

Edl, Michele

From: Pat Brown [pbrown@idl.idaho.gov]
Sent: Friday, August 13, 2010 12:32 PM
To: Edl, Michele
Cc: Al Ruberry; Kurt Houston
Subject: Gem Lake Harbor Navigability/Regulatory Responsibility
Attachments: FERC-RegAuthority-11-05-1993.pdf; DAG Strack-Navigability of Gem Harbor-5-23-2006.pdf

Michele,

Attached are copies of the two letters we discussed regarding navigability and regulatory authority for Gem Lake Harbor.

DAG Strack's 2006 letter to the Bonneville County Prosecuting Attorney states that Gem Lake Harbor is navigable and that boaters suing it cannot be cited for trespass. A footnote on the last page indicates that since Gem Lake Harbor is navigable, essentially an extension of Gem Lake proper, boat docks and other encroachments would be subject to regulation under Idaho's Lake Protection Act.

The Lake Protection Act – IC 58-13 states in part:

58-1302.ENCROACHMENT ON NAVIGABLE LAKES -- DEFINITIONS. (a) "Navigable lake" means any permanent body of relatively still or slack water, including man-made reservoirs, not privately owned and not a mere marsh or stream eddy, and capable of accommodating boats or canoes. This definition does not include man-made reservoirs where the jurisdiction thereof is asserted and exclusively assumed by a federal agency.

The underlined portion gets to the attached 1993 letter from the Federal Energy Regulatory Commission (FERC). The letter is a response to a specific question regarding encroachments on Gem Lake, but indicates that FERC asserts exclusive jurisdiction for regulating encroachments for all FERC licensed reservoirs, which jurisdiction FERC in turn transfers over to their licensee – in the case of Gem Lake, the City of Idaho Falls. The City of Idaho Falls has never approached IDL regarding acting in their stead, which the FERC letter indicates is acceptable, so, to the best of my knowledge, the City of Idaho Falls is/has been responsible for the regulation of navigable encroachments on Gem Lake since it was constructed and, by extension, on Gem Lake Harbor since the wall between the old gravel pit and Gem Lake was breeched, creating a single water body.

Let me know if you have questions.

Pat Brown

Eastern Idaho Area Manager
Idaho Department of Lands
3563 Ririe Highway
Idaho Falls, ID 83401
208.525.7167

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

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NOV 12 1993

Department of Lands
Idaho Falls, Idaho

Mr. Steven J. Schuster
Deputy Attorney General
Department of Lands
1215 W. State
Boise, ID 83720-7000

Dear Mr. Schuster:

Thank you for your letter of May 25, 1993, on behalf of the Idaho State Board of Land Commissioners (State Board) and the Idaho Department of Lands requesting confirmation that the Federal Energy Regulatory Commission (Commission) exercises exclusive jurisdiction over "lake encroachments" for the Gem State Project No. 2952. The project is located on the Snake River, a navigable waterway of the United States, in Bingham and Bonneville Counties, Idaho, and occupies lands of the United States administered by the U.S. Department of the Interior's Bureau of Land Management. The licensee for the project is the City of Idaho Falls, Idaho.

Under Idaho Code Title 58, Chapter 13, the State Board and Department of Lands regulate "lake encroachments" (such as boat docks, land fills, and buoys) on "navigable lakes," which "includes man-made reservoirs except where the jurisdiction thereof is asserted and exclusively assumed by a federal agency."

Pursuant to Part I of the Federal Power Act (FPA), 16 U.S.C. §§ 791a - 823b, the Commission issues licenses for the construction, maintenance, and operation of non-federal hydroelectric projects located on waters subject to the jurisdiction of the United States Congress or on public lands or reservations of the United States. The licensed project includes all reservoirs associated therewith, and in most cases includes a buffer strip of land around the reservoir. (Licensed projects exclude federal reservoirs, such as those statutorily entrusted to the authority of the United States Department of the Interior's Bureau of Reclamation or the United States Army Corps of Engineers.) The Commission's authority over project reservoirs is exclusive. See Puget Sound Power & Light Company, 54 F.P.C. 157, 161 (1975) (the FPA empowers the Commission to "require Commission approval for all uses of project lands and waters to determine their consistency with the [FPA]"). The reservoir of Project No. 2952, which has a surface area of 305 acres, is entirely within the project's licensed boundary; accordingly, the Commission has exclusive regulatory jurisdiction over "lake encroachments" for Project No. 2952.

Section 10(a)(1) of the FPA provides that licenses are issued on the condition that the project shall, in the judgment of the Commission, be best adapted to a comprehensive plan for developing the waterway in question for all beneficial public interest uses, including resource conservation and recreation. Furthermore, Commission policy requires optimum development of the recreational resources afforded by the project and adequate public access to project waters (see Recreational Development at Licensed Projects, 34 F.P.C. 1546 (1965) (Order No. 313) and the policy codified at 18 C.F.R. § 2.7 (1993)). The Commission's regulations also require that a licensed project's boundary be set at a sufficient distance from the involved waterline to allow operation and maintenance of the project and for other project purposes, such as recreation, shoreline control, or environmental resource protection (see, for example, license application content requirements for major unconstructed projects 18 C.F.R. § 4.51(h)(2)).

Pursuant to the above-described policies and regulations, the Commission has required licensees to extend a project's boundary to provide reasonable public access to and use of recreational facilities (see Georgia Power Company, 31 FERC ¶ 61,014 (1985), reh'g denied, 32 FERC ¶ 61,237 (1985)) and to give the licensee sufficient control to fulfill license requirements for soil erosion protection (see The Charter Township of Van Buren, Michigan, et al., 44 FERC ¶ 61,048 (1988)).

Licenses include a standard land use article that authorizes licensees to permit minor changes in the use of project lands and waters without Commission approval. See Brazos River Authority, 11 FERC ¶ 61,162 at p. 61,347 (1980). I am enclosing the Brazos River Authority order, which includes (at pp. 61,348-50) the full text of land use Article No. 36. By letter dated June 18, 1980, the Commission offered all licensees the opportunity to amend their licenses to include this article. All licenses issued after June 1980 contain this article. The license for the Gem State Project No. 2952 contains an identically worded land use Article No. 44. As described below, the land use article imposes conditions to ensure protection of the project's scenic, recreational, and environmental values, as well as conditions requiring compliance with state and local approvals.

The land use article authorizes licensees to grant permission for such uses of project property as: (1) landscape plantings; (2) non-commercial boating access facilities (such as piers and docks); and (3) erosion control structures (such as bulkheads). The licensee must demonstrate to the Commission's authorized representative that the above-described uses and occupancies comply with state and local health and safety requirements.

The land use article authorizes licensees to convey easements, rights-of-way, or leases of project property for: (1) replacement, expansion, or maintenance of bridges and roads for which all necessary state and federal approvals have been obtained; (2) storm drains and water mains; (3) sewers that do not discharge into project waters; (4) minor access roads; (5) telephone and energy utility lines; (6) non-project overhead electric transmission lines with support structures outside the project boundary; (7) major telephone distribution cables; and (8) water intake or pumping facilities that do not extract more than one million gallons per day from the project reservoir. The licensee must file with the Commission annual reports describing any of the foregoing conveyances made during the prior calendar year.

The land use article also authorizes licensees to convey fee title, easements, or leases in project property for construction of: (1) new bridges; (2) sewer or effluent lines that discharge into project waters for which all necessary federal and state water quality certificates or permits have been obtained; (3) other types of pipelines crossing project lands, for which all necessary federal and state approvals have been obtained; (4) non-project overhead transmission lines with support structures within the project boundary; and (5) marinas, overhead utility distribution lines, and improvements of existing bridges and roads. The licensee must give the Commission 45 days' notice prior to conveying the described interests in project property. The notice must contain a description of the type of conveyance and location of the lands conveyed, the identity of any federal or state officials consulted, and any federal or state approvals required for the proposed use. Therefore, where the licensee grants lake encroachments pursuant to the standard land use article, state permits would be appropriate if the state wishes to exercise such authority.

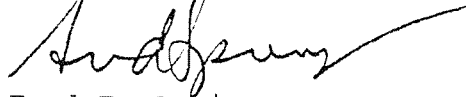
Licensees sometimes arrange with state or local agencies or municipalities to maintain facilities for project purposes such as public recreation. However, the Commission has consistently found that such arrangements neither obviate nor supersede license articles imposing specific requirements and reserving control by the Commission to ensure future adherence to a comprehensive plan of development for the waterway in question. See, for example, Appomattox River Water Authority, 49 FERC ¶ 61,313 at p. 62,176 (1989).

You also ask for information on the Commission's jurisdiction over encroachments in other Idaho reservoirs. Attached is a list of licensed Idaho projects showing each project's name, owner, waterway, and reservoir surface acreage. The Commission exercises exclusive jurisdiction over encroachments in the reservoirs of the listed projects, subject

to the standard land use article discussed above, with respect to those projects whose licenses contain such articles.

I hope this information is helpful to you. If I may be of further assistance to you, please let me know.

Sincerely,

A handwritten signature in dark ink, appearing to read "Fred E. Springer", with a long, sweeping horizontal line extending to the right.

Fred E. Springer
Director, Office of
Hydropower Licensing

Enclosures

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Figure 1

OWNER

DATE

PACIFIC

CONTAINER

FASTING

ACIFI

DAHO

2-11

29A	MILNER	SLAKE R.	IDAHO POWER CO ET MO	1100	58270 E	840727 881215	381130
29	GEM STATE	SLAKE R	IDAHO FALLS, IDAHO	305	23400 E	810914 831212	331130
2973A	ISLAND PARK	HENRYS FK, SNAKE R	FALL RIVER RURAL MO	7794	4800 C	850701 881019	380930
3407A	MAGIC	BIG HOOD R	MAGIC RES HYDRO, I MO	3740	9000 E	840724 870115	271231
4656A	ARROWROCK	BOISE R	BOISE-KUNA IRRIG MO	3100	60000 P	840727 890327	390228
4797A	AUGER FALLS	SLAKE R	COGENERATION INC MO		43600 P	830531 910329	410228
481A	BARBER DAM	BOISE R	ADA COUNTY ET AL MO		3700 E	820907 831223	231130
5089A	FELT LOWER	TEION R	FALL RIVER RURAL MO	10	5500 E	820222 830909	230831
5089B	FELT	TEION R	FALL RIVER RURAL MO	10	1950 E	820222 830909	230831
5376A	HORSESHOE BEND	PAYETTE R	HORSESHOE BEND HY MO		9500 C	830502 860730	360630
6015A	ROCK CREEK	ROCK CR, SNAKE R	ROCK CREEK HYDRO MO		1900 E	840831 860829	360731
7194A	BIRCH CREEK	BIRCH CR, SNAKE	BIRCH POWER CO ET MO		2700 E	850221 860521	360430
8133A	EAST FORK DITCH	E FK WEISER R	B S INC MO		4978 P	861215 880930	380831
8278A	CEDAR DRAW CREEK	CEDAR DRAW CR, SNAKE R	CRYSTAL SPRINGS H MO	6	2924 E	840501 850524	350430
8436A	SMITH CREEK	SMITH CR, KOOTENAI R	SMITH FALLS HYDRO MO		37792 E	850311 870410	370331
8498B	WARM SPRINGS RANCH	WARM SPRING CR, SAL MON R	INGRAM WARM SPR R MO		1080 E	840806 851121	351031
8498A	UPPER WARM SPRING	WARM SPRING CR, SAL MON R	ANCH PNSP MO		510 E	840806 851121	351031
8646A	MINK CREEK	MINK CR, BEAR CR	ANCH PNSP MO		3075 E	850425 860630	360531
8800A	GOOSE/BRUNDAGE	BRUNDAGE CR, GOOSE CR, L SALMON R	WESTERN HYDRO ELE MO		3056 P	841212 900725	400630
8909A	DIETRICH DPOD	MILNER-GOODING CNL (L WOOD R)	C INC MO		4770 E	850130 870522	370430
9656A	MARBLE CREEK	MARBLE CR, ST JOE R	BP HYDRO ASSOCIAT MO		3200 P	861231 900515	400430
9885A	FALLS RIVER	FALLS R, HENRYS FK, SNAKE R	MARYSVILLE HYDRO MO		9100 C	880311 890525	290430
9952A	SIXMILE CREEK	SIXMILE CR, L SALMON R	OSBORN, WARREN MO		2100 P	890731 901224	401130
10468A	MARSH VALLEY	PORTNEUF R	MARSH VALLEY ELEC MO		1700 C	870904 891201	391130
7589A	SHINGLE CREEK	SHINGLE CR, RAPID R	BOYER, PAUL S NA	5	621 P	850423	
1413A	POND LODGE	BUFFALO R, HENRYS FK, SNAKE R	BUFFALO HYDRO INC MO		250 E	740601 800314	041031
2794A	HARREN	SLAUGHTER CR, HARRE N CR, SALMON R	PICKELL, JACK W MO		20 E	770225 790816	060830
3041A	HETTINGER	SMITH CR, S FK SALMON R	MACKAY DAR CORP MO		12 E	800212 801114	101031
4025A	SHINGLE CREEK	SHINGLE CR, RAPID R	DEVNEY, WILLIS O MO	1	224 E	810115 810930	310831
7447A	PORTNEUF RIVER	PORTNEUF R	COMMERCIAL ENERGY MGMT, INC		900 C	850830 861229	361130
7986A	FORD	JIM FORD CR, CLEARWATER R	FORD HYDRO LTD PN MO		1500 E	840118 860117	351231
8865A	PROJECT 1	UNH STR, SNAKE R	STEVENSON, LYNN E MO		115 E	850107 860318	240630
8866A	PROJECT 2	UNH STR, SNAKE R	STEVENSON, LYNN E MO		85 E	850107 860318	240229
9907A	SUNSHINE	LAKE CR, SALMON R	BROWN, A W CO INC MO		110 E	860210 870320	370228
9967A	SHOSHONE	LITTLE WOOD R, BIG WOOD R	SHOROCK HYDRO INC MO	499	840 P	860409 890525	390430
10512A	MILLER	REDFORD CREEK, FORD CREEK	REDFORD CREEK, FORD CREEK		332 F	910511 920817	420731