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DEPARTMENT OF
WATER RESOURCES

Attorney for Applicant.

BEFORE THE STATE OF IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF APPLICATIONS
FOR PERMIT NO. 63-34079 AND 63-
34080

**APPLICANT'S PETITION FOR
RECONSIDERATION**

Applicant Chris Emmert ("Emmert") requests that the Director reconsider that portion of his October 27, 2017 *Order Denying Petition to Intervene; Order Affirming Preliminary Order Rejecting Applications for Permit* ("Final Order") finding that Emmert failed to satisfy his burden of demonstrating that proposed mitigation will offset losses to the Boise Project Board of Control ("Protestant"). This petition concerns only the mitigation question and does not contest the issues of third party intervention or whether mitigation legally is required. Accordingly, the sole question presented by this petition is whether the record contains sufficient information to allow the Department to craft a condition that will mitigate the 3.1 AF of losses of water to Protestant's existing water rights.¹ *IDAPA 37.03.08.045.01.1.iv*. Emmert maintains that the record is adequate to support either: 1) the Department's standard mitigation condition, 2), the mitigation condition proposed by the Protestant, and/or 3) a logical variation of the mitigation proposed by the Applicant. Alternatively, Emmert requests that the Director remand the matter to the Hearing Officer for additional fact finding related to mitigation issues that were raised for the first time after the conclusion of the hearing.

I. The record supports approving the applications with a mitigation condition.

¹ Emmert reserves his right to file an appeal of all the issues raised in prior briefing.

Emmert's preferred outcome on reconsideration is that the Department approve Emmert's applications and include the Department's standard mitigation conditions. Indeed, there is no need to reinvent the wheel, and using standard language previously added to numerous other permits that conditions diversions upon an approved mitigation plan is a reasonable outcome given the unprecedented nature of this case. This would place Emmert on par with permit holders who have received approvals even in situations where mitigation is an established norm, and balance the equities for an applicant who had the mettle to test a years' long de facto moratorium and finally bring an important, unresolved legal issue to the forefront. Alternatively, if the Director insists that the mitigation in this case must be limited to only specific proposals in the record (a standard that is not legally required) then the record supports approval of one or both of two mitigation proposals, one by Protestant, and one by Emmert.

A. The Department can impose the standard mitigation condition its uses even in areas where mitigation is known to be required.

In its *Order Extending Deadline to Issue Final Order on Exceptions* (October 13, 2007), the Director extended the deadline for issuing the *Final Order* given the "important issues that require careful consideration and extensive legal research." In other words, the Director recognized that this is a complex case that presents unique issues for which there was no guiding precedent. Indeed, by all accounts the issue of whether injury occurs to existing water rights as a result of increased seepage from delivery and storage systems by ground water pumping is a novel issue in Idaho. Neither the parties nor the Department had any direct precedents to rely on, other than the many permits that have been issued in the area without imposing any mitigation on the basis of increased seepage.

Under these circumstances, it is reasonable for the Director to take into consideration the novel nature of this case and provide some flexibility on the precise amount and nature of

mitigation that would be required in the event, which was uncertain prior to the *Final Order*, that any mitigation would be required. Had the path established by the *Final Order* been previously cut, Emmert could have known that mitigation would be required, have a good idea as to what amount, and made pre-hearing arrangements to secure replacement water. But given all the uncertainty about the outcome of this case, and Emmert's reasonable position under the circumstances that his permits should be approved in the fashion of other similarly situation permits in a non-moratorium area, it is unreasonable to hold Emmert to a standard that required him to have made pre-hearing arrangements for mitigation. Too much was unknown.

Instead, it would be reasonable to impose the Department's standard mitigation condition it has crafted and used in other basins:

Prior to any diversion and use of water under this water right, the right holder shall (1) provide evidence of participation in a mitigation plan, approved by the director, and administered by a ground water district or other recognized organization, or (2) provide individual mitigation approved by the director.

And, of course, the companion condition on compliance would be included as well:

Noncompliance with any condition of this right, including the requirement for mitigation, is cause for the director to issue notice of violation, cancel or revoke the right, or, if the right is included in a water district, request that the watermaster curtail the diversion and use of water.

A list of the water rights that include these conditions, compiled by a search of the Department's database, is attached as appendix 1. Notably, the basins where this condition has been used are basins where there is a known mitigation requirement, and yet the Department did not require applicants to prove a mitigation plan upfront. Rather, the Department approved the permits on condition that appropriate and approved mitigation is provided before pumping and use begins.

Imposing the standard conditions recited above on Emmert's permits is appropriate based on the developed record in this case. Emmert clearly indicated a willingness to mitigate should mitigation be required. He proposed his own form of mitigation and did not object to the mitigation proposal of Protestant. There is no prejudice to the Protestant by imposing these conditions. Protestant already conceded mitigation is an appropriate way to address any injury, and it would have the opportunity to object in the event it deemed a proposed mitigation plan insufficient.

Given all the upfront uncertainties surrounding this case, the mitigation proposals in the record, and the absence of any prejudice to Protestant, the Director should approve Emmert's applications with the standard mitigation conditions.

B. The Department can impose the mitigation condition proposed by the Protestant, which Emmert never opposed.

If the Director is not inclined to adopt the Department's standard mitigation condition and insists on considering only specific proposal made at hearing, he should adopt the Protestant's proposal. The Protestant proposed its own form of mitigation it determined would satisfy the injury to its existing water rights. This condition is summarized and explained on page 10 of the *Boise Project Board of Control's Post-Hearing Closing Argument (Protestant Post-Hearing Brief)*: Emmert would annually rent water from the Water Supply Bank in the amount of the predicted losses induced by Emmert's pumping as prerequisite to pumping in any given irrigation season. *Id.* The proposal was specific. It requested that the rented water be made prior to the irrigation season and made available in time for Protestant to deliver to Lake Lowell during the early season fill of Lake Lowell. *Id.* The proposal did not include any additional water for conveyance loss over and above what the Department determined was the amount of induced seepage from Emmert's pumping. In other words, the Protestant itself was satisfied that its

existing rights could be protected from injury so long as Emmert replaced induced seepage from his proposed pumping with an equivalent amount of water into the Protestant's canal system.

Emmert did not object to this proposal by the Protestant. Of course, Emmert has argued that no mitigation should be required, but has always taken the position that should the Department determine injury would occur to existing rights, he would mitigate. Emmert did not object to the Protestant's proposal because he thought it to be a reasonable option, among others, for mitigating any injury. Notably, because the Protestant did not assert that it needed additional water for conveyance losses for mitigation, the issue was never raised, and Emmert had no reason to independently raise the issue or explore it with the Protestant.

Following the hearing, the Hearing Officer issued a *Preliminary Order Approving Applications for Permit* (the "*Preliminary Order*"), that approved the applications with a mitigation condition he crafted that largely adopted the Protestant's proposed mitigation condition. Although the Protestant filed a petition for reconsideration asking the Hearing Officer to alter his decision approving Emmert's applications, the petition did not object to the Hearing Officer's mitigation condition. Instead, it objected to the Hearing Officer's rejection of the analysis of Protestant's expert. The absence of objection the mitigation condition is not surprising since the Hearing Officer essentially adopted the Protestants mitigation proposal verbatim.

Even though Protestant did not object to the mitigation condition, on reconsideration the Hearing Officer changed the *Preliminary Order* and ruled that the permits should be denied because Emmert did not prove the amount of conveyance losses associated with delivering mitigation water. *Order Granting Petition for Reconsideration; Amended Order Rejecting Applications for Permit* (July 21, 2017) ("*Amended Preliminary Order*"). The *Final Order* makes the same conclusion and denies the permit applications on the basis that Emmert did not

prove conveyance losses associated with the Project's proposed form of mitigation. This conclusion is in error because it imposes upon Emmert the unprecedented and impossible standard of having to determine that the Department may, post hearing, determine on its own accord that a protestant's own proposed form of mitigation is insufficient in a manner that was never previously raised by either the Department or the Protestant.

Indeed, until the Hearing Officer issued his *Amended Preliminary Order*, the issue of conveyance loss for mitigation water had never been raised. The Department did not raise the issue in its pre-notice review of the permit, and it was never raised by either the Department or the Protestant at the hearing or in post-hearing briefing. Accordingly, Emmert had no reason nor any opportunity to address a conveyance loss issue that the Department now holds out as the fatal error in his applications. If the *Final Order* is not amended, the Department is saying that to meet his burden of proof in this case, Emmert was required to 1) have anticipated that the Hearing Officer would determine the Protestant's own mitigation proposal was incomplete after hearing; and 2) have cross-examined Protestant as to how much conveyance loss would occur within Protestant's delivery system. Such questioning likely would have elicited an objection as being off topic on any issue raised on direct. In any event, this is not a reasonable standard. Emmert satisfied his burden of persuasion on the mitigation issue when he accepted the proposal put forward by the Protestant.

C. The Department can approve the permits with a variation on Emmert's proposed mitigation.

As an alternative to adopting the Protestant's mitigation proposal, or as addition to it, the Director can include a slight variation on the proposal made by Emmert that would satisfy the identified criticism to it. The Director certainly has the authority and discretion to independently

fine-tune mitigation conditions appropriate to the circumstances and is not constrained only to the precise proposals made in a case. *IDAPA 37.03.08.045.01.1.iv*.

Emmert proposed mitigation for the impacts of his proposed ground water pumping in the form of foregoing deliveries of surface water entitlements from the Protestant. The *Final Order* criticizes Emmert's proposal because in the Director's view, it never completely offsets losses of water to the Boise Project. Although Emmert disagrees as a practical matter, the Director's view does not mandate a conclusion that Emmert's applications be denied. The Director instead can and should modify the proposal to address the concern about it causing additional ground water pumping by simply requiring that no further ground water pumping occur.² Under this condition, rather than pumping additional ground water to cover the 3.1 acre feet of foregone surface water, Emmert would simply forego delivery of the 3.1 acre feet and not pump, the practical effect being he dries up an acre of land in exchange for the opportunity to pump supplemental irrigation water on his permitted acres. The record includes testimony from Emmert that he idles acres in years where he forecasts that surface water alone will not be sufficient to meet crop irrigation demands. Consequently, the record supports such an amendment to Emmert's proposal.

In summary, precedent, law, and the record all support the imposition of reasonable mitigation to address the 3.1 AF of depletion the Director has determined will occur as a result of Emmert's pumping. The Director can impose mitigation in the form of the standard condition that requires approval of a plan, impose the Protestant's own proposed form of mitigation, and/or

² This is one option. The Department could also require that Emmert mitigate any additional pumping by renting water, as he has in the past, from within the Protestant's delivery system. The Department could also require offsetting rentals, and if unavailable, idling ground. There are a number of options available that are supported by the record and that would completely offset the 3.1 AF of depletion.

adopt the modified proposal by Emmert discussed above. Denying the applications when these options are available is not reasonable, particularly under the unique circumstances of this case.

II. If the Director determines additional factual development is necessary on mitigation, he should remand for further proceedings on this issue.

In the *Applicant's Exceptions to Amended Preliminary Order*, Emmert proposed that if the Director were not persuaded that the record supports approving the permits with a mitigation condition, he should remand for further evidentiary proceedings pursuant to the authority under Rule 730.02.d (IDAPA 37.01.01.730). The Director did not address this issue in the *Final Order*, and Emmert requests remand as an alternate remedy on reconsideration.

Emmert need not repeat the arguments made in Section I.B. above, but references them in making this argument for remand. In summary, if the Director remains persuaded that the fatal error in Emmert's applications is the failure to propose conveyance losses in Protestant's system over and above what Protestant itself proposed, then Emmert, at minimum, deserves the opportunity to address the perceived deficiency by developing additional facts. This would remedy the unfairness of holding that Emmert did not address an issue that was never raised until after the hearing. A short, supplemental hearing addressing at minimum the conveyance loss issue, or ideally the broader mitigation condition, would also serve the broader interests of the Protestant and the Department by avoiding a repeat of a hearing that has already occurred. The hearing involved considerable expense. Experts were hired on both sides. Protestant's expert is out of state. Repeating the entire proceeding on the protest to the applications in order to get to the mitigation question would be grossly inefficient. If the Director is not satisfied that the record as it stands allows approval of the applications with a mitigation condition to address the 3.1 AF of

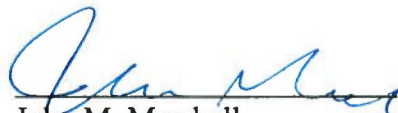
depletion, the appropriate response is to remand for additional factual development on the mitigation question.

CONCLUSION

In summary, with regard to the conclusion in the *Final Order* that Emmert's applications should be denied because he did not prove conveyance losses for rented mitigation water, the Director should reverse the denial and approve the permits with one of the mitigation proposals presented above or remand to the Hearing Officer for additional factual development on mitigation options, and at the very least on the conveyance loss issue.

Dated this 13th day of November, 2017.

JOHN MARSHALL LAW PLLC



John M. Marshall

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of November, 2017, I caused the original of this document to be filed with the Idaho Department of Water Resources via hand delivery and a true and correct copy of the foregoing to be served by the method indicated below, and addressed to the following.

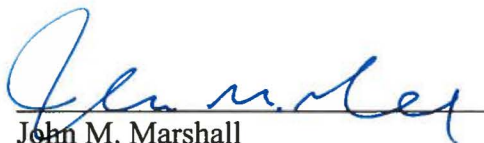
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Courtesy copy sent to the Municipal Coalition as follows:

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APPENDIX 1

Basin	Sequence	Priority Date	Diversion Rate	Source List	Water Use List
25	13984	4/6/2003	0.550	GROUND WATER	DOMESTIC
25	14194	8/12/2015	0.700	GROUND WATER	DOMESTIC
25	14226	6/17/2008	4.740	GROUND WATER	MUNICIPAL
35	13577	9/7/2006	0.550	GROUND WATER	DOMESTIC
35	13917	3/16/2009	0.420	GROUND WATER	DOMESTIC
36	8242	4/10/1984	0.200	GROUND WATER	IRRIGATION
36	8789	3/23/1999	0.390	GROUND WATER	IRRIGATION
37	21355	9/23/2004	1.290	GROUND WATER	MUNICIPAL
37	22431	1/13/2009	1.190	GROUND WATER	MUNICIPAL
37	22596	2/15/2011	0.070	GROUND WATER	DOMESTIC
37	22751	6/1/2012	0.200	GROUND WATER	MUNICIPAL
37	21293	4/12/2004	0.080	GROUND WATER	IRRIGATION