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DEPARTMENT OF
WATER RESOURCES

Attorneys for Boise Project Board of Control

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF PERMITS TO	)	
APPROPRIATE WATER NOS. 63-	)	
34079 & 63-34080, IN THE NAME OF	)	BOISE PROJECT BOARD OF
CHRIS EMMERT	)	CONTROL'S MEMORANDUM IN
	)	OPPOSITION TO APPLICANT'S
	)	PETITION FOR
	)	RECONSIDERATION

The Boise Project Board of Control, by and through its counsel of record, the law firm Barker Rosholt & Simpson LLP, and pursuant to Idaho Code § 67-5246 and Rule 740 of the Idaho Department of Water Resources Rules of Procedure, IDAPA 37.01.01.740, hereby submits this Memorandum in Opposition to the Applicant's Petition for Reconsideration of the Director's October 27, 2017, Final Order Denying Petition to Intervene; Order Affirming Preliminary Order Rejecting Applications for Permit. The Applicant's Petition seeks redress concerning only the mitigation proposed and rejected by the Director in his Final Order, and the Boise Project Board of Control will confine its' argument to the same subject matter.

ARGUMENT

I. The Record Does Not Support the Applicant's Position Arguing the Required Mitigation Can be Accurately Quantified on the Existing Record or Some Future Record on Remand:

Applicant Emmert argues that applying standard mitigation provisions that have been applied to permits issued for water rights in other basins would be sufficient to protect the Boise

Project Board of Control's ("Boise Project") water rights in Lake Lowell, while still recognizing that this case presents novel problems that have not yet been resolved. Mitigation conditions that have placed upon water right permits that may affect the Eastern Snake Plain Aquifer are insufficient for application in Basin 63, and particularly in the south Lake Lowell area. In the Eastern Snake Plain the surface water and groundwater connection has been modeled and studied for more than a decade, and water right applications have been through many contested case proceedings where substantial scientific data has been developed which provides the Department of Water Resources with the necessary certainty required to calculate and approve mitigation conditions. That is not the case in the south Lake Lowell area of Canyon County. While some studies have been conducted concerning the aquifer in south Lake Lowell, little is known about the impacts to Lake Lowell and the Boise Project delivery canals in that vicinity of increased groundwater pumping. What is known is that the Emmert's proposed wells will injure the Boise Project's water rights in Lake Lowell, and evidence in the record also supports the conclusion that even greater injury would be felt in the Boise Project's delivery canals.

A. The Department's Standard Mitigation Conditions Are Insufficient to Protect the Boise Project's Water Rights:

The Applicant's argument that the Department may impose the standard mitigation requirements imposed in other basins ignores the underlying basis of the Boise Project's protest to Applicant's water rights, and many others in the south Lake Lowell vicinity.¹ Between 2013 and the present a number of applications have been filed with the Department seeking to appropriate groundwater in the south Lake Lowell vicinity, cumulatively seeking to appropriate

¹ In addition to the Applicant's two application, the Boise Project have protested these additional water rights applications, numbered 63-33131, 63-33132, 63-33133, 63-33134, 63-33135, 63-33644, 63-33713, 63-33756, 63-33763, 63-33777, 63-33811, 63-33814, 63-33900, 63-33810, 63-33894, 63-34045, 63-34050, 63-34157, 63-34254, 63-34320, and 63-14280.

127.6 cfs of new groundwater withdrawals. In each of its protests, the Boise Project has stated that the basis of its protest as this:

Protestant has information that indicates in excess of 115 cfs of additional development is proposed in the vicinity of its Lake Lowell reservoir, and that the cumulative effects of that proposed development has not been modeled or even adequately described. *See* Exhibit 1. 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.

See Ex. 102. In his Final Order affirming the Hearing Officer's preliminary order rejecting the Applicant's applications, the Director confirmed that the Protestants concerns are well-founded. The Director stated that "the impacts to the Boise Project's senior water right from a decision that would all Emmert to escape mitigation for his proposed ground water pumping are unknown." Order, p. 6. He went on to state in the absence of a moratorium, "[w]hile the impact of this one permit may be small, the cumulative impact on the senior water user here is unknown." Order, p. 7.

In the record before the Director in this action, both experts conclude that there is injury to the Lake Lowell water rights. Order, p. 5. Additionally, the Boise Project's expert modeled substantial injury to its' three delivery canals in the Lake Lowell vicinity. Ex. 110, pp. 30-32. In the Department's 2004 report titled Simulation of Increased Ground Water Withdrawals in the Lower Boise River Basin, authored by Christian Petrich, the report concluded that "[o]ne area of decline seen in the drawdowns calculated from the maximum predicted head elevations (minimum decline) is a small area south of Lake Lowell in layer 2 (Figure 3-13). This suggests that additional withdrawals in this area might lead to at least some further water level declines." Ex. 106, p. 32. It should be noted also that the nature of the Emmert's applications seek "supplemental ground water rights." In the Petrich 2004 report he did not simulate supplemental

withdrawals, but stated that “[p]rocessing permits for supplemental withdrawals would increase the total ground water extraction and would increase the year-to-year variability of the extraction. Increased withdrawals could exacerbate the predicted declines associated with the non-supplemental extraction.” Ex. 106, p. 33. It should be noted that the vast majority of the applications protested by the Boise Project in the south Lake Lowell vicinity are for supplemental groundwater wells. Ultimately, the Petrich report concluded:

Local areas of simulated declines were noted south of Lake Lowell, in an area in the northwestern portion of the model, and in portions of an area between Boise, Meridian, and Kuna. These may be associated with unrealistically high simulated stresses or excessively low simulated aquifer parameter values. The simulated declines also may indicate potential problems in supplying the increasing ground water demands in these areas.

Ex. 106, p. 34. While the 2004 report did not study the specific matter of induced seepage of groundwater from Lake Lowell, or the Boise Project’s delivery canals, the study did find that the aquifer in the south Lake Lowell area may already be insufficient to meet increasing demands. Subsequently, Petrich on behalf of Applicant and RD Schmidt on behalf of the Boise Project determined that the pumping proposed by the Applicant’s two applications will injure the Boise Project’s senior water rights in Lake Lowell.

The two ‘standard’ mitigation conditions that the Applicant advocates be included in order for a permit to be issued for its two applications are based on well-known groundwater conditions in the ESPA. Contrast that wealth of modeling and analysis to the dearth of analysis and modeling present concerning groundwater and surface water in the area south of Lake Lowell. What the evidence to date tells the Director is that there is a potentially unstable aquifer in the area south of Lake Lowell, and that the comparable small amount of water sought by the Emmerts will injure the senior Lake Lowell water rights, and likely the delivery canals as well. Under this scenario there is not enough information developed to date that would allow the

Director to approve a mitigation plan that would ensure protection of the senior surface water rights of the Boise Project.

B. The Boise Project Sought to Have the Emmert Applications Disallowed, and Proposed Mitigation Only in Response to the Applicants' Proposed Mitigation:

The Boise Project proposed a mitigation requirement in its post-hearing briefing because in its initial expert report, the Applicant proposed to mitigate for the admitted impacts to Lake Lowell "by non-diversion of a portion of the annual surface water delivery allocated to the proposed places of use," and its experts testified to the same at hearing. Ex. 1, p. 24. The Boise Project, in its closing argument stated "[i]f the Department disagrees that the applications should be denied, but rather should be permitted with conditions requiring mitigation, the Department cannot recommend the mitigation proposed by the Applicant." Closing Argument Brief, p. 10. The fact that the Boise Project proposed mitigation should not have some as a shock to the Applicant based on the record in this action. Furthermore, the Boise Project's proposed mitigation was not adopted by the hearing officer in his initial order approving the permits. The Boise Project had stated that at least 81 AF/yr needed to be provided to the Boise Project in order to account for the estimated injury to its surface water rights. Closing Argument Brief, p. 10. The hearing officer rejected the Boise Project's expert's analysis concerning losses to the canals and therefore proposed a much smaller amount, 3.1 AF/yr. On reconsideration the Boise Project argued that the hearing officer's rejection of RD Schmidt's modeling and conclusions concerning impacts to the canals was error with serious repercussions to its surface water supply.

It was always the Boise Project's position that the Emmert applications should be denied because of admitted injury to its surface water supply, and because of the precedent that permitting the applications, even with mitigation conditions, may set for the additional pending and protested applications. The Director was correct that none of the evidence in the record

supports the various mitigation proposals supplied by the applicant, and that accordingly, the Department properly rejected the applications. Order, p. 9. The Applicant's Petition for Reconsideration supplies no newly discovered evidence that would change the fact that the Applicant failed to meet its burden to demonstrate that the proposed mitigation will offset the losses to the Boise Project.² The Department, under I.C. § 42-203A(5) has an independent duty to determine whether the Applicant meets all of the criteria for the grant of a permit, and it was not error for the hearing officer and Director to determine that the Applicant had not provided sufficient evidence of adequate mitigation. Therefore, the Petition for reconsideration should be denied.

C. The Request for Remand Should Be Denied:

Pursuant to Rule 730.d.2 of the Department's Rules of Procedure, if the Director finds that additional factual development is necessary prior to issuance of a final order, the Director may remand the proceeding for further factual development. Here the Director has already issued his Final Order affirming the hearing officer's Order Granting the Boise Project's Motion for Reconsideration. In his Order Granting Petition for Reconsideration the hearing officer held:

The amount of mitigation is dependent on the conclusion that seepage from the canals occurs but is not induced by ground water pumping. The Hearing Officer has re-evaluated Conclusion of Law no. 6. The Hearing Officer still finds that seepage losses must be overcome to show the proposed ground water diversions will not reduce the amount of water beneficially used by the Boise Project under its existing water rights. However, the Hearing Officer erred in his approach. Emmert bears the ultimate burden of persuasion regarding the potential for his proposed diversions to cause injury to other water right holders. By not providing sufficient information to establish a satisfactory mitigation requirement pursuant to Rule 45.01.a.iv of the Water Appropriation Rules (IDAPA 37.03.08), Emmert has not met his burden of persuasion regarding the requirements of Rule 45.0.a.i of the Water Appropriation Rules.

² The Applicant's suggestion that the Director could require Emmert to rent water within the Boise Project delivery system does not provide any net addition to the reduction that will be caused by the proposed applications. It is in essence the same proposal made earlier that the losses could be mitigated by non-use of surface water.

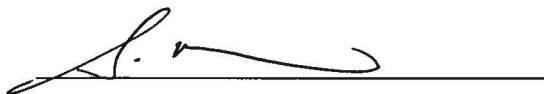
Order Granting Petition for Reconsideration, pp. 3-4. The Applicant had sufficient time and information prior to the hearing to revise his proposed non-diversion of surface water mitigation proposal and potentially provide satisfactory mitigation requirement, but failed to do so. The record is now complete in this proceeding. The Director reviewing the Petition on Exceptions carefully reviewed the record and legal arguments of the parties, and found there to be sufficient evidence in the record to reject the permits without remand. The Department's rules only provide for remand before the issuance of a Final Order. The Director's Final Order has issued. The Applicant's request for remand should be denied.

CONCLUSION

The Applicant has the burden to provide satisfactory mitigation requirements and failed to do so. Requesting the inclusion of 'standard' mitigation conditions imposed on certain water rights in the Eastern Snake Plain Aquifer region is not feasible because the data concerning groundwater and surface water interactions is not comparable, and there is conflicting evidence in the record as to the potential impacts to the Boise Project's senior surface water rights. The Applicant in its Petition for Reconsideration provided no new evidence or proposals for mitigation that are feasible or supported by the existing record. Remand is not appropriate pursuant to the Department's rules. For these reasons, the Applicant's Petition for Reconsideration must be denied.

DATED this 27th day of November, 2017.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in black ink, appearing to read 'S. Davis', is written over a horizontal line.

Shelley M. Davis
Attorneys for Boise Project Board of Control

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of November, 2017, I caused to be served a true and correct copy of the foregoing **BOISE PROJECT BOARD OF CONTROL'S MEMORANDUM IN OPPOSITION TO APPLICANT'S PETITION FOR RECONSIDERATION** by the method indicated below, and addressed to each of the following:

Original Filed with the Director of Idaho Department of Water Resources via Hand Delivery.

Copies to:

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