

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATIONS
FOR PERMIT NOS. 63-34079 AND
63-34080 IN THE NAME OF
CHRIS EMMERT

**ORDER ON RECONSIDERATION
REMANDING MATTER TO HEARING
OFFICER**

BACKGROUND

On May 8, 2015, Chris Emmert ("Emmert") filed Applications for Permit Nos. 63-34079 and 63-34080 ("Applications") with the Idaho Department of Water Resources ("Department"). The Applications seek supplemental supplies of ground water to irrigate farmland in Canyon County approximately five miles southeast of Lake Lowell. Application No. 63-34079 proposes the diversion of 1.9 cfs of ground water from a well in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 35, Township 2 North, Range 1 East, B.M., for supplemental irrigation of 95 acres of land in the NE $\frac{1}{4}$, Section 35, Township 2 North, Range 1 East, B.M. Application No. 63-34080 proposes the diversion of 1.46 cfs of ground water from a well in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 1, Township 1 North, Range 2 West, B.M., for supplemental irrigation of 73 acres of land in the NW $\frac{1}{4}$, Section 1, Township 1 North, Range 2 West, B.M.

The Department published notice of the Applications as required by Idaho Code § 42-203A. The Boise Project Board of Control ("Boise Project") protested the Applications on October 22, 2015. In the protests, the Boise Project stated:

Protestant is concerned about the cumulative effects that groundwater withdrawals in the Lake Lowell vicinity may have[,] adversely affecting its senior water rights in Lake Lowell, and therefore submits this Protest. Further, the location and proposed depth of the applicant's well will most likely directly withdraw water from Lake Lowell.

On April 6, 2017, the Department conducted a hearing on the Applications. On April 24, 2017, the Department received *Applicant's Closing Arguments* and *Boise Project Board of Control's Post-Hearing Closing Argument*.

On June 19, 2017, the Hearing Officer issued a *Preliminary Order Approving Applications for Permit* pursuant to Rule 730 of the Department's Rules of Procedure (IDAPA 37.01.01). On June 30, 2017, the Department received *Boise Project Board of Control's Petition*

for Reconsideration of Preliminary Order Approving Applications for Permit. On July 14, 2017, the Department received the *Applicant's Opposition to Reconsideration*.

On July 14, 2017, the Cities of Meridian, Caldwell, Nampa, Eagle, Boise, and Kuna and Suez Water Idaho Inc. ("Municipal Providers") submitted the *Municipal Providers' Petition to Intervene*. On July 19, 2017, the Boise Project filed a memorandum in opposition to the Municipal Providers' petition to intervene. On July 21, 2017, the Department issued an order denying the Municipal Providers' petition to intervene. That same day, the Department issued an *Order Granting Petition for Reconsideration; Amended Preliminary Order Rejecting Applications for Permit* ("Amended Order").

On August 3, 2017, the Department received the *Applicant's Exceptions to Amended Preliminary Order* ("Exceptions"). On August 4, 2017, the Department received the *Municipal Providers' Second Petition to Intervene* ("Second Petition to Intervene") and the *Municipal Providers' Brief on Exceptions to the Director*. On August 14, 2017, the Boise Project filed a *Memorandum in Opposition to Second Petition to Intervene*, a *Motion to Strike and Memorandum in Support*, and *Boise Project Board of Control's Response to Applicant's Exceptions to Amended Preliminary Order*.

On October 27, 2017, the Director issued an *Order Denying Petition to Intervene; Order Affirming Preliminary Order Rejecting Applications for Permit* ("Order on Exceptions"). The Director denied the Second Petition to Intervene. *Order on Exceptions* at 10. The Director also concluded the hearing officer's determination that Emmert's proposed ground water pumping will reduce the quantity of water under existing water rights is supported by substantial evidence, that Emmert must mitigate for seepage his proposed ground water pumping will induce from Lake Lowell, and that Emmert has not submitted an adequate plan to mitigate losses of water to the Boise Project. *Id.* at 4-11. Because Emmert did not satisfy his burden to demonstrate his proposed mitigation will offset losses of water to the Boise Project, the Director determined the hearing officer properly rejected the Applications and affirmed the Amended Order. *Id.* at 11-12.

On November 13, 2017, Emmert filed the *Applicant's Petition for Reconsideration* ("Petition for Reconsideration"). On November 27, 2017, the Boise Project filed *Boise Project Board of Control's Memorandum in Opposition to Applicant's Petition for Reconsideration* ("Opposition").

ANALYSIS

As discussed in the Order on Exceptions, Emmert asserted "there is sufficient information in the record 'to determine conveyance loss of mitigation water.'" *Order on Exceptions* at 8. However, the Director rejected Emmert's assertion and determined the hearing officer correctly concluded that Emmert "'did not provide figures for the record' that could be used to 'quantify seepage losses as a percent of diversion volume.'" *Id.*

Emmert also asserted there are "mitigation options available" where the hearing officer's "concern about conveyance losses from the Boise River is not applicable." *Exceptions* at 4.

Specifically, Emmert asserted he could rent water “internally within the Boise Kuna Irrigation District,” or rent “a ground water right from the Water Bank” or purchase “one and dedicate[e] it to mitigation.” *Id.* However, the Director determined “Emmert did not submit information to the hearing officer necessary to evaluate whether these proposed mitigation options can actually offset losses to the Boise Project due to Emmert’s proposed ground water pumping.” *Order on Exceptions* at 9. The Director also agreed “with the hearing officer that mitigating by reducing the volume of surface water delivered to Emmert is not viable because it only increases Emmert’s need to pump ground water.” *Id.*

In the Petition for Reconsideration, Emmert raises other potential options to mitigate for losses of water to the Boise Project his proposed ground water pumping will cause. *Petition for Reconsideration* at 2-7. In the alternative, Emmert requests the Director “remand for further evidentiary proceedings” and “additional factual development on the mitigation question.” *Id.* at 8-9.

The Director will grant Emmert’s request to remand this matter to the hearing officer for an evidentiary hearing and “further factual development of the record” regarding Emmert’s proposal or proposals to mitigate injury to the Boise Project’s senior water rights. *See* IDAPA 37.01.01.730.02.d. The Director agrees with the hearing officer that “it could be possible for Emmert to devise a satisfactory mitigation plan.” *Amended Order* at 12. The Director also agrees with Emmert that potential options for mitigation exist and that, given the specific facts and circumstances of this matter, Emmert should have the opportunity to present evidence in support of those mitigation options at an evidentiary hearing on remand. Regardless of the mitigation option Emmert chooses to pursue, he must choose an option or options at this stage of the proceeding and satisfy his burden to demonstrate his proposed mitigation will offset losses of water to the Boise Project. *See* IDAPA 37.03.08.040.04.c and IDAPA 37.03.08.045.01.a.iv. Otherwise, the Department may properly reject Emmert’s applications. *See* IDAPA 37.03.08.045.01.a.iv.

The Boise Project asserts the Director may not remand this matter for additional factual development of the record because the Director already issued the Order on Exceptions. *Opposition* at 6-7. In support of this assertion, the Boise Project cites Rule 730.02.d’s statement that the agency head “may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.” IDAPA 37.01.01.730.02.d.

The Order on Exceptions did not become an effective final order. *See* Idaho Code § 67-5246. Emmert timely filed his Petition for Reconsideration in accordance with Idaho Code § 67-5246(4) and the Department’s Rule of Procedure 740.02.a (IDAPA 37.01.01.740.02.a). In the Exceptions, Emmert requested that the Director remand the matter for further evidentiary proceedings regarding mitigation pursuant to Rule 730.02.d. *Petition for Reconsideration* at 8; *see Exceptions* at 8-9. However, the Director declined to remand the matter in the Order on Exceptions. Upon reconsideration, and as stated above, the Director determines that, given the specific facts and circumstances of this matter, Emmert should have the opportunity to present evidence in support of mitigation proposals at an evidentiary hearing on remand. The Director’s decision to remand this matter for such evidentiary hearing is consistent with the Director’s

authority to reconsider the Order on Exceptions pursuant to Idaho Code § 67-5246(4) and the Department's Rule of Procedure 740.02.a (IDAPA 37.01.01.740.02.a).

ORDER

IT IS HEREBY ORDERED that this matter is REMANDED to the hearing officer for an evidentiary hearing and further factual development of the record only as to the issue of Emmert's proposal or proposals to mitigate injury to the Boise Project's senior water rights established in the Amended Order. If Emmert does not satisfy his burden to demonstrate his proposed mitigation will offset losses of water to the Boise Project, the Applications may be denied. Following the hearing, the hearing officer shall issue an amended preliminary order including additional analysis regarding Emmert's proposed mitigation and either approving or denying the Applications.

DATED this 1st day of December 2017.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of December 2017, I caused to be served a true and correct copy of the foregoing document by U.S. mail, postage pre-paid, and by electronic-mail to the following:

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