

GEORGE B. BACON  
Director  
Idaho Department of Lands  
300 N. 6<sup>th</sup> St., STE 103  
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-602A ) **FINAL ORDER**  
Pend Oreille Bonner Development, LLC )  
)  
Applicant. )  
\_\_\_\_\_ )

**I. NATURE OF PROCEEDINGS/ISSUES**

A public hearing was held on August 26, 2008 at 6:00 pm PST at the Sandpoint Community Center in Sandpoint, Idaho. Eric Wilson served as Hearing Coordinator. The Hearing Coordinator issued his Recommendations on September 19, 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 August 26, 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 Idaho 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 Encroachment Permit L-96-S-602A be approved and the permit be issued by the Mica Supervisory Area to Applicant with the following additional term: "All dredging and filling below the artificial high water mark of 2062.5 feet will be done when the lake level is 2055 feet or lower. Dredging or filling in open water of the lake is not authorized."

This is a final order of the agency. If the Applicant, or a party who appeared at the hearing, is aggrieved by the director's final decision, they shall have the right to have the proceedings and final decision of the director reviewed by the district court in the county in which the encroachment is proposed. A notice of appeal must be filed within thirty (30) days from the date of the final decision in accordance with IDAPA 20.03.04.030.09.

DATED this 25<sup>th</sup> day of September, 2008.

  
GEORGE B. BACON  
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25<sup>th</sup> day of September, 2008, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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ERIC WILSON  
IDL Program Manager - Navigable Waters and Minerals

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**GEORGE B. BACON, DIRECTOR**  
EQUAL OPPORTUNITY EMPLOYER

**STATE BOARD OF LAND COMMISSIONERS**

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September 19, 2008

**MEMORANDUM**

**TO:** George B. Bacon, Director

**FROM:** Eric Wilson, Navigable Waters/Minerals Program Manager

**SUBJECT:** Public Hearing – Community Dock for  
Pend Oreille Bonner Development, LLC L-96-S-602A

**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 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 December 6, 2007, Pend Oreille Bonner Development, LLC (Applicant) submitted to IDL an encroachment permit application (L-96-S-602A) requesting the approval to construct a community dock on Lake Pend Oreille. The application is incorporated into this document by reference. This application was advertised and a hearing was scheduled based on the comments received from the public and other agencies. The notices and comments are incorporated into this document by reference. Most of the comments objected to the proposed floatplane dock, breakwater, beach, dredge and fill activity, riparian/littoral setback, and privatization. The applicant then withdrew the application in a letter dated February 25, 2008. A revised application was received on July 18, 2008 along with Applicant's request for a public hearing. The withdrawal letter and revised application 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). On July 24, 2008 and July 31, 2008, IDL published a joint Notice of Application and Notice of Public hearing in the Bonner Bee newspaper for the encroachment permit application submitted by Applicant. The Notice of Application and Hearing is incorporated into this document by reference.

3. In a letter dated July 21, 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
- US Army Corps of Engineers
- Bonner County Planning & Zoning
- Bonner County Public Works
- Bonner County Marine Division
- Panhandle Health District 1 in Sandpoint
- Tri-State Water Quality Council
- Lakes Commission
- Jeanelle Shields
- Adjacent Neighbors

The letter is incorporated into this document by reference.

4. IDL received two (2) e-mails prior to August 27, 2008, the deadline for public comments. The e-mails are incorporated into this document by reference.

a. Ms. Jeanelle Shields sent an e-mail on August 26<sup>th</sup> objecting to the application based on the loss of public access and lack of public benefit. She also objected to the noise generated by float plane traffic.

b. Ms. Janet Robnett sent an e-mail on August 27<sup>th</sup> refuting the objections stated by Ms. Shields.

5. Based on Applicant's request, and in accordance with IDAPA 20.03.04.030, IDL initiated a public hearing process for the proposed community dock. The public hearing was scheduled for August 26, 2008 at 6:00 pm at the Sandpoint Community Center in Sandpoint, Idaho.

6. On August 26, 2008 IDL held a public hearing at 6:00 pm at the Sandpoint Community Center. Mr. Eric Wilson, Navigable Waters/Minerals Program Manager, served as hearing coordinator. In attendance were Mr. Ed Robinson, IDL Area Manager; Mr. Jim Brady, IDL Navigable Waters Specialist; Mr. Chuck Reeves, Applicant; Ms. Janet Robnett, representing Applicant; Mr. Pierre Bordenave, representing Applicant; Mr. Martin Taylor, representing Applicant; Mary Terra-Berns, representing Idaho Department of Fish and Game, and 7 members of the public who filled out attendance cards but did not testify. The public hearing was recorded on audio

tape and was subsequently transcribed. The transcript of the public hearing and the attendance cards are incorporated into this document by reference.

The applicant and his representatives presented a project overview. The previous owners ran an RV park with 84 boat slips. The new owners are proposing a condominium complex with a private marina. The first application was withdrawn due to agency questions about the effects of the project on habitat. Many of the public comments received at that time also raised the issue about float planes and noise associated with them. The revised application removed the float plane dock, and the float planes have been instructed to alter their takeoff direction and location to reduce noise impacts. The revised application also removed the breakwater and artificial beach.

Two upland parcels are associated with the proposed community dock. The northern parcel is 30 acres in size and that portion of the community dock would have 105 slips. The southern parcel is 11 acres in size and would have 19 slips. The combined properties have over 3,000 feet of littoral frontage, and the proposed dock has 20,158 square feet. The littoral rights for both properties will be dedicated to the community dock, even the littoral rights in front of the single family houses. The work will be conducted during low water and in the dry below the artificial high water mark of 2062.5 feet elevation.

The dredged sediments will be tested for suitability as fill prior to removal. No maintenance dredging is anticipated in the future due to the expected low sediment influx after the north branch of Trestle Creek is reconstructed. The dredging and filling will result in a net gain of open water for the lake. The RV park layout was created through a previous episode of dredging and filling prior to the Lake Protection Act. The existing boat basins are havens for warm water fish species, and are not good for cold water fish species (bull trout and kokanee). The reconstruction of the north branch of Trestle Creek will help cold water fish species avoid the boat basins and migrate up the creek to spawn. The shoreline along the project area will be mostly devoid of vegetation due to the proposed dredging, filling, and dock construction. Some trees will be planted on the upland side of the docks, and many shrubs will be planted near the streams. Existing trees and shrubs will be transplanted when possible, especially near the reconstructed stream. At a minimum grasses and forbs will be planted on all the disturbed littoral areas.

The applicant stated that the proposed project falls within the allowed uses of their littoral rights. It is private property, so no taking of public use has occurred. The proposed docks will be over privately owned submerged lands. Although the activity level along the lakeshore may be increased because more slips are present, the RV park and associated activity will no longer be present. The project provides an economic benefit to the community due to an increase in the tax base, employment, more moorage, better habitat for fish, etc. Lastly, the applicant stated that the application should be processed under the old administrative rules and not the current rules because the original application was filed prior to the adoption of the new rules.

Mary Terra-Berns stated that the dredging will be done when the water is low. The water depths in the marina area will increase, which will be better for cold water fish species that are desirable. The riparian/littoral buffer areas are improved over the first plan, which is overall very beneficial. Pulling the dock structure back into the bay will essentially mimic the dock structure in the previous RV park configuration.

Some comments were written on the attendance cards. In general they expressed support for the project, although one attendee expressed concern about the reconstructed junction of the north branch Trestle Creek with the main creek.

### **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). Pursuant to IDAPA 20.03.04.012.02, 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.

6. IDAPA 20.03.04.010.11 defines a community dock as "A structure that provides private moorage for more than two (2) adjacent littoral owners, or other littoral owners possessing a littoral common area with littoral rights including, but not limited to homeowner's associations. No public access is required for a community dock." The proposed dock meets this definition.

7. IDAPA 20.03.04.015.02.c limits the surface decking area of a community dock to seven (7) square feet per lineal foot of shoreline owned by the applicant. The applicant in this instance owns over 3,000 feet of littoral frontage. The proposed dock has



approximately 20,158 square feet, which is in compliance with the cited rule.

8. IDAPA 20.03.04.015.11.b states "An excavated or dredged channel or basin to provide access to navigable waters must have a clear environmental, economic, or social benefit to the people of the state, and shall not result in any appreciable environmental degradation. A channel or basin shall not be approved if the cumulative effects of these features in the same navigable lake would be adverse to fisheries or water quality." The application has demonstrated the environmental benefit of the dredging, and that the dredging will be done in a manner that is not anticipated to be adverse to fisheries or water quality.

9. IDAPA 20.03.04.015.13.d limits the length of docks to the normal accepted line of navigability established through use unless additional length is authorized by permit or order of the director. Other docks are not present in this area, so a line of navigability is not clearly established. The end of the proposed dock, however, will be within a small bay on the applicant's property. As a result, the proposed dock will not unduly hinder navigation and the length is acceptable.

10. IDAPA 20.03.04.015.13.e establishes a twenty-five (25) foot setback from adjacent littoral property for community docks. The proposed docks and boat ramp appear to be in compliance with this rule.

11. Idaho law, including Idaho Code § 58-1301 *et. seq.* (the Lake Protection Act), delegates no authority to IDL for the regulation of float planes and their landing areas. Aside from county enforced no-wake zones, float planes and their landing areas have no identifiable regulations in the State of Idaho.

12. The original application was withdrawn on February 25, 2008. It was resubmitted on July 18, 2008, and therefore it was processed under the rules that are currently in place.

13. The ordinary high water mark of Lake Pend Oreille is in fact 2051, not 2062.5 as stated in the application. 2062.5 is the artificial high water mark for Lake Pend Oreille. The department, however, understands the difference and this minor error has no material effect on the application or the department's processing of the application.

14. Idaho Code § 58-1306(e) states in part "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...". Adjacent littoral property will not be unreasonably impacted by the proposed project, nor will navigation be unduly interfered with.

15. 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

Objections to the first application appear to have been addressed by the changes incorporated into the revised application. The float plane dock has been removed, the breakwater has been removed, and the large northern dock is reduced in size such that it now fits within the bay. The dredging and filling will be done in the dry and should not have an appreciable effect on water quality. The reconstruction and revegetation of the north branch Trestle Creek has been improved and provides wildlife benefits for the public. This work also provides adequate mitigation for the proposed project. The surface area of the lake will also be enlarged, which appears to be an additional benefit for the public trust.

The only substantive objection that has not been addressed is the loss of public access. While the applicant was correct in stating that the upland property has always been privately owned, the public has been allowed to use the boat ramp and lease slip spaces. The proposed use will be for members only, which is considered to be a private use under IDAPA 20.03.02.015.03, and therefore the public will be losing access to the lake from this property. The project does, however, meet the requirements for a community dock.

Based on the information provided to me as the hearing coordinator, and based upon the fact that the encroachment permit application for the community dock 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** the encroachment permit application submitted by the Applicant with the following additional term: "All dredging and filling below the artificial high water mark of 2062.5 feet will be done when the lake level is 2055 feet or lower. Dredging or filling in open water of the lake is not authorized."

DATED this 19th day of September, 2008.

  
\_\_\_\_\_  
ERIC WILSON  
Hearing Coordinator

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 25<sup>th</sup> day of September, 2008, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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