community Dock - Sourdough Point Owners Association
L-96-S-205F

DEPT OF LANDS

JUN 18 2008

PEND OREILLE LAKE

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 the expansion of a community dock 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 March 1, 2008, the Sourdough Point Owners Association (Applicant) submitted to IDL an encroachment permit application (L-96-S-205F) requesting the approval to

expand an existing community dock on Lake Pend Oreille. Dennis Liming of Eagle Marine Supply (Agent) 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 March 11, 2008 and March 18, 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 March 5, 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 responses from the Bonner County Planning Department, Panhandle Health District 1 (PH1), and the Idaho Department of Environmental Quality (IDEQ). IDL also received approximately 30 letters and e-mails both in support of and objecting to the proposed dock expansion. Additionally, IDL received an objection letter from Paul Vogel. These responses (letters, memorandums, e-mails, and phone records) are incorporated into this document by reference.

a. A letter dated April 16, 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. An e-mail to IDL dated February 15, 2008 from June Bergquist of IDEQ expressed concerns related to the placement of additional slips within lagoon (proposed location) and suggested an alternative location. In a phone conversation with June Bergquist on May 13, 2008, however, Ms. Bergquist indicated that IDEQ would certify water quality for the proposed location because the additional docks would not further degrade water quality within the lagoon.

c. PH1 provided IDL with a Memorandum dated March 7, 2008 indicating that

adequate sewage water disposal will be necessary for the proposed project in accordance with IDAPA 41.01.02.

d. IDL received approximately 30 letters and e-mails from members of the Sourdough Point Owners Association both in favor and against the proposed location. Opinions varied as to the impact of the dock expansion on navigation, view sheds, boater and swimmer safety, wildlife, and water quality. Opinions also varied regarding the need for the additional slips.

e. A letter dated March 27, 2008 was submitted to IDL by Paul Vogel, attorney for Ken Beresford objecting to the proposed encroachment and requesting a public hearing. The letter identified the following concerns:

- impacts on swimming
- impacts on navigation
- lack of need for expansion
- application deficiencies
- alternative locations available
- objections raised by Mr. Fargo Mumtaz

5. Based on the request by Mr. Beresford (letter from Paul Vogel to IDL dated March 27, 2008), 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 12, 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 12, 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; Mike Nash (Applicant); Kenneth Beresford (Objector); Paul Vogel (Attorney for Objector); and eight 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. Mike Nash (Applicant) provided an overview of the project, indicating that the project included the expansion of the existing dock structure. Mr. Nash indicated the dock would be rotated approximately 15 degrees and that eight boat slips would be added. Mr. Nash argued that the dock development should be maximized within the northern lagoon prior to the construction of any dock structures in the southern lagoon. Mr. Nash reflected on varied opinions with the association but indicated the proposed location best represents the interests of the entire association. Mr. Nash clarified that the Army Corps of Engineer's permit application had mistakenly been withdrawn and that the application is again under consideration.
- b. Paul Vogel (Attorney for Objector) provided testimony indicating his client's concerns related to adverse impacts on adjacent property owners and interference

with navigation. Mr. Vogel also indicated that not all the docks are utilized and questioned the need for additional docks. Mr. Vogel also expressed concerns related to water quality. Mr. Vogel also provided IDL with a letter dated May 13, 2008 indicating his client's objection to the proposed project based on the privatization and business transactions related to the slips.

c. Bob Legg, George Simchuke, Pam Legg provided testimony in support of the proposed project.

d. Mumtaz Fargo and Ken Beresford (Objector) provided testimony opposed to the proposed project. The combined testimony expressed concerns over boating safety and congestion, swimmer safety, water quality, shoreline erosion. Mr. Fargo identified the south lagoon as the preferred location for dock expansion.

e. 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.

f. 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 AHW, 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 presumed adverse impact for community docks located closer than twenty-five (25) feet to adjacent littoral properties.

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. IDAPA 20.03.04.015.03b limits the surface decking area of a community dock to seven (7) square feet per lineal foot of shoreline owned by the applicant.

12. 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 Sourdough Point Owners Association (Applicant) has a unique opportunity to control the management, development and use of the uplands and littoral zones surrounding Sourdough Point, including the island and the two lagoons. Unfortunately, the mixed reaction from within the organization itself to the proposed dock expansion is a clear indicator that the organization has not reached consensus on an overall developed plan that matches the collective stewardship goals and practical needs of the community. The Department has neither the desire nor the legal obligation to resolve the internal disputes of the association.

The Department may only consider the application and the proposed location, as submitted by Applicant, and measure its conformance with the standards of the Lake Protection Act. In this case, many strong arguments do exist for the placement of the proposed slips in the southern bay, not within the lagoon to the north, as proposed; however, the Department will

only consider whether the proposed location meets the legal requirements set forth in the Lake Protection Act, not the potential conformance of alternative locations.

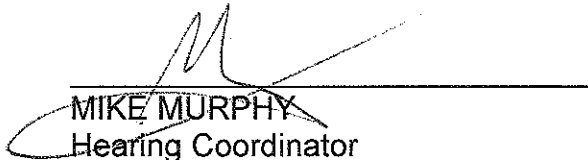
Contrary to Mr. Paul Vogel's letter dated May 13, 2008, Applicant does have the opportunity to establish private moorage at Sourdough Point based on littoral ownership. Private moorage is allowed in IDAPA 20.03.04 which meets the community dock standards. The Department does not involve itself in the management of community docks as long as the operations do not involve commercial activities with parties outside the community. Additionally, the standards in IDAPA 20.03.04.015 for community docks relate to the overall square footage of the encroachment, not the number or slips. It is Applicant's responsibility to design a dock which meets the needs of the community and the Department's responsibility to ensure the square footage standard is met. The proposed dock expansion does meet the square footage requirements of IDAPA 20.03.04.015.

The proposed location is within a protected, no-wake lagoon which by its geographic nature will limit the public's use of this portion of the lake and should provide a safe environment for the recreational use of the association members. Objectors provided opinion, but no specific evidence, that the additional eight slips would have an adverse impact on navigation and adjacent properties (which in this case is owned by members of the association). The Bonner County Marine Division provided no feedback to IDL that the proposed expansion would create a navigational or recreational hazard. The lagoon has clearly been dedicated to boat moorage based on previous decisions of the association and there is no indication that the additional eight slips will have an unreasonable impact on navigation or adjacent properties.

Much concern was expressed related to water quality. IDL must rely on sister agencies, such as IDEQ, for technical advice related to water quality. In this situation, IDEQ has indicated that they will certify water quality for this project.

Based upon the information provided to me as the hearing coordinator and based upon the fact that the encroachment permit application for the expansion of the existing community dock meets all the requirements of Idaho Code § 58-1301 *et. seq.* (the Lake Protection Act) and IDAPA 20.03.04, I recommend the Director of IDL issue a Final Order stating that the Pend Oreille Supervisory Area should approve the requested encroachment permit upon resolution of the issues raised by Panhandle Health District 1 related to sewage disposal.

DATED this 11th day of June, 2008.


MIKE MURPHY
Hearing Coordinator

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12 day of June, 2008, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

Steve Schuster
Idaho Department of Lands
300 N. 6th Street
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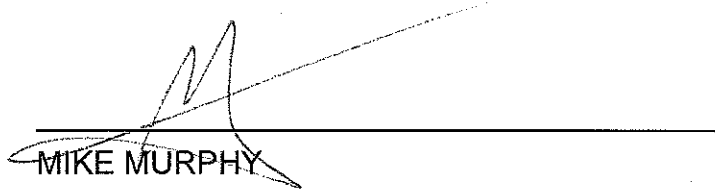
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