



State of Idaho

DEPARTMENT OF WATER RESOURCES

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December 1, 2020

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ELMORE COUNTY, BOARD OF COUNTY COMMISSIONERS
C/O SCOTT L CAMPBELL
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PO BOX 170538
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RE: Application for Permit No. 63-34891 (Boise Project Board of Control)

Dear Parties:

On September 25, 2020, the Idaho Department of Water Resources (“Department”) received *Stipulated Conditional Withdrawal of Elmore County’s Protest* (“Stipulation”) in the matter of Application for Permit 63-34891 (“Application”). The parties have agreed that Elmore County will withdrawal its protest against the Application provided any permit and subsequent license issued pursuant to the Application is conditioned as provided in the Stipulation.

On October 5, 2020, the Department sent a letter to the parties that acknowledged the Stipulation and circulated an example draft approval document with conditions substantially similar to those proposed in the Stipulation. In the letter, the Department also requested additional information from the Boise Project necessary to complete evaluation of the Application.

On October 12, 2020, the Department received a letter from Elmore County objecting to some of the conditions in the example draft permit document that were not identical to conditions proposed in the Stipulation. On November 2, 2020, the Department received a

response from the Boise Project that provided the information requested by the Department and provided comments on Elmore County's objections to the draft conditions.

In any conditional withdrawal, the department must consider whether the proposed conditions are acceptable. The department may choose to modify a proposed condition, or choose not to place a condition on the face of a water right for a number of reasons. Examples include conditions that are unclear, ambiguous, or contrary to laws, rules, or policy of the department, and those whose enforcement is burdensome because the condition is outside the authority of the department or will unreasonably consume department time or effort.

The Department has prepared the attached draft approval that includes the conditions substantially as proposed in the Stipulation as well as other conditions required by the Department. Some of the conditions on the attached draft approval have been modified from those on the October 5th example draft in response to Elmore County's objections and the comments of the Boise Project. Some of the conditions in the attached draft approval were not changed from the October 5th example draft and still vary slightly from those proposed in the Stipulation. The conditions proposed in the Stipulation are listed below with some discussion of why the conditions on the draft approval are not identical.

Item 1 Proposed Conditions

“That all of the conditions (1-9) contained in the license for Water Right No. 63-10240 issued to the Boise Project for a water right for power at the Arrowrock Hydroelectric Project be included in the permit and any subsequent license for Water Right 63-34891.”

Conditions 1, 3, 4, 5, 8 and 9 from the license for water right 63-10240 are included verbatim on the October 5th document, as well as the attached draft approval, although they are numbered differently on the draft documents.

Condition 2 on the license for water right 63-10240 was not included on the October 5th document, but has been added to the draft approval as Condition 4. Condition 4 on the October 5th document is conceptually similar, but has been removed from the draft approval. Condition 4 on the October 5th document has measurement requirements and is typically included on permits for hydropower rights to ensure the developed capacity could be obtained at licensing. Once that purpose is achieved at licensing, the condition is not carried forward to the license. If the right is subject to watermaster control, the condition is generally replaced by a standard condition that requires measurement and control. Note that this is exactly the process the Department employed when permitting and licensing water right 63-10240. The permit for 63-10240 included the same condition as Condition 4 on the October 5th document, but it was dropped at licensing and the alternative measurement and control condition was added as Condition 2 on the license for 63-10240.

The Department would normally follow the same process for the Application, but since Condition 2 on the license for 63-10420 for the same facility already requires measurement and control, the Department is willing to include the condition as proposed in the Stipulation and has included Condition 2 from the license on the draft approval in lieu of what was Condition 4 on the October 5th document¹.

¹ The Boise Project asserts that the “Condition 2” requires a locking headgate and that it is not feasible to do so on the inlet structure of Arrowrock Reservoir. However, the condition actually requires a “lockable controlling works...”

Conditions 6, and 7 on the license for water right 63-10240 are included with slight modifications on the on the October 5th document and the draft approval. The conditions used on the license vs the draft permit documents are nearly identical, but each condition is consistent with the Department's standard language to be used on a permit and on a license. The "permit versions" of these conditions will be updated to the "license versions" upon licensing. The Department does not agree that the standard language should be modified.

Item 2 Proposed Condition

"That in addition to these nine (9) conditions, the water right permit and subsequent license for 63-34891 shall contain as a condition the following:

'This right is subject to all prior rights, including prior permits that become licensed.'

All permits issued by the Department contain a condition that reads "Subject to all prior rights". Both the October 5th document and the draft approval contain that standard condition without adding the additional language "including prior permits that become licensed" that was proposed in the Stipulation. Elmore County objects to the Department's proposal to maintain the standard language and not include the additional language because the Department's standard language does not provide Elmore County sufficient assurance that the condition applies to existing permits that become licensed later. Elmore County asserts that the additional language should be included on a permit and license issued pursuant to the Application to prevent a future court from interpreting the standard condition in a way that neither the parties nor the Department intend.

The Department declines to include the additional language and has included its standard condition on the draft approval. The additional language "including prior permits that become licensed" is unnecessary, reduces clarity, and is subject to multiple interpretations. The additional language is unnecessary because other conditions prevent the right holder from demanding water from anyone. The additional language reduces clarity and is subject to multiple interpretations because it Under the Prior Appropriation Doctrine, the question of which of two rights is a "prior right" is straightforward and is based on the relative priority dates, subject to any conditions on the senior priority right that subordinate it to the junior right. The additional language undermines the clarity of that basic aspect of the Prior Appropriation Doctrine because the phrase "prior permits that become licensed" is not clear and could be interpreted to mean that the original priority of the permit is relevant, even if it is advanced. The priority date of a permit can be advanced during the course of development and licensing for a number of reasons resulting in what was once a "prior permit" becoming a permit or license with a junior priority date. Additionally, the language will not be included because the Boise Project's proposed water use would be unique in bearing the proposed language. Unique conditions are not inherently problematic if they serve to facilitate administration or use of a water right with unique qualities. The proposal by the Boise Project is not unique and the non-standard language only serves to

that will provide the watermaster suitable control of the diversion(s)." This requirement is very general. What provides the watermaster "suitable control" is situation-dependent and can often be accomplished with methods other than a traditional headgate over the inlet structure as Boise Project suggests. Certainly the operators of Arrowrock Dam have the ability to adjust the amount of water flowing through the turbines, and can be responsive to watermaster instruction and be held accountable in the unlikely event the need arises to regulate the use of this right.

suggest otherwise and invite an atypical interpretation, rather than prevent one as Elmore County suggests.

Please review the draft approval carefully. If you think the draft approval is not acceptably in conformance with the conditional withdrawal, please contact the Department within 14 days of the date of this letter and provide your availability for a prehearing conference to be held in January as the Department will consider the contested matter as unresolved and the protest still active.

If the draft approval is acceptable, you need not respond to this letter and the Department will consider the protest resolved and will take the steps necessary to bring the application to final resolution. As always, you may file a petition for reconsideration within 14 days after the Department issues a preliminary order approving the permit.

Please feel free to contact this office if you have any questions regarding this procedure.

Sincerely,

A handwritten signature in black ink, appearing to read 'Nick Miller', written over a horizontal line.

Nick Miller
Regional Manager

Enclosure

State of Idaho
Department of Water Resources
Permit to Appropriate Water
No. 63-34891

10. The rights for the use of water acquired under this right shall be junior and subordinate to all other rights for the use of water, other than hydropower, within the State of Idaho that are initiated later in time than the priority of this right and shall not give rise to any claim against any future rights for the use of water, other than hydropower, within the State of Idaho initiated later in time than the priority of this permit.
11. This right does not convey any authority to require or demand the delivery or release of water, but shall only allow generation of hydroelectricity using water delivered or released to satisfy existing water rights and operating procedures, flood control, or other authorized purposes.
12. Construction, operation, maintenance, repair, replacement or modification of the project works and features under this right shall not injure, reduce, or impair existing water rights established under state law or water rights entitlements under federal contracts relating to the Boise River, its reservoirs, or its tributaries.

This permit is issued pursuant to the provisions of Idaho Code § 42-204.

Signed this _____ day of _____, 20_____.

DRAFT

NICK MILLER
Western Regional Manager