

GEORGE B. BACON
Director
Idaho Department of Lands
300 N. 6th 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 Permits No. L-95-S-3615D) **FINAL ORDER**
Murphy Marine Construction - Applicant)
)
)
)
)
_____)

I. NATURE OF PROCEEDINGS/ISSUES

A public hearing was held on January 10, 2011 at 6:00 pm PST at the IDL Staff Office in Coeur d’Alene, Idaho. Mike Murphy served as Hearing Coordinator. The Hearing Coordinator issued his recommendation on February 9, 2011.

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 January 10, 2011.
- 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 piling and log booms, 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.

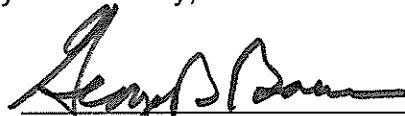
IV. FINAL ORDER

On the basis of the record, it is my order that Encroachment Permit L-95-S-5615D be approved. Furthermore, it is my order that the Mica Supervisory Area shall issue an encroachment permit to Applicant with the following conditions:

- Applicant may provide dock storage only between October and May of each season, but allow for IDL pre-approved adjustments based on specific weather conditions.
- Applicant shall provide IDL with construction details and a maintenance plan for log booms and safety lighting prior to permit issuance.

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 9 day of February, 2011.



GEORGE B. BACON
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of February, 2011, 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 – Surface and Mineral Resources

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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

February 9, 2011

MEMORANDUM

TO: George B. Bacon, Director

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

SUBJECT: Public Hearing – Encroachment L-95-S-3615D for Murphy Marine Construction Co.

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-3615D) for a winter dock storage facility within Cougar Bay on Lake Coeur d'Alene, 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 October 13, 2010, Mr. Fred Murphy - Murphy Marine Construction Company (Applicant) submitted to IDL an encroachment permit application (L-95-S-3615D) requesting approval to construct and operate a winter dock storage facility within Cougar Bay on Lake Coeur d'Alene. The application is incorporated into this document by reference.

2. IDL initiated the processing of L-95-S-3615D as an encroachment pursuant to the Lake Protection Act (Idaho Code § 58-1306) and the associated Rules (IDAPA 20.03.04.030). On October 16, 2010, October 23, 2010, December 6, 2010 and December 13, 2010, IDL published the required Notice of Application in the Coeur d'Alene Press newspaper for the encroachment permit applications submitted by

Applicants. The Notice of Application is incorporated into this document by reference.

3. In letters dated October 13, 2010 and December 1, 2010, IDL notified several agencies, organizations, and persons of the encroachment permit applications submitted by Applicants 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
- U.S. Army Corps of Engineers
- Panhandle Health District #1
- Kootenai County Parks, Recreation, and Waterways
- Kootenai County Marine Division
- Kootenai County Building, Planning and Zoning
- Kootenai Environmental Alliance
- Lakes Commission
- Littoral landowners in and adjacent to Cougar Bay

The letter is incorporated into this document by reference.

4. IDL received a letter dated November 15, 2010 from Paul W. Daugharty, an attorney representing Don Gross (Objector), objecting to the application and requesting a hearing. The letter stated that the proposed encroachment citing concerns about potential activities beyond dock storage. The letter is incorporated into this document by reference.

5. IDL received 58 letters from members of the public in support of the proposed encroachment and one letter opposed to the proposed encroachment. Those in support cited benefits to the public and benefits to the lake (preventing dock damage). The letter opposed cited concerns about activities outside of dock storage and visual impacts.

6. Based on the request by Mr. Daugharty, and in accordance with IDAPA 20.03.04.030, IDL initiated a public hearing process for the proposed encroachment. The public hearing was scheduled for January 10th, 2011 at 6:00 pm at the IDL office in Coeur d'Alene. On December 27th, 2010 and January 3rd, 2011 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 from IDL dated December 23rd, 2010 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
- U.S. Army Corps of Engineers
- Panhandle Health District #1
- Kootenai County Parks, Recreation, and Waterways
- Kootenai County Marine Division
- Kootenai County Building, Planning, and Zoning
- Kootenai Environmental Alliance
- Lakes Commission
- Applicant
- Objector
- Littoral landowners in and adjacent to Cougar Bay

The letter is incorporated into this document by reference.

12. On January 10th, 2011 IDL held a public hearing at 6:00 pm in IDL's Coeur d'Alene office. Mr. Mike Murphy, Bureau Chief of Surface and Mineral Resource, served as hearing coordinator via video conferencing from Boise, Idaho. In attendance were Carl Washburn, IDL Navigable Waters Specialist; Mike Denney, IDL Mica Supervisory Area Manager; Mr. Fred Murphy, representing Murphy Marine Construction Company (Applicant); Mr. Paul Daugharty, representing Objector; Mr. Don Gross (Objector) and twenty-five (25) 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. Applicant provided a brief overview of the project. Applicant stated that his operation has provided the same dock storage service for more 60 years around Lake Coeur d'Alene (10-15 years within Cougar Bay in association with Foss Maritime). Applicant indicated the location of the proposed facility will be more toward the center of Cougar Bay to minimize impacts to boating
- b. Testimony in opposition to the project was presented by Mr. Daugharty and Objector. Collectively their objections related to the completeness of the application; concerns with water quality; impacts to wildlife; concerns with full-year use as opposed to seasonal use; concerns with activities beyond dock storage (e.g. construction, repair and the use of hazardous materials with the potential to impact water quality); and concerns with the activities of potential sublessees under the submerged lands lease that would be issued subsequent to the encroachment permit.
- c. Upon questioning by the Hearing Coordinator, Applicant stated that the only activity that would occur would be seasonal dock storage (which would also apply to any sublessees).
- d. The Hearing Officer then asked Objector, "If the permit that would be authorized by the Department was limited to dock storage only for the

Cougar Bay Area as was described by Mr. Murphy, do you have objections that still remain?” Objector responded, “I would have no objections, if it was seasonal and dock storage only, I have no questions at all, and I’m fine with that.”

- e. Testimony followed from members of the public. Ten members of the public testified in favor of the proposed encroachment citing benefits to the public based the concept of eliminating damaged docks and providing a service to the community. Seasonal dock storage was supported by these members of the public, including kayakers and members of the public that support osprey nesting within Cougar Bay. Three members of the public testified in opposition to the proposed encroachment citing concerns related to activities outside of dock storage that might occur, aesthetics and the concerns about protection of Cougar Bay based on historical uses (e.g. log storage, dock repair, orphan dock collection, uses of hazardous materials). Much of this testimony related to historical activities that were adverse to Cougar Bay. Applicant rebutted near the end of the public hearing, “I’d just like to point out that all the evidential pictures that have been put into the meeting here, if you’ll look at them, I can guarantee that none of that stuff belongs to me, none of the equipment that is pictured, none of docks, none of the boat houses, everything that has been put into evidence here does not belong to my company and that wouldn’t be part of what we are doing.”

13. No specific details were provided in the application regarding how the proposed new piling and log booms would be maintained, replaced, or repositioned. In addition no details were provided in the application regarding safety lighting.

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 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 water craft and moorage on, in, or above the beds or waters of a navigable lake.

7. The winter storage of docks supports moorage on Lake Coeur d'Alene and is a navigational encroachment.

8. Applicant has littoral rights on Lake Coeur d'Alene.

9. 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

Applicant has provided a reasonable and limited proposal to manage a dock storage facility within Cougar Bay on Lake Coeur d'Alene. Such operations have historically been located in this approximate location and have provided a service to members of the public that have sought protection of their docks during winter conditions. Much of the testimony during the hearing supported this operation and acknowledged the benefits of not having docks be destroyed by winter conditions and thus creating navigational hazards.

During the hearing Applicant addressed the concerns of Objector and other members of the public related to other activities that might be included with the dock storage operation. Applicant stated clearly that no activities beyond dock storage, including dock construction; dock repair; or the storage or use of hazardous materials, are proposed or would occur. Applicant indicated any subleasing would be similarly limited.

During the hearing, Objector testified that he had no objection to the proposed encroachment once he heard Applicant proposed no activities outside of seasonal dock storage. Testimony during the hearing also indicated that the proposed encroachment


had the support of kayakers and members of the public that support osprey nesting within the bay.

Based upon the information provided to me as the hearing coordinator and the fact that the application meets 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 Mica Supervisory Area of IDL should **approve** the encroachment permit application submitted by Applicant with the following conditions:

- Applicant may provide dock storage only between October and May of each season, but allow for IDL pre-approved adjustments based on specific weather conditions.
- Applicant shall provide IDL with construction details and a maintenance plan for log booms and safety lighting prior to permit issuance.

I also recommend that the Mica Supervisory Area consider issuing a submerged lands lease associated with this encroachment permit that includes incentives for lake clean-up consistent with the Land Board's historical policy related to log storage facilities. The policy provides log storage companies a dollar for dollar rental credit for documented lake cleanup expenses which can reduce submerged land lease payments down to the base rent of \$250.00 per year.

DATED this 9th day of February 2011.


MIKE MURPHY
Hearing Coordinator

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of February, 2011, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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