

**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 DENYING PETITION
TO INTERVENE; ORDER
AFFIRMING PRELIMINARY ORDER
REJECTING APPLICATIONS FOR
PERMIT**

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. Emmert, Christian Petrich (“Petrich”), and Terry Scanlan (“Scanlan”) testified in support of the Applications. Robert D. Schmidt (“Schmidt”) and Tim Page (“Page”) testified against 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* ("Preliminary Order") 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* ("Municipal Providers' Brief on Exceptions"). 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*.

ANALYSIS

A. The Director will deny the Municipal Providers' Second Petition to Intervene.

The Department's Rule of Procedure 352 requires that petitions to intervene be filed at least fourteen days "before the date set for formal hearing, or by the date of the prehearing conference, whichever is earlier, unless a different time is provided by order or notice." IDAPA 37.01.01.352. "If a timely-filed petition to intervene shows a direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues" the petition will be granted "unless the applicant's interest is adequately represented by existing parties." IDAPA 37.01.01.353. "Petitions not timely filed must state a substantial reason for the delay." IDAPA 37.01.01.352. Untimely petitions to intervene may be denied "for failure to state good cause for untimely filing, to prevent disruption, prejudice to existing parties or undue broadening of the issues, or for other reasons." *Id.*

The Municipal Providers acknowledge that the Second Petition to Intervene was not timely-filed. *See Second Petition to Intervene* at 16. However, the Municipal Providers assert the Director should grant their Second Petition to Intervene because they have stated substantial

reason for their delay in filing the petition and have a substantial interest in the proceeding that is not adequately represented by Emmert. *Id.* at 15-18. The Municipal Providers also assert their intervention at this stage of the proceeding will not prejudice the parties or disrupt the proceedings. *Id.* at 17.

The Municipal Providers contend they have a substantial interest in this proceeding because “[e]ach of the Municipal Providers holds water rights potentially affected by the precedents that will be set in this matter, and some have water right applications now pending or anticipated that could be affected.” *Second Petition to Intervene* at 8. The Municipal Providers assert “the conclusions in the [Amended Order] invite the argument that any well in the valley induces additional seepage from Lake Lowell requiring mitigation from the applicant and/or the right holder.” *Id.* at 11. The Municipal Providers also assert the Department’s conclusions in the Amended Order “could be used against any of the Municipal Providers with respect to additional seepage from [irrigation canals owned by the Boise Project and other irrigation entities] induced by their own groundwater pumping, whether conducted pursuant to future or existing groundwater rights.” *Id.*

The Municipal Providers assert that Emmert does not adequately represent their interest because “they divert and deliver vastly more ground water from many more wells” than Emmert and “a decision requiring mitigation of a small percentage of ground water diversions might be undesirable but ultimately acceptable to” Emmert, whereas such requirements “would carry far greater consequences for the Municipal Providers.” *Second Petition to Intervene* at 16. In other words, the Municipal Providers argue that Emmert does not adequately represent their interest because he uses a smaller volume of water than the Municipal Providers and, therefore, would have to mitigate a smaller amount than the Municipal Providers if the same types of mitigation were required of them with respect to one of their pending or future water right applications.

The fact that the Municipal Providers divert and deliver more ground water than Emmert, and therefore may face larger mitigation requirements with respect to their pending and future applications for permit, does not demonstrate the Municipal Providers’ interest in this proceeding is not adequately represented by Emmert. The Municipal Providers’ interest is to raise arguments in support of the same determination Emmert has sought from the Department: that juniors seeking to appropriate ground water should not have to mitigate for induced seepage from Lake Lowell that their proposed ground water pumping will cause. The Municipal Providers state the same two grounds in support of this position that Emmert asserted in his closing arguments. First, the Municipal Providers assert that junior appropriators are only “responsible for injury they cause at the point of the senior’s diversion” and “[n]o one has suggested that Emmert’s wells have any measurable impact on the Boise River upstream of the [Boise Project’s] diversion structures.” *Municipal Providers’ Brief on Exceptions* at 10-12. In his closing arguments, Emmert asserted he should not have to mitigate for induced seepage from Lake Lowell because, “when analyzing whether the quantity of water available to [the Boise Project’s] existing rights will be reduced, the Department looks not to Lake Lowell, but to whether flows of the Boise River are reduced at [the Boise Project’s] point of diversion.” *Applicant’s Closing Arguments* at 9. Second, the Municipal Providers assert “the mitigation sought by Boise Project violates the maximum use doctrine.” *Municipal Providers’ Brief on Exceptions* at 14. In his closing arguments, Emmert asserted he should not have to mitigate for

induced seepage from the Boise Project's "storage facilities" because of the "maximum use doctrine." *Applicant's Closing Arguments* at 10-13. The Municipal Providers' interest in raising arguments in support of a determination that new appropriators should not have to mitigate for induced seepage from Lake Lowell is already represented by Emmert.

Moreover, the Municipal Providers seek to intervene to raise a new argument that neither Emmert nor the Boise Project presented to the hearing officer. The Municipal Providers argue that the Boise Project's protest "is an attempted end run around the" Department's *Rules for Conjunctive Management of Surface and Ground Water Resources* ("CM Rules"). *Second Petition to Intervene* at 24-25. Allowing the Municipal Providers to raise this new argument at this late stage of the proceeding would prejudice the parties and cause disruption. The parties would have to expend additional time, effort, and expense to file briefing in response to the new argument and the Director's decision on the Exceptions would be delayed. In an exercise of discretion, the Director will deny the Municipal Providers' Second Petition to Intervene. Because the Director will deny the Second Petition to Intervene, the Director will not further consider the Municipal Providers' Brief on Exceptions.

B. 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.

Idaho Code § 42-203A(5) directs the Department to evaluate certain criteria in reviewing each application for permit to appropriate water, including whether the proposed use "will reduce the quantity of water under existing water rights." Where the proposed use "will reduce the quantity of water under existing water rights," the Director "may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions." Idaho Code § 42-203A(5).

Rule 45 of the Department's Water Appropriation Rules (IDAPA 37.03.08) states "[a] proposed use will be determined to reduce the quantity of water under an existing water right (i.e. injure another water right) if," among other things, "[t]he amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less." IDAPA 37.03.08.045.01.a & IDAPA 37.03.08.045.01.a.i.

In the Amended Order, the hearing officer determined "the modeling efforts of both Petrich and Schmidt show that Emmert's proposed ground water diversions would cause" an increase in "seepage of surface water stored in Lake Lowell." *Amended Order* at 10.¹ Petrich determined the depletion to Lake Lowell from Emmert's pumping of 235 AF/year "consists of an

¹ The hearing officer also determined that "testimony of Scanlan and Petrich discredit the Boise Project's allegations that Emmert's proposed ground water pumping would deplete the Boise Project's water supply by causing increased seepage from the canals the Boise Project uses to distribute water . . ." *Amended Order* at 10. Emmert does not challenge this determination in the Exceptions and the Boise Project did not file exceptions pursuant to the Department's Rule of Procedure 730.02.b.iii to challenge this determination.

approximate 3.1-AF increase in seepage *from* Lake Lowell.” Exhibit 1 at 20 (emphasis in original). Schmidt determined Emmert’s pumping of 235 AF/year will increase seepage from Lake Lowell by approximately 1.73 AF. Exhibit 110 at 26, Table 3. Based upon Petrich’s analysis, the hearing officer determined that “Emmert’s maximum likely impact on Lake Lowell” is 3.1 AF. *Amended Order* at 11. Accordingly, based upon Emmert’s testimony that “the Boise Project does not have a sufficient supply of surface water to meet all the needs of the irrigators it supplies every year,”² the hearing officer concluded “Emmert’s proposed ground water diversions will reduce the amount of water to the Boise Project under its existing water rights below the amount historically beneficially used by the Boise Project.” *Id.* at 10.

Emmert asserts “there is no factual basis on which to conclude that groundwater pumping is inducing leakage out of Lake Lowell.” *Exceptions* at 13-14. But, as just described, both Emmert’s expert and the Boise Project’s expert determined in their reports that Emmert’s proposed ground water pumping would increase seepage from Lake Lowell. The hearing officer’s determination is supported by substantial evidence in the record and will not be reversed.

C. Emmert must mitigate for seepage his proposed ground water pumping will induce from Lake Lowell.

Emmert asserts he should not have to mitigate for increased seepage from Lake Lowell due to his proposed ground water pumping because, as a matter of law, the “Boise Project is not entitled to legal protection against leakage from its facilities, including Lake Lowell.” *Exceptions* at 10. Emmert has raised two arguments in support of this assertion:

- 1) “[W]hen analyzing whether the quantity of water available to [the Boise Project’s] existing rights will be reduced, the Department looks not to Lake Lowell, but to whether flows of the Boise River are reduced at [the Boise Project’s] point of diversion.” *Applicant’s Closing Arguments* at 9.
- 2) Requiring mitigation for induced seepage from Lake Lowell due to ground water pumping is contrary to “the maximum use requirement.” *Exceptions* at 11-13.

Emmert’s first argument constitutes an assertion that, when analyzing whether a proposed use “will reduce the quantity of water under existing water rights,” the Department must only analyze whether the quantity of water available to a senior water right holder will be reduced at the senior’s point of diversion. This assertion is contrary to the plain language of Rule 45 which states a proposed use will reduce the quantity of water under an existing water right if “[t]he amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim *or the historical amount beneficially used by the water right holder under such recorded rights*, whichever is less.” IDAPA 37.03.08.045.01.a & IDAPA 37.03.08.045.01.a.i (emphasis added). The Department would act contrary to Rule 45 if it constrained its analysis of a new proposed water use to whether the use would reduce the quantity of water to a senior’s point of diversion. The Department must “follow the law” and

² Page also testified regarding the Boise Project’s lack of a sufficient supply of surface water to meet the needs of irrigators it supplies each year.

cannot limit its analysis with respect to new applications for permit in violation of the plain language of the Department's Water Appropriation Rules. *See In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014).

Emmert asserts three sources support his second argument that requiring him to mitigate for induced seepage from Lake Lowell is contrary to "the maximum use requirement": 1) the United States Supreme Court's decision in *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912), 2) the Department's Application Processing Memo No. 76 ("Memo 76"), and 3) the Director's authority "to determine a reasonable pumping level in an aquifer." *Exceptions* at 12. The Director will address each source in turn.

With respect to *Schodde*, the Idaho Supreme Court explained in *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 809, 252 P.3d 71, 90 (2011), that "[t]he issue in *Schodde* was whether the senior appropriator was protected in his [unreasonable] *means of diversion*, not in his priority of water rights." (emphasis added). Emmert does not allege the Boise Project's means of diversion from the Boise River is unreasonable. Therefore, *Schodde* is readily distinguishable. Nonetheless, Emmert asserts the Director should apply principals in *Schodde* to allow Emmert to avoid mitigation.

While the Idaho Supreme Court determined it was appropriate to apply "principles stated in *Schodde*" to the "water management case" in *Idaho Ground Water Assoc. v. Idaho Dep't of Water Res.*, 160 Idaho 119, 133, 369 P.3d 897, 911 (2016), reh'g denied (May 9, 2016), where the reasonableness of the senior's point of diversion was not at issue, the facts in *Idaho Ground Water Assoc.* were significantly different from the facts in this matter. In *Idaho Ground Water Assoc.*, the Director determined in a water delivery call proceeding pursuant to the CM Rules that ground water pumping in the Eastern Snake Plain Aquifer ("ESPA") "was materially injuring" a senior appropriator's water rights diverted within the ESPA area of common ground water supply. *Id.* at 124, 369 P.3d at 902. However, the Director concluded the policy of "maximum and beneficial use of the State's water resources" justified not curtailing certain junior ground water users. *Id.* at 129, 369 P.3d at 907. The record in the case contained substantial evidence to support the Director's conclusion that curtailing junior ground water users east of a specific geologic boundary would curtail irrigation of "hundreds of thousands of acres so that [the senior water user] might get another 1.5 cfs of water." *Id.* at 132, 369 P.3d at 910. The Court concluded the "Director had discretion to implement the trim line based on the policy of beneficial use." *Id.* at 129, 369 P.3d at 907. There is no similar factual record in this case to support application of the policy here.

Furthermore, the impacts to the Boise Project's senior water rights from a decision that would allow Emmert to escape mitigation for his proposed ground water pumping are unknown. There is no moratorium in place that will prevent others from seeking appropriations for consumptive use similar to Emmert's that may induce seepage from Lake Lowell and injure the Boise Project's senior water rights. In support of its protest, the Boise Project submitted a letter from the Department explaining that "[a] number of applications seeking new appropriations of ground water generally south of Lake Lowell have been filed by various parties." The Boise Project stated as the basis for its protest that it "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." Application of the policy of beneficial use to excuse the impacts

of Emmert's proposed water use on the Boise Project's senior water rights would logically apply to future applications. While the impact of this one permit may be small, the cumulative impact on the senior water user here is unknown. This uncertainty leads the Director to conclude that application of the policy is not appropriate in this case.

Emmert also cites Memo 76 in support of his contention he should not have to mitigate for seepage his proposed ground water pumping will induce from Lake Lowell. Memo 76 addresses Idaho Code § 42-203A(5)(f)'s requirement that the Department ensure "proposed water uses are not contrary to conservation of water resources when reviewing new water right applications." *Memo 76* at 1. Memo 76 describes seepage rates that "provide reasonable seepage loss expectations for appropriately designed small ponds and reservoirs" and explains "the Department should not authorize the appropriation of water to replace seepage losses in excess of these rates, except as described in" the memorandum. *Id.* at 2. Emmert asserts that Memo 76 is a "specific example" of the "maximum use requirement" and "[t]he same policy that drives the existence of [Memo 76] should be used here to reject the Boise Project's theory that would encourage leaky facilities." *Exceptions* at 12.

Memo 76 was prepared to guide Department staff in fulfilling their statutory duty set forth in Idaho Code § 42-203A(5)(f) to review new water right applications to ensure proposed uses are not contrary to the conservation of water resources. *Memo 76* at 1. Memo 76 is specific to new applications seeking to appropriate a volume of water for storage in "new ponds or reservoirs." *Id.* at 3. Memo 76 is inapplicable to Emmert's applications which propose to divert ground water for irrigation purposes. Memo 76 does not support Emmert's argument that he should not have to mitigate for seepage from Lake Lowell that his proposed ground water pumping will induce.

Finally, Emmert cites the Director's authority in Idaho Code §§ 42-226 and 42-237a to establish a "ground water pumping level." Emmert argues this authority is another "specific example of the maximum use requirement" and that, if the Director requires Emmert to mitigate for induced seepage from Lake Lowell, the Director "would be setting the reasonable pumping level for the regional aquifer surrounding Lake Lowell at a level near the ground surface" in contravention of the "maximum use requirement." *Exceptions* at 12.

The Department's review of new applications for permit such as Emmert's is guided by Idaho Code § 42-203A(5)'s criteria. The Department determined Emmert's proposed use "will reduce the quantity of water under existing water rights." Idaho Code § 42-203A(5). This determination is supported by substantial evidence. The Director is not exercising his authority in Idaho Code §§ 42-226 and 42-237a to establish a "ground water pumping level" by analyzing Emmert's applications pursuant to the review criteria set forth in Idaho Code § 42-203A(5) and requiring mitigation consistent with the plain language of the Department's Water Appropriation Rule 45. Emmert's citation to the Director's authority to establish a ground water pumping level does not support Emmert's argument he should not have to mitigate injury to the Boise Project's senior water rights.

D. Emmert has not submitted an adequate plan to mitigate losses of water to the Boise Project.

Emmert asserts that, if the Director determines Emmert must mitigate for injury his proposed pumping will cause, the Director should “reinstate” the Preliminary Order because “Condition no. 12 is a reasonable and appropriate mitigation condition.” *Exceptions* at 3. Condition no. 12 from the Preliminary Order states:

To mitigate for the depletion of water stored in Lake Lowell that will occur as a result of the ground water diversions authorized by this right, the right holder shall rent from the Water District 63 Rental Pool or the Water Supply Bank or otherwise lawfully acquire at least [3.1] AF of water prior to March 1 each year for delivery to the Boise Project Board of Control for use within its member irrigation districts for irrigation purposes. The right holder may arrange for the necessary mitigation water supply in multiple year increments. Each time the right holder enters into a new rental or other agreement for the required mitigation water supply, the right holder shall give a copy of the agreement to the Boise Project Board of Control within seven days of the execution of the agreement. If the right holder does not comply with the mitigation requirement for any irrigation season, the right holder shall not divert water pursuant to this water right during that irrigation season.

Preliminary Order at 12.

The Director will not “reinstate” Condition no. 12 from the Preliminary Order. A condition that requires Emmert to acquire “*at least* [3.1] AF of water prior to March 1 each year for delivery to the Boise Project Board of Control for use within its member irrigation districts for irrigation purposes” (emphasis added) is not adequate to ensure “losses of water to” the Boise Project due to Emmert’s ground water pumping will be mitigated. As the hearing officer determined, “it would require more than 3.1 acre feet of rented water to convey the 3.1 acre feet of water to Lake Lowell” should Emmert seek to mitigate by delivering rented water through the New York canal to Lake Lowell. *Amended Order* at 11-12.

Emmert asserts there is sufficient information in the record “to determine conveyance loss of mitigation water.” *Exceptions* at 5. In support of this argument, Emmert points to the discussion in Schmidt’s report regarding “canal conveyance losses” and “a 37% loss for the Mora Canal.” *Id.* at 6. But this discussion pertains to seepage from the Mora Canal “during the period 1967 to 1997.” Ex. 110 at 13. Schmidt’s report goes on to state that canal losses have increased from the Mora Canal by the mid-1980s. *Id.* at 14. Further, Mora Canal seepage losses do not establish a basis for calculating conveyance losses for water delivered from the Boise River to Lake Lowell through the New York Canal. 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.” *Amended Order* at 12.

Emmert asserts 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 asserts 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.* Emmert concludes “these and potential other options for mitigation that do not involve diversions from the Boise River” demonstrate the hearing officer erred when he rejected Emmert’s applications “on the basis that Emmert did not prove how much water would be lost in conveying rental water from the Boise River to Lake Lowell.” *Id.* Emmert asserts this discussion “if nothing else, makes clear that the Department should not assess the adequacy of any particular mitigation proposal at this point in time” because it is “premature.” *Id.* at 7.

While Emmert testified at the hearing regarding his practice of “internally” renting water “within the Boise Kuna Irrigation District,” the record does not contain any information quantifying the amount of water Emmert rents pursuant to this practice or the amount of water Emmert could rent pursuant to this practice on a yearly basis. The record also does not contain any information demonstrating that Emmert has actually rented a ground water right from the Water Supply Bank or purchased a ground water right and dedicated it to mitigation. Accordingly, Emmert’s assertion that 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” in order to offset losses to the Boise Project is based upon speculation. 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. Rule 45 only allows the Department to approve applications that would otherwise be rejected for “injury to another water right” if conditions can be imposed “which will mitigate losses of water to the holder of an existing water right.” IDAPA 37.03.08.045.01.a.iv. The Director rejects Emmert’s assertion that it is “premature” for the Department to “assess the adequacy of” his mitigation proposals at this time.

The only mitigation proposal Emmert presented to the hearing officer was to “mitigate impacts of his ground water pumping on Lake Lowell by ‘foregoing delivery of equivalent volume of surface water.’” *Amended Order* at 11. The hearing officer rejected this proposed mitigation, concluding “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.*

Emmert asserts that, while he would “have to pump more water to make up for the foregone surface water,” this mitigation option should not be eliminated because “the math here quickly goes effectively to zero.” *Exceptions* at 4. Emmert suggests he could simply forego delivery of “3.15 AF to make the Boise Project whole.” *Id.* But as Emmert acknowledges, this mitigation option never completely offsets losses of water to the Boise Project caused by Emmert’s proposed ground water pumping. Further, the Director agrees 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.

Emmert has not met 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. Accordingly, the Department properly rejected Emmert’s applications. *See* IDAPA 37.03.08.045.01.a.iv.

ORDER

IT IS HEREBY ORDERED that the Second Petition to Intervene is DENIED.

IT IS FURTHER ORDERED that the hearing officer's Amended Order rejecting the Applications is AFFIRMED.

DATED this 27th day of October 2017.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of October 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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EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) The petition for reconsideration is disposed of; or
 - (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.