

GEORGE B. BACON
Director
Idaho Department of Lands
300 N. 6th St., STE 103
PO Box 83720
Boise, Idaho 83720-0050

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of;)	
)	
Encroachment Permit No. L-95-S-5389)	FINAL ORDER
)	
Kootenai County)	
Applicant)	
_____)	

I. NATURE OF PROCEEDINGS/ISSUES

A public hearing was held on May 6, 2010 at 6:00 pm PST at the Idaho Department of Lands Supervisory Office in Coeur d'Alene, Idaho. Eric Wilson served as Hearing Coordinator. The Hearing Coordinator issued his Recommendations on May 28th, 2010.

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 May 6, 2010.
- 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 buoys, placed on 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.

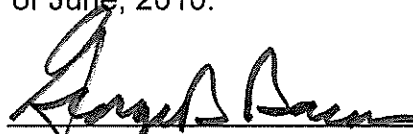
IV. FINAL ORDER

On the basis of the record, it is my order that Encroachment Permit L-95-S-5389 be issued with the following conditions:

1. The encroachment permit will only authorize three mooring buoys.
2. The northern-most portion of the designated moorage area will be used for the three mooring buoys.
3. The Applicant will restrict the number of boats per buoy to prevent the movement of the anchor blocks.
4. If usage of the mooring buoys results in conflicts with the conservation or non-motorized use of Cougar Bay, then this permit may be subject to revocation.

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 3 day of June, 2010.



GEORGE B. BACON
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of June, 2010, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

Kootenai County Parks and
Waterways
10905 N. Ramsey Road
Hayden, ID 83835

- ☒ U.S. Mail, postage prepaid
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Don D. Gross
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Terry J. Harris
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Fred R. Murphy
448 W. Casco Bay Shore
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Dwight McCain
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Sue Flammia
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Bill & Diane Cook
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Keith Kroetch
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Peter Grubb
PO Box 579
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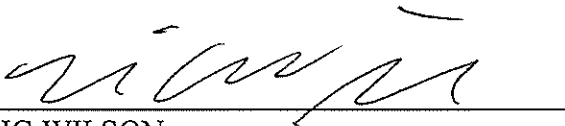
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ERIC WILSON
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GEORGE B. BACON, DIRECTOR
EQUAL OPPORTUNITY EMPLOYER

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

May 28th, 2010

MEMORANDUM

TO: George B. Bacon, Director

FROM: Eric Wilson, Navigable Waters/Minerals Program Manager

SUBJECT: Public Hearing – Navigational Encroachment L-95-S-5389 for Kootenai County Parks and Waterways

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 (L-95-S-5389) on Lake Coeur d'Alene, a navigable lake in Idaho. The application proposes to install 12 mooring buoys and 15 regulatory navigational buoys in Cougar Bay on Coeur d'Alene Lake. 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 February 11th, 2010, Kootenai County Parks and Waterways (Applicant) submitted to IDL an encroachment application (L-95-S-5389) requesting approval to install and maintain encroachments on Lake Coeur d'Alene. The application is incorporated into this document by reference.
2. The application for L-95-S-5389 proposes the following actions:
 - a. Install 12 mooring buoys for public use in Cougar Bay. They would be placed in a ten acre area in the southeast portion of the bay inside the no-wake zone. The buoys are 20 inches in diameter and are secured in place by 4,000

pound anchors.

- b. Install 15 regulatory navigational buoys to mark the designated "No Wake Zone" in Cougar Bay established by Kootenai County. The buoys would be spaced approximately 300 feet apart over a total distance of approximately 4,300 feet. The Buoys would extend from Donovan's Point at the southeast corner of the bay to the approximate western boundary of the former Foss Maritime facility west of Blackwell Island. Buoys will have solar powered LED lights, and 4,000 pound anchors would secure the buoys in place.

3. IDL initiated the processing of L-95-S-5389 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 16th, 2010 and February 23rd, 2010, IDL published a Notice of Application in the Coeur d'Alene Press newspaper for the encroachment permit application submitted by Applicant. The Notice of Application is incorporated into this document by reference.

4. In a letter dated February 12th, 2010, IDL notified several agencies, organizations, and persons of the encroachment permit application, and requested that the parties provide comments to IDL. Those notified included:

- Idaho Department of Fish and Game
- Idaho Department of Environmental Quality
- Idaho Department of Water Resources
- Idaho Department of Transportation
- Idaho Department of Parks and Recreation
- US Army Corps of Engineers-CDA
- Panhandle Health District 1
- Kootenai County Marine Division
- Kootenai County Building, Planning, & Zoning
- Kootenai Environmental Alliance
- Lakes Commission
- 24 Adjacent Neighbors (See Attachment #1)

The letter is incorporated into this document by reference.

5. Thirteen letters and emails commenting on the application were received before the comment deadline of March 18th, 2010. A letter dated February 18th, 2010 from Scott Reed objected to the application and called for a public hearing. The comments in these letters and emails are summarized below. All the letters and emails are incorporated into this document by reference.

- a. **The no-wake buoys are fine.** Keith Kroetch, Richard Algeo, Joan Murphy, Ronald Fritz, and Greg Torline stated support for the no-wake buoys. John Barlow also stated support for the no-wake zones provided they were located far enough west to not interfere with boat traffic from Blackwell Island. Eric R. Thomson, Field Manager of the Bureau of Land Management's Coeur d'Alene Field Office, stated support for the no-wake buoys because they would likely

increase compliance with the no-wake zone.

- b. **The no-wake buoys are not needed.** Ron Jessick stated that the residents of the bay appear to be trying to cordon off the lake for their personal use. He also stated that water skiing occurred in the bay in the 1950s and 60s, and bird usage was greater then. Mr. Jessick observed that piling usage by geese was more common than by osprey.
- c. **Proposal will threaten non-motorized use.** Mr. Fritz, Robyn Miller, and Mr. Torline stated that the proposal will increase motorized usage of Cougar Bay and threaten the popular non-motorized boating activities in the bay. Ms. Cowles stated that Cougar Bay is often enjoyed by people in canoes, kayaks, and small boats. Mr. Thomson stated that one of the BLM's long term management goals for their property is to provide non-motorized boating activities, and a tranquil natural setting is important for that activity.
- d. **Mooring area would disturb wildlife in the bay.** Mr. Kroetch stated that osprey and eagles frequent the bay close to the mooring area. Mr. Algeo stated that osprey and grebe should be protected in Cougar Bay. Ms. Murphy, Christine Ponti, Thomas Burns, Mr. Fritz, and Mr. Torline stated that public moorings would create a hostile environment for the wildlife. Elizabeth Cowles stated that the osprey population will be threatened due to wave action after the piling and booms are removed. Mr. Thomson stated that increased motorized use and human activity might affect the wildlife habitat.
- e. **Proposal threatens ongoing conservation work in Cougar Bay.** Ms. Murphy stated that Cougar Bay is a designated wildlife preserve. Ms. Cowles and Ms. Ponti stated that the Osprey Association, Bureau of Land Management (BLM), and the Nature Conservancy have worked to protect the wildlife habitat in Cougar Bay. William F. Chapman stated that the proposed moorage area is not compatible with the nearby Nature Conservancy property. Ms. Miller, the Inland Northwest Conservation Manager for the Nature Conservancy, stated that her organization has worked with the BLM and other landowners to manage Cougar Bay for the benefit of the public and the wildlife. Ms. Miller also stated that the County's proposal jeopardizes their investment made in Cougar Bay. Mr. Torline stated that much of Cougar Bay's shoreline is publicly owned or protected by conservation easements. Mr. Thomson stated that the BLM property in Cougar Bay was acquired in the 1990s to protect and conserve the unique landscape and resources. He also stated that an undeveloped, uncrowded, tranquil natural setting was important for the activities in the bay, and the proposed encroachment would have a negative effect on that setting.
- f. **Mooring buoys will disturb fishing.** Mr. Kroetch stated the proposed location has some of the best fishing in the bay and moored boats will disturb the fish and displace the anglers.

- g. **The proposed location of the mooring buoys is not appropriate.** Jerry Carlson stated that a location in the middle of the bay, and further from his property, would be more appropriate.
- h. **Time limits for mooring cannot be effectively enforced.** Mr. Kroetch stated that complaints about overstays will be numerous and will burden the sheriff's office. Ms. Ponti, Mr. Thomson, and Mr. Fritz also expressed concern with time limits on moorage.
- i. **Illegal dumping will occur at the mooring buoys.** Mr. Kroetch stated that smaller boats moored with no toilet facilities will dump into the lake. Mr. Algeo and Ms. Murphy also stated concerns with sanitation.
- j. **Visual effect of mooring area will not be good.** Mr. Kroetch stated that this is the first area seen by drivers coming from the south on Highway 95, and the mooring area will be unappealing. E.J. FitzGerald stated that moored boats would be an eyesore. Mr. Thomson stated that the lights on moored boats would intrude on the undeveloped environment.
- k. **Noise from the mooring area will be an issue.** Mr. Kroetch stated that partying noise will carry across the lake and be heard clearly from shore. Mr. Barlow also expressed some concern for a party zone that could develop and extend into the evenings. Mr. Algeo, Ms. Murphy, Ms. Ponti, Mr. FitzGerald, Mr. Chapman, Mr. Fritz, Mr. Thomson, and Mr. Torline also stated concerns about noise with the proposed number of moorages.
- l. **Mooring area is too close to other facilities and is not needed here.** Mr. Kroetch stated that hundreds of slips exist nearby, and placing mooring buoys further south in a different bay would make more sense. Mr. FitzGerald stated that the buoys would add boat traffic to the already congested entrance to the Spokane River. Mr. Fritz and Ms. Miller stated that many other places on the lake can be used for moorage.
- m. **The mooring buoys are needed for increased public access.** Mr. Jessick stated the location was good and having them centralized was preferable.
- n. **The proposed number of mooring buoys is excessive.** Mr. Algeo stated that based on historic usage of piling to tie up overnight, three or four mooring buoys would be sufficient similar to those in Loffs Bay and Beauty Bay. Mr. Thomson expressed concerns over armadas of lashed vessels.
- o. **Bottom sediments will be disturbed in the mooring area.** Mr. Kroetch stated that prop wash will kick up sediments as boats maneuver in the moorage area, and rear anchors to keep the boats from swinging around will also disturb the bottom sediments. Ms. Ponti stated that the removal of the booms will increase

erosion of the lake bottom. Mr. Fritz stated that the increased boat traffic due to the mooring area will stir up sediment.

- p. **Wave action will be increased.** Mr. Kroetch stated that many large boats from nearby marinas generate large wakes, and the bobbing buoys will cause problems. Mr. Algeo stated that the increased boat traffic will create associated wake damage to beach and boats, and a permanent breakwater is needed. Ms. Ponti and Ms. Miller also stated concerns with increased shoreline erosion. Mr. Burns stated that the increased boat traffic will exacerbate current disregard of the no wake zone.
- q. **Better solutions include limited piling removal.** Mr. Kroetch stated that some piling should be left to regulate traffic and allow for osprey nesting sites. Ms. Cowles and Ms. Ponti stated that the piling and booms are needed as protective barriers for the fragile environment of Cougar Bay. Mr. FitzGerald stated that piling removal would be detrimental to birds. Mr. Chapman stated that most of the log booms and piling should remain for the protection of the residents' shoreline.
- r. **The deadheads in Cougar Bay must be addressed.** Mr. Algeo stated that the increased boat traffic requires these threats to safe boating to be removed. He also stated that the piling are not the real danger, but the partially submerged deadheads are a danger and a secure pen of boom sticks should be used to corral them. Mr. Burns, J. Patrick McFarland, and William R. Brown also expressed concern about the deadheads and the need to expedite their removal.

6. Based on a request by Scott Reed, and in accordance with IDAPA 20.03.04.030, IDL initiated a public hearing process for the proposed encroachments. The public hearing was scheduled for May 6th, 2010 at 6:00 pm at the IDL office in Coeur d'Alene. On April 5th, 2010 and April 12th, 2010 IDL published the required Notice of Hearing in the Coeur d'Alene Press. The Notice of Hearing is incorporated into this document by reference.

7. A letter dated April 1st, 2010 IDL notified the following agencies and individuals of the scheduled hearing:

- Idaho Department of Fish and Game
- Idaho Department of Environmental Quality
- Idaho Department of Water Resources
- Idaho Department of Transportation
- Idaho Department of Parks and Recreation
- US Army Corps of Engineers-CDA
- Panhandle Health District 1
- Kootenai County Marine Division
- Kootenai County Building, Planning, & Zoning
- Kootenai Environmental Alliance
- Lakes Commission

- 24 Adjacent Neighbors (See Attachment #1)
- Scott Reed
- Applicant

The letter is incorporated into this document by reference.

8. On May 6th, 2010 IDL held a public hearing at 6:00 pm Pacific Daylight Time, 7:00 pm Mountain Daylight Time, in the IDL Staff Office in Coeur d'Alene, Idaho. Mr. Eric Wilson, Navigable Waters/Minerals Program Manager, served as hearing coordinator. Also in attendance was Mr. Mike Denney, IDL Area Manager for Mica Supervisory Area, and Steve Schuster, Deputy Attorney General, and thirty eight (38) 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.

Several letters from members of the public were also provided on the night of the hearing. These letters are incorporated into this document by reference. These materials are included in the summary below.

a. **The Applicant, through the testimony of Nick Snyder, provided a brief history and overview of the project.** As explained by Mr. Snyder, part of the Kootenai County Parks and Waterways mission is to provide public access to waterways and to provide facilities to meet their needs. The primary funding source is vessel registration and user fees from boaters, so their customer is the motorized boater.

Mr. Snyder stated that in the fall of 2009, he was contacted by the Idaho Department of Lands' (IDL's) Coeur d'Alene office and informed that the lease for log storage in Cougar Bay expired at the end of the year. IDL then explained that the lessee would be removing the piling and booms after the lease expired, and asked the county if they had any recreational interest in Cougar Bay. Mr. Snyder stated that IDL was trying to understand the diverse interests in the bay once it was restored to its native conditions. He informed IDL at that time that some mooring buoys and no-wake markers might be desired. The no-wake zone markers would be especially needed to enforce the no-wake zone and manage the additional boat traffic expected in the restored bay and from the upgraded Blackwell Island Marina.

Mr. Snyder then stated that IDL informed him an application would be needed for the mooring and no-wake zone buoys, and IDL arranged a meeting with all the parties interested in permitting encroachments in Cougar Bay. The purpose of the meeting was to better understand the parties concerns and how they might coexist. Mr. Snyder stated that the parties at the meeting generally agreed upon the location of the no-wake zone as presented in their current application. He also stated that a dock storage area and piling for osprey were discussed, and all potential users were instructed to make timely applications for their proposed activities. Mr. Snyder also stated that the county is willing to make reasonable

amendments to their application.

Mr. Snyder stated that the 300-foot spacing between the no-wake buoys was chosen because that is the site distance on a foggy night. The buoys will be lit. Mr. Snyder stated that change is coming to Cougar Bay as obstructions are removed and motorized use becomes more attractive. This application is their attempt to address that increased use. The moorage area was designed to help prevent problems with motorized use farther inside the bay, and they can limit the number of boats that use the buoys. Sanitation issues have not been reported at the buoys in Loff's Bay and Beauty Bay. A restroom was suggested for Cougar Bay, but members of the public stated they did not want that. Mr. Snyder acknowledged that rafting up of boats did occur at Loff's Bay and Beauty Bay, and that indicates the high demand for that type of moorage.

Mr. Snyder then provided additional information in response to numerous questions. He believes that the mooring buoys are navigational encroachments because boaters will use them when seeking safe harbor. The parks staff and the Sheriff will monitor usage of the mooring buoys for compliance with the 48 hour limit. The lake depth is about 15 feet in the proposed mooring area. Overnight moorage is in high demand all over the lake, and is appropriate so close to City of Coeur d'Alene. Seasonal recreational boaters would likely use the buoys to eliminate the need to pull their boat out overnight and drive home. Twelve buoys is the maximum that might be wanted, but fewer may be installed. Trash and sanitation will not be provided so boaters will have to provide their own. The specific location for the moorage area was chosen because it was the deepest water located farthest from Blackwell Island Marina and the dense cluster of houses along the north shore of Cougar Bay. County Ordinance 438 designates the no-wake zone, and it has helped to increase safety. The use of Cougar Bay is expected to increase largely due to the removal of the piling and booms. The proposed buoys are the county's attempt to manage that use.

John Cafferty, the deputy prosecutor for Kootenai County, stated that a noise ordinance on boats limits them to 90 decibels. The same ordinance also has references to disturbance of the peace that is more generally applicable to people but does not have a specific decibel rating. Mr. Cafferty also stated that a public campground could be located next door to single family housing in Kootenai County. The intent is to deploy the buoys after the piling and booms are removed, so the buoys will not be attracting people to use the area with all the existing hazards.

b. Public testimony in support of the project was primarily in response to the no-wake buoys. Jim Aucutt, Chairman of the Kootenai County Parks and Waterways Board, stated that the original purpose of the no-wake zone was to slow the boats down before they attempted to navigate all the pilings and other hazards in Cougar Bay. Mr. Aucutt also stated that once the piling are removed the no-wake zone serves no purpose, but the county is willing to keep most of the bay as a no-wake zone as long as some moorage is provided for the

motorized users. Lastly, he reiterated that the no-wake buoys and moorage buoys are a package deal.

Roberta Larsen stated that the no-wake buoys will notify the boaters to slow down and enable the marine deputies to enforce the no-wake zone. Mr. Gross stated that the current situation with all the obstacles is not safe, and all the users can coexist within the no-wake zone. Sue Flammia commended the county for keeping the no-wake zone. Mr. Kroetch, Ron Brunelle, Ronald Fritz, and Joanne Wing think the no-wake zone is needed. Brian White, with the Bureau of Land Management, and William Cook support the no-wake zone but they have concerns about enforcement. Sandy Emerson said the proposed line from Donovan Point to the former Lafferty site west of Blackwell Island is the most logical location because it generally follows the boundary of shallows in the bay. Mr. Emerson thought that only four to six buoys were needed to mark the no-wake zone.

c. **Support for the mooring buoys was mixed.** Ms. Larsen stated that several boats currently moor to the existing piling for overnight use with no problems, but then she stated concerns that the mooring buoys would be the equivalent of an RV park. William Paradee and Mr. Brunelle stated that the mooring buoys would reduce the need to drop anchors and disturb the bottom sediments and heavy metals. Mr. Aucutt stated that buoys would be less destructive for mooring than anchors. He also stated that noise complaints related to other mooring buoys in Loff's Bay and Beauty Bay are rare. Mr. White stated that more mooring buoys are needed, but outside the no-wake zone might be better. Ms. Wing supported the mooring area, noting that it only occupies 10 acres out of 250 acres in Cougar Bay. Mr. Brunelle stated that osprey, turtles, and elk are not disturbed by the moorage area in Loff's Bay and he would expect the same result in Cougar Bay.

Mr. Fritz stated that two or three mooring buoys would be a more reasonable number. Mr. Emerson stated that four to six mooring buoys would be more appropriate. Matt Street with the Sheriff's Office Marine Division stated that Parks and Waterways can restrict the number of boats using the buoys, and they have ordinances that can be used for users who are not exhibiting good behavior. Mr. Street also stated that mooring buoys would be more manageable than the existing transient moorage.

d. **Public testimony in opposition to the project focused on the mooring buoys.** The following concerns were noted:

i. **Number of boats using each buoy must be controlled.**

Karen Williams and Mr. Fritz stated that three or four boats often use each buoy in Beauty Bay. Mr. Wold stated that up to four boats would likely use each buoy, so up to 48 boats could be moored together. Mr. Cook stated that if two or three boats tie up to one buoy in Beauty Bay, then the wind action on the boats can cause the anchor to slide. Mr. Kroetch affirmed that multiple boats raft up to

buoys, and that wind action on that many boats will probably move the anchors. Mr. Cook recommended only one or two boats be allowed to use each buoy at one time.

ii. Proposal will threaten non-motorized use.

Ms. Williams stated that the best use of Cougar Bay is for small non-motorized craft and anglers. Wes Somerton, Fred Murphy, Dwight McCain, Peter Grubb, Terry Harris, and Stan Litz stated that the buoys will attract more motorized use and conflict with the existing non-motorized use. Ms. Flammia stated that Cougar Bay is only 2% of the lake, and it is one of the few places safe for non-motorized craft. Mr. Wold stated that Cougar Bay was the nicest place for canoeing on the northern part of the lake. Mr. White stated that BLM manages approximately 80% of the Cougar Bay shoreline, and BLM's acquisition of the shoreline was due to the conservation values of the land and the non-motorized uses in the bay. Julie Dalsaso stated that some other moorage location outside the no-wake zone would be more appropriate. Mr. Fritz stated that Cougar Bay offered non-motorized boaters a unique opportunity to not get run over by large boats.

iii. Mooring area would disturb wildlife in the bay.

Ms. Larsen stated that fishing, hunting, and wildlife viewing could be disturbed by the water equivalent of a state park. Mr. Somerton stated that the increased amount of motorized boats will have a detrimental effect on wildlife and birds, but at least a buffer area was left between the mooring area and more sensitive, shallower parts of the bay. Mr. Paradee also stated that the back of the bay was the more sensitive area. Ms. Flammia stated that Cougar Bay was a sanctuary for birds and wildlife, and the increased boat traffic due to the moorage area is not appropriate. Mr. White stated that one reason for the BLM's land acquisition in Cougar Bay was the land's conservation value for wildlife, and he questioned the ability of the county to enforce time limits, numbers of boats, and noise issues. Mr. Harris stated that Cougar Bay's importance for wildlife, birds, and fish needed to be balanced against the proposed navigational value. Mr. Harris also stated that the applicant cannot guarantee that boaters will not use the piling and upset osprey instead of using the buoys. Mr. McCain stated that wildlife is more visible in the back of the bay than anywhere else he visits on the lake.

iv. Bottom sediments will be disturbed in the mooring area and shoreline erosion will be increased.

Terry Harris with the Kootenai Environmental Alliance stated that prop wash and wave action will disturb sediments in the shallow bay, and boats will continue to drop anchor in the bay and disturb more sediments. Mr. Wold, Mr. Carlson, Mr. Murphy, Ed Haglund, and Mr. Kroetch stated that the proposed moorage area was much shallower than the applicant stated. Mr. Wold and Mr. Kroetch also stated that a back anchor would be required. Mr. Somerton and Ms. Flammia stated that wave actions will be increased and cause more shoreline erosion.

v. Noise and sanitation in the mooring area will be an issue.

Mr. White stated that the county noise ordinance allows boat noise about six times the level emitted by a snow mobile at full throttle. He also stated concern with party noise traveling across the lake. Ms. Dalsaso, Mr. Wold, Jerry Carlson, and Mr. Kroetch expressed concern about sanitation issues.

vi. Other pertinent comments opposed to mooring buoys.

Mr. Harris questioned the navigational necessity of the mooring buoys. Mr. Haglund stated that a different location should be found due to the numerous sunken logs in the area.

e. Some testimony did not support the no-wake buoys. Mr. Emerson stated that they were not necessary. Mr. Murphy stated that fewer would do the job, and the aquatic plants in 75% of the bay would effectively regulate motorized use. Terry Harris with the Kootenai Environmental Alliance stated that the buoys were not needed because piling currently delineate the no-wake zone. He also stated that the buoys were intrusive.

f. Piling removal was mentioned in some testimony. The applicant stated that the piling in Cougar Bay would be removed at some point, and IDL had discussed piling removal since at least 2009. Mr. Aucutt and Mr. White stated that boat traffic is expected to increase once the piling are removed from the bay. Ms. Flammia expressed concern that piece-meal permitting was occurring following the coordination that occurred between all users last year. Mr. Carlson and Mr. Harris stated that no resolution had been reached on the piling issue. Mr. Emerson stated that the piling have historic value and have protected the habitat in the bay, especially for eagles, osprey, and other birds. Mr. Gross stated that boats tying up to the existing piling is an accident waiting to happen because they are so old. Mr. Carlson stated that the piling work just fine for moorage at the current time. Mr. Gross and Ms. Wing stated that with the log business gone the bay should be cleaned up. Mr. Brunelle stated that the bay was a real hazard with the piling present.

9. The no-wake zone was established to slow down motorized boats as they approached the former log storage piling. Deadheads and aquatic vegetation are additional hazards and provide more reasons for slow travel speeds in Cougar Bay.

10. The proposed line of no-wake buoys is from Donovan's point to just west of the existing Murphy Marine Construction facility adjacent to Blackwell Island Marina. Boat traffic for these two commercial facilities is not expected to be unduly affected by the proposed no-wake zone.

11. The applicant stated that the large number of no-wake buoys is needed so boaters can see from one buoy to the next on foggy nights. 300 feet is their estimated site distance in these conditions, and no testimony was provided to refute that assertion.

12. The docks present along the north side of Cougar Bay and down the west side of the bay suggest that motorized craft travel in these areas of the bay. Several people

testified that motorized craft do currently use parts of the bay for fishing, mooring, and other reasons. Motorized use is expected to increase as some navigational hazards are removed.

13. Cougar Bay has some unique public trust values such as wildlife and recreation use due to the nature preserves created on the west and south side of the bay, and the designation as a no-wake zone. Testimony indicates that Cougar Bay is one of the few locations on Lake Coeur d'Alene where motorized and non-motorized uses do not conflict. Cougar Bay is only about 2% of the lake surface, so restricting speed in this area is not a significant impact to motorized use. Existing motorized use has not substantively impacted non-motorized uses in Cougar Bay largely due to the no-wake zone designation and the navigational hazards in the bay.

14. Testimony indicates that the existing mooring buoys in Loff's Bay and Beauty Bay have not had the problems with noise, sanitation, and wildlife disturbance that other people predict for Cougar Bay. The only apparent problem with usage at these other two locations is too many boats trying up to the buoys.

15. The 10-acre moorage area constitutes 4% of the approximately 250 acre bay. In addition, the proposed moorage area is in the southeast corner of the bay where lake access is fairly easy. It is also not in the back of the bay, where testimony suggests that conflicts with non-motorized craft and wildlife would be more pronounced.

16. Several people testified that the number of mooring buoys provided in Cougar Bay should be similar to the number of buoys in Loff's Bay or Beauty Bay. The applicant stated that they are willing to have fewer mooring buoys and limit the numbers of boats per buoy to address any concerns about the moorage area.

17. The proposed no-wake and mooring buoys are in front of several littoral owners. The proposed moorage area appears to be about 200 or 300 feet off Donovan's Point, and that is the closest point to shore. Mr. Carlson stated that the moorage area would be 200 feet from his Donovan's Point property. The air photo in the application suggests it could be 300 feet.

18. The air photo in the application indicates that the single-family docks in the south portion of the bay extend approximately 100 feet into to the lake. Those along the northern shore extend up to approximately 170 feet into the lake.

19. The applicant stated that the piling must be removed from the proposed permit area before the encroachments can be installed.

20. Piling and deadhead removal is not a part of the current application.

21. Given the location of Cougar bay near the lake outlet, and the shallow conditions of the bay, deadheads will continue to be a problem even if the piling are removed in the

future.

22. Deadheads may be classified as prize logs under Idaho Code § 38-809. These logs must be sold at public auction by the State Board of Scaling Practices.

23. IDL has no funding or appropriation for piling or deadhead removal.

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 Coeur d'Alene 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. The Supreme Court in KEA determined that public trust uses include those of fish and wildlife habitat, recreation, aesthetic beauty, and water quality. 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. Idaho law, including Idaho Code § 58-1301 *et. seq.* (the Lake Protection Act), delegates no authority to IDL for the regulation of vessels. Vessels are regulated by the United States Coast Guard through the Idaho Department of Parks and Recreation, local County Sheriff's Departments, and Title 67, Chapter 70, Idaho Code (Idaho Safe Boating Act).

7. Idaho Code § 58-1302(h) and IDAPA 20.03.04.010.15 define navigational

encroachments as docks, piers, jet ski and boat lifts, buoys, pilings, breakwaters, boat ramps, channels or basins, and other facilities used to support vessels and moorage on, in, or above the beds or waters of a navigable lake.

8. IDAPA 20.03.04.010.02 defines an aid to navigation as buoys, warning lights, and other encroachments in aid of navigation intended to improve waterways for navigation.

9. IDAPA 20.03.04.020.07.d allows a county or federal agency to apply for a noncommercial encroachment intended to improve waterways for public recreation. An application for no-wake buoys could have been submitted by either the county or the Bureau of Land Management (BLM). Both agencies recognize the importance of Cougar Bay as a destination for non-motorized use and wildlife habitat. The county, however, is better able to enforce the no-wake zone because of the marine deputies.

10. Using buoys to regulate boat traffic is authorized by Idaho Code § 67-7031. Counties and cities may regulate water use within their jurisdictions through ordinances and floating markers.

11. Kootenai County Ordinance No. 438 established a 5 mph “no-wake” zone within Cougar Bay from Donovan’s Point to Blackwell Island.

12. Non-motorized recreation and conservation appear to be customary uses of Cougar Bay. The acquisition of land in Cougar Bay by the Nature Conservancy and the Bureau of Land Management were specifically to support these two uses. Local support for these uses is quite high.

13. IDAPA 20.03.04.015.13(d) states in part “that no structure may extend beyond the normal accepted line of navigability established through use unless additional length is authorized by permit or order of the director.”

14. Idaho Code § 58-1302(g) and IDAPA 20.03.04.010.20 define the line of navigability as a line located at such distance waterward of the low water mark established by the length of existing legally permitted encroachments, water depths waterward of the low water mark, and by other relevant criteria determined by the board when a line has not already been established for the body of water in question.

15. IDAPA 20.03.04.010.34 states that littoral right lines extend out to the line of navigation.

16. The existing single-family docks nearest the proposed moorage area indicate that the line of navigability is approximately 100 feet from the ordinary high water mark on the south side of Cougar Bay. The proposed buoys in the moorage area are at least 300 feet offshore of the closest adjacent littoral area, which places them beyond the littoral right lines of the closest littoral owner. Since the proposed buoys are outside of

the local resident's littoral rights, the proposed buoys do not interfere with the resident's littoral rights.

17. Piling left in Cougar Bay with no remaining permittee or lessee are essentially abandoned with no owners. Any new uses proposed for them would have to be permitted. Regardless of any prior meetings or agreements, all proposed uses of the piling or other proposed encroachments must go through the permitting process. The permitting process with public involvement satisfies the Idaho Supreme Court's directive in KEA.

18. The county may remove abandoned piling if they determine the piling are a navigational hazard. Removal activities are subject to limitations under the federal Clean Water Act and applicable state water quality rules administered by the Department of Environmental Quality.

19. Deadhead removal must comply with Idaho Code § 38-809, the Clean Water Act, and applicable state water quality rules administered by the Department of Environmental Quality.

20. IDAPA 20.03.04.060.04 states in part that encroachments must be completed within three (3) years of permit issuance or the permit shall automatically expire.

21. 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

Cougar Bay is clearly a unique part of Coeur d'Alene Lake. Support for a no-wake zone designation was almost universal in written and oral testimony, and IDL supports this continued designation. The no-wake designation is needed for safety and to reduce conflicts with other established uses in Cougar Bay. No-wake, however, does not mean non-motorized. Demand for limited recreational resources will continue to climb, and it is the responsibility of all lake users to act responsibly. In Cougar Bay, that includes both the non-motorized and motorized boaters. It is also the responsibility of the Applicant to enforce the regulations that promote responsible use and discourage abuse of this public trust resource.

In contrast with the no-wake zone, support for the moorage buoys was limited. While many potential concerns were noted, few concerns were cited with the existing moorage areas in Loff's Bay and Beauty Bay. The number of boats per buoy was the only complaint concerning these other two locations that could be applicable to the Cougar Bay location. The no-wake designation in Cougar Bay should address many of the other concerns. Reducing the number of mooring buoys in Cougar Bay would address most of the remaining concerns and reduce the potential conflicts with other uses in the bay. Since three mooring buoys in Loff's Bay and Beauty Bay have not created

problems in those locations, three mooring buoys in Cougar Bay are not expected to create problems. If these mooring buoys appear to be compatible with other uses of Cougar Bay, then the Applicant may apply for more in the future.

Piling removal was not a part of this application. Who will remove the piling, when it will be done, and if it will occur are still unknown. As a result, piling removal cannot be evaluated in this decision. Deadhead removal also cannot be evaluated in this decision due to the prize log statute and concerns about the contaminated lakebed sediments. The applicant has stated that piling must be removed from the permit area in order for the anchor blocks to be placed. If piling removal does not occur within three years of permit issuance, the permit will expire and the Applicant will have to reapply.

Based upon the information provided to me as the hearing coordinator, the fact that the designated no-wake zone needs to be marked, the fact that the Applicant is entitled to apply for a buoy permit, the fact that the proposed buoys will not interfere with littoral rights of adjacent owners, and the fact that few problems were reported at similar moorage areas, I recommend that the Director of IDL issue a Final Order stating that the Mica Supervisory Area of IDL should **approve** the encroachment permit application with the following conditions:

1. The encroachment permit will only authorize three mooring buoys.
2. The northern-most portion of the designated moorage area will be used for the three mooring buoys.
3. The Applicant will restrict the number of boats per buoy to prevent the movement of the anchor blocks.
4. If usage of the mooring buoys results in conflicts with the conservation or non-motorized use of Cougar Bay, then this permit may be subject to revocation.

DATED this 28th day of May, 2010.



ERIC WILSON
Hearing Coordinator

Attachment 1
24 Neighbors In and Around Cougar Bay

1. Blackwell Island Marina
2. Fred Murphy
3. Dianne Borjessan
4. Ronny Jessick
5. Rose M. Jessick
6. Edwin Haglund
7. William F. Chapman
8. Cougar Bay Sailing Chowder Society
9. David Yadon
10. Elizabeth K. Steve
11. Sue Flammia
12. Stephen Groner
13. Rasmussen Inc.
14. Ronald Fritz
15. Bureau of Land Management
16. Keith Kroetch
17. Rocky Watson
18. Nature Conservancy
19. Joan C. Murphy
20. Jerry Carlson
21. John W. Brewer Trustees
22. John Reinhardt
23. Richard Powers
24. Peter Reinhardt

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of June, 2010, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

Kootenai County Parks and
Waterways
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ERIC WILSON
IDL Program Manager - Navigable Waters and Minerals