

John M. Marshall  
John Marshall Law PLLC  
575 W Bannock St  
Boise, Idaho 83702  
Telephone: 208-991-2701  
Email: [john@jmarshalllaw.com](mailto:john@jmarshalllaw.com)

RECEIVED

AUG 03 2017

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 EXCEPTIONS TO AMENDED  
PRELIMINARY ORDER**

Applicant Chris Emmert ("Emmert") files these exceptions to the *Amended Preliminary Order Rejecting Applications for Permit* (the "*Amended Order*") asking the Director to either: 1) restore the original *Preliminary Order Approving Applications for Permit* (the "*Original Order*"), which approves the applications subject to a mitigation requirement; or 2) revise the *Amended Order* to approve Applicant's permit applications without any mitigation requirement.

**I. If mitigation the Director finds and injury to existing rights, he should approve Emmert's permits on condition that he provide mitigation.**

Emmert steadfastly believes that the Boise Project will not suffer any injury on account of his pumping the two permits at issue here, and, as a consequence, that his permits should not require any mitigation. We address the reasons why in part two of this memorandum. However, in this portion of the memorandum we address what a mitigation requirement should look like if the Director determines there is any injury. More specifically, we ask the Director to reinstate the *Original Order*, which imposes a mitigation condition that requires Emmert to produce 3.1 AF annually to replace the water the Hearing Officer concluded would seep from Lake Lowell as a result of Emmert's pumping. That mitigation requirement is fine, so long as one determines mitigation is necessary, because it appropriately leaves open the options for how to meet the

mitigation requirement. For reasons unclear, the Hearing Officer lost sight of this in the *Amended Order* and made several mistaken conclusions about how mitigation will be achieved. The Director can readily correct these errors by reverting to the mitigation condition in the *Original Order*.

**A. If mitigation is required, the mitigation condition in the *Original Order* is appropriate.**

The *Original Order* approves Emmert's two permit applications with the following condition no. 12:

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 1.8 AF [and 1.3 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.

*Original Order* at p. 12 and 14. This condition is a derivate of Conclusion of Law no. 6 in the *Original Order*, which addresses the mitigation option in Rule 45.01.a.iv (IDAPA 37.03.08.045.01.a.iv). *Original Order* at p. 8. Adopting the Boise Project's own suggestion for the types of acceptable mitigation (see Conclusion of Law no. 6), the Hearing Officer identifies rentals from the Rental Pool or the Water Supply Bank as viable mitigation options, but leaves open other options, so long as the water is "lawfully acquire[d]." *Id.* The condition further provides that the mitigation water must be made available "for delivery to the Boise Project Board of Control for use within its member irrigation districts for irrigation purposes." *Id.* This requirement is consistent with Conclusion of Law no. 3, which adopts the Boise Project's

testimony concerning injury, which is based on the assertion that “the Boise Project does not have sufficient supply of surface water to meet the needs of irrigators it supplies every year.” *Original Order* at p. 7. Notably, the alleged injury by the Boise Project, and, accordingly, the injury found by the Hearing Officer, is not based specifically on the reduced amount of water in Lake Lowell, but rather on the general reduction of irrigation water available in the Boise Project’s system as a whole. Consequently, the mitigation Condition no. 12 appropriately requires 3.1 AF of replacement water to the Boise Project’s system, which is then available for delivery to Boise Project users. In these ways, Condition no. 12 is a reasonable and appropriate mitigation condition in the event the Director determines mitigation is necessary to remedy an injury to existing rights.

**B. The *Amended Order* errantly concludes that the permit applications should be denied because Emmert did not prove how much mitigation water would be lost to conveyance.**

Despite the logical reasoning in the *Original Order* that leads to Condition no. 12, the Hearing Officer, on his own volition, without any prompting by the Boise Project, took a major sidestep in the *Amended Order* and decided the applications should be denied because, in his view, Emmert did not prove how much conveyance loss would occur between the Boise River and Lake Lowell, and therefore the Hearing Officer could not determine how much mitigation water is necessary to convey 3.1 AF to Lake Lowell. *Amended Order* at p. 12. In reaching this conclusion, the Hearing Officer lost the proper perspective on mitigation that guided his decision in the *Original Order* and made a number of errors that lead to the flawed conclusion in the *Amended Order* that the permits should be denied.

**1. The *Amended Order* errantly concludes that surface water rented from the Rental Pool or Water Bank is the only form of available mitigation.**

First, the Hearing Officer erred by presupposing that the only form of mitigation available is Boise River water, presumably from the Rental Pool or Water Bank, that would be diverted at

the New York canal. In making this prejudgment, the Hearing Officer diverted from the language in the original Condition no. 12 that appropriately left open the options for acquiring mitigation water. There are, in fact, numerous mitigation options available. For one, as the Hearing Officer correctly notes in Conclusion of Law no. 6, Emmert “already sometimes rents a water supply to augment the surface water he receives from the Boise Project.” *Original Order* at p. 8. This is true, and as he testified at hearing, his rentals are made internally within the Boise Kuna Irrigation District, not from the Rental Pool or Water Bank. Consequently, he rents water locally, in the Dry Lake area, and this same rental process is available for mitigation here. In this mitigation scenario, the Hearing Officer’s concern about conveyance losses from the Boise River is not applicable.

The Director should also take the opportunity here to correct the error in the *Original Order* that concludes Emmert cannot forego his own deliveries from the Boise Project as a means of mitigation. The Hearing Officer made this conclusion on the basis that in doing so, Emmert would then have to pump more water to make up for the forgone surface water. Although true, this is no reason to eliminate it as a form of mitigation. Based on the conclusion that 1.3% of Emmert’s pumping causes injury, it follows that in addition to foregoing 3.1 AF of surface water delivery, Emmert would also need release the amount that is 1.3% of the 3.1 AF. And yes, that amount would need to be pumped, so 1.3% of the 1.3% would also need to be released to the Boise Project canal, but the math here quickly goes effectively to zero (1.3% of 3.1 is 0.04, 1.3% of 0.04 is 0.0005) . Instead of foregoing 3.1 AF, Emmert would forego 3.15 AF to make the Boise Project whole.

Additionally, another viable mitigation option, and one Emmert has actively investigated, is either renting a ground water right from the Water Bank or purchasing one and dedicating it to mitigation. In either of those scenarios, conveyance loss is a non-issue, and any effects of

Emmert's pumping would be offset by cessation of a nearby groundwater right. Given these and potential other options for mitigation that do not involve diversions from the Boise River, the Hearing Officer erred when he amended the *Original Order* 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. The Hearing Officer unnecessarily and prematurely jumped to a conclusion based on far too narrow a view of mitigation options.

**2. The Amended Order errantly requires delivery of mitigation water to Lake Lowell.**

In addition to focusing on conveyance loss, the Hearing Officer also erred in the *Amended Order* when he concluded that mitigation water needs to be delivered to Lake Lowell. As discussed above, the injury to be mitigated here is a reduction of 3.1 AF of irrigation water the Boise Project would deliver to irrigators served by the Boise Project system. Although the location of the impact of Emmert's pumping shows up at Lake Lowell, the Boise Project's alleged injury is not the reduction of water in the Lake, but rather the general impairment of its ability to convey irrigation water to its patrons. As stated by the Boise Project in the opening paragraph of its *Post-Hearing Closing Argument*: "granting the permits requested by Applicant will injure the Boise Project Board of Control's water rights, and interfere with its ability to deliver water to land owners in the irrigation districts served in the vicinity of Lake Lowell." The Hearing Officer adopted the Boise Project's position regarding its injury in his Conclusion of Law No. 6. *Amended Order* at p. 10. Accordingly, the Hearing Officer had it right in the *Original Order* when he required mitigation simply by making irrigation water available within the Boise Project system for delivery to Boise Project irrigators. The new focus on conveying water to Lake Lowell is not supported by the record.

**3. The record includes sufficient facts to determine conveyance loss of mitigation water.**

Even if the Director were to adopt the new mitigation paradigm in the *Amended Order* that requires extra mitigation for conveyance losses, he should still reverse the *Amended Order* because the Hearing Officer erred in concluding the record does not include sufficient information to determine that loss.

First, a little perspective. The SPF model runs relied upon by the Hearing Officer to determine the 3.1 AF mitigation requirement assume all of the water pumped by Emmert will be consumed even though the modeled assumes a 50% irrigation efficiency. Exhibit 1 (*SPF Report*), p. 23, ¶ 8. This is extremely conservative and, as explained by SPF, overestimates how much water Emmert will pump and also overestimates the modeled impact of the pumping because no credit is given for the 50% return flows. *Id.* Accordingly, the modeled 3.1 AF of impact the Hearing Officer relies on to determine injury already has a significant measure of leeway built in—50% actually—to cover for any conveyance losses incurred in moving any acquired surface water through the system.

In addition, the record includes the very information about the magnitude of conveyance losses the Hearing Officer deems fatal to Emmert's applications. Of course, for all the reasons addressed above, the Director should not add any conveyance loss requirement, but if the Director were to insist that Emmert mitigate with surface water, that he prove the amount of conveyance losses would occur, and that his return flows should not be accounted for, the record still includes the necessary data. R.D. Schmidt's report discusses canal conveyance losses and reports a 37% loss for the Mora Canal, the primary canal at issue in this case and the one held out by the Boise Project as representative of its alleged problems.<sup>1</sup> *Exhibit 110* at p. 13. So, if the Director

---

<sup>1</sup> We recall additional testimony from either Mr. Page and/or Mr. Schmidt concerning conveyance losses for Project canals. If necessary, the audio transcript can be reviewed to glean additional conveyance loss testimony.

determines a conveyance loss factor must be included, the record supports a 37% conveyance loss factor. And as discussed above, there is already a 50% cushion built into the SPF analysis of impact that more than covers for this loss.

Based on all the above, it should be clear that if mitigation is required, the Hearing Officer had it right in his *Original Order* in imposing Condition of Approval no. 12 requiring the future acquisition of replacement water as a condition to pumping under the permit applications. If the Director is persuaded that mitigation is required, then he should revise the *Amended Order* to approve the permits and adopt Condition No. 12 from the *Original Order*.

**B. The *Amended Order* errantly prejudices the form and sufficiency of conveyance loss, both of which should be addressed in the future.**

The discussion above, if nothing else, makes clear that the Department should not assess the adequacy of any particular mitigation proposal at this point in time. It is premature. The *Original Order* imposes the specific mitigation requirement of replacing 3.1 AF as a condition of approval, but correctly does not dictate the method of acquiring the mitigation water. Condition no. 12 in the *Original Order* also appropriately requires Emmert to notify the Boise Project of his proposed mitigation. In that way, the Boise Project has the opportunity to contest the mitigation if Emmert's future proposal would short the Boise Project, including because of conveyance loss. The conditions of approval nos. 10 and 11 also require monitoring and reporting to the Department, making it impossible for Emmert to end run the mitigation requirement. *Original Order at p. 12*. These conditions strike the appropriate balance between protecting existing rights while allowing new appropriations of available ground water in a prolific aquifer. The conditions are an entirely appropriate exercise of the Director's authority under Idaho Code § 42-203A and Rule 45, both of which expressly give the Director flexibility to strike this balance.

Accepting the conclusion in the *Amended Order* that would require an applicant to bear the burden of proving the specifics of mitigation—particularly in a situation like the one here where the groundwater resource is open for appropriation and the Department has not imposed mitigation in prior groundwater rights—would set the undesirable precedent of saddling applicants with a nearly impossible burden that would require them to guess prior to hearing a) whether the Hearing Officer will find injury; b) the extent of that injury; and c) the type of mitigation the hearing officer might find acceptable. Such a requirement not only would unfairly burden applicants, it would unnecessarily restrict the Department’s flexibility to maximize the appropriation and use of Idaho’s water resources by establishing a rule that the Director can only impose mitigation conditions that are proposed by an applicant. Such a rule would be contrary to the Director’s authority in Idaho Code § 42-203A(5) to “grant a permit upon conditions.” We could see how a requirement to presuppose injury and the particulars of mitigation could be inferred in a fully appropriated basin closed to new appropriations, but in case such as this, where the Department has specifically determined that a basin is open for appropriation, as it has here with Amended Processing Order No. 59, *Exhibit 3*, it is not reasonable to require an applicant to concede up front that injury exists, guess as to what the Hearing Officer will determine the extent of the injury is, and then choose a mitigation strategy without the benefit of knowing what he is mitigating for. Accordingly, the general mitigation condition that was stated in Condition no. 12 in the *Original Order* is the sensible way to address mitigation.

**C. If the Director believes more information about mitigation is needed, he should remand for further evidentiary proceedings.**

If the Director is unpersuaded by the arguments above, and believes that calculation of conveyance losses for a potential type of mitigation is required at this stage, and that the record does not include sufficient information to do this, then the appropriate thing to do at this stage is

remand for further evidentiary proceedings. Of course, the Director is authorized to do this under Rule 730.02.d (IDAPA 37.01.01.730). The alternative, which is that Emmert start over with new applications, would require the applicant to repeat the application and hearing process that he, the protestant and the Department already have been through. Requiring a repetition of the same proceedings would needlessly waste the time, resources and money of all involved.

In summary, with regard to the conclusion in the *Amended Order* that Emmert's applications should be denied because he did not prove conveyance losses for mitigation water rented from the Boise River through the Water Bank or Rental Pool, the Director, if he concludes that mitigation is even necessary, should reverse the denial because: 1) mitigation options exist that do not require conveyance; 2) the Director has independent authority to approve permits on conditions he deems appropriate; and 3) he can remand now for further proceedings if deemed necessary to develop additional facts about mitigation. Consequently, Emmert asks the Director to reverse the *Amended Order*, grant the permit applications, and, if any injury is found, restore Condition no. 12 from the *Original Order*.

## **II. Mitigation should not be required because there is no injury to the Boise Project's Water Rights.**

The Hearing Officer's imposition of mitigation in the *Original Order*, and his denial of the permits in the *Amended Order*, are premised on the conclusions that Emmert's pumping will induce seepage from Lake Lowell and that this induced seepage counts as an injury to the Boise Project's senior rights. Both conclusions are in error. The record includes abundant facts showing that Lake Lowell on net is recharged by the aquifer and, in any event, even if there is seepage from the Lake, the Boise Project is not entitled to protection against seepage from a leaky, offstream reservoir. Because of this, the Director should reverse and revise the *Amended Order* to remove any mitigation requirement.

**A. Emmert does not concede that his pumping will induce seepage from Lake Lowell.**

When this case began, it was only about alleged induced leakage from Lake Lowell, and Emmert elected not to contest the point. After all, he is just a small farmer and he did not have any desire to be the test case over whether: 1) Lake Lowell actually leaks and, 2) if so, whether ground water appropriators are legally responsible to mitigate this leakage. Accordingly, he hired SPF to run a simulation using the best available theoretical tool—the TVHP model—and offered mitigation to the Boise Project in an amount equal to the simulated withdrawals from Lake Lowell. Boise Project refused to accept the offered mitigation and so the case moved forward, with a hearing set to debate the details of the SPF analysis. Then, as the hearing date approached, Boise Project—using questionable procedural tactics—fundamentally changed the nature of this case from being about whether SPF correctly estimated leakage from Lake Lowell to the broader issue of whether ground water appropriators are on the hook to mitigate for seepage from any leaking delivery facility. The Boise Project supported their theory with a previously undisclosed theoretical model prepared by R.D. Schmidt. Suddenly, Emmert’s little case about theoretical impacts of his supplemental ground water pumping on Lake Lowell became the mechanism by which the Boise Project attempts to open an entirely new theory of injury to senior rights.

Emmert responded in two ways. First, he hired SPF to criticize the Boise Project’s newly disclosed model. Second, he argued that as a matter of fact and law, that Boise Project is not entitled to legal protection against leakage from its facilities, including Lake Lowell. However, given the procedural posture of the case, where Emmert originally opened by proposing mitigation in response to the original protest that focused only on concern about Lake Lowell, the Hearing Officer may have believed that Emmert concedes the point that leakage from Lake Lowell should be mitigated. But as discussed below, that is not the case.

**B. The Boise Project's position is contrary to the conservation of water resources, the maximum use doctrine and the requirement of full economic development of ground water resources.**

The Boise Project's position in this case rests on the theory that new groundwater development cannot be allowed in any aquifer where the top surface of that aquifer intersects with the bottom of an offstream reservoir (or other delivery facility). According to the Boise Project, when that occurs, water is no longer simply cascading out of the reservoir, but being induced to seep by a change in head pressure caused by groundwater pumping. *Exhibit 110*, pages 2-3. The Boise Project concedes that if the top surface of the aquifer is below the bottom of the reservoir, and water is simply flowing down into the aquifer, then there is no injury, and ground water pumping would be allowed. *Id.* However, according to the theory, injury where there is "induced seepage" because of the hydraulic connection. Neither fact nor law supports the Boise Project's theory.

At the outset, note the irrationality of the Boise Project's theory on the practical level. The theory, in essence, is that the Boise Project is entitled to protection from seepage losses in areas where the leakage has been so prolific that it has raised the groundwater table to near the ground surface. In other words, when a reservoir is first built, it will cascade leaking water into the ground, which will eventually make it into an aquifer. No injury. Over time, if the reservoir is leaky enough, the water table may rise to meet the bottom of the reservoir. If that occurs, then as reward for wasting water out of facilities that are so leaky that they raise water table to the surface, the owner is entitled to protection. Such a policy is contrary to the foundational obligation in Idaho's prior appropriation doctrine that requires "the maximum use and benefit, and least wasteful use, of [Idaho's] water resources." *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960).

One of the specific example of this policy is *Application Processing Memo No. 76*, which imposes stringent requirements on the amount of water that may be allowed to leak from the bottom of reservoirs for new storage applications. The same policy that drives the existence of this Processing Memo should be used here to reject the Boise Project's theory that would encourage leaky facilities.

Another specific example of the maximum use requirement is the statutory authorization given to the Director to determine a reasonable pumping level in an aquifer so that an owner of a shallow well is not able to command the full aquifer by arguing later appropriators have injured his right by lowering the water table below the level at which he established his right. *See Idaho Code §§ 42-226 and 42-237a; Baker v. Ore-Ida Foods, Inc.*, 513 P.2d 627 (Idaho 1973). If the Protestant has its way, the Department effectively would be setting the reasonable pumping level for the regional aquifer surrounding Lake Lowell at a level near the ground surface. Again, this would be completely contrary to the maximum use requirement.

Protestant's position is akin to the claim made in *Shodde v. Twin Falls Land & Water Co.*, 22 U.S. 107 (1912), where a senior right holder sought to block operation of Milner dam to continue his prior use of current-driven water wheels to deliver water to his irrigation system. The court, of course, declined to protect the prior appropriator who claimed the whole flow of the river to support use of only a small portion of that flow, giving rise to the reasonableness limitation that now permeates Idaho water law. Here the Protestant, like the senior appropriator in *Shodde*, seeks to curtail further appropriation in a vast water resource, in this case the regional aquifer in the Treasure Valley, from which additional water is undisputedly available for appropriation, on the basis that Protestant is entitled to have the hydraulic pressure of the aquifer support its surface deliveries. This position is no more reasonable than the claim that by *Shodde* that he was entitled to maintenance of the current in the Snake River to turn his water wheels.

All of the above leads to the conclusion that the law does not support the Boise Project's theory that it is protected from "induced seepage." If its offstream reservoir leaks into a State-owned resource available for appropriation, so be it. It is the owner's responsibility to stop the leakage if that is its desire, not the responsibility of groundwater users.

**C. The evidence in the record suggests that Lake Lowell is not losing water because of ground water pumping.**

The maximum use requirement is not the only reason the Director should reject any mitigation requirement. The facts also point to a conclusion that the Boise Project is not suffering any injury. The water budget data in the record bears this out. R.D. Schmidt, Protestant's expert, describes the water budget in a report titled *Analysis of Hydrologic Impacts of New Groundwater Pumping in the Dry Lake Area of Canyon County, Idaho*, included in the record as Exhibit 113.

Here are the pertinent facts:

- Canal seepage recharges the aquifer with about 588,000 AF per year. *Id.* p 11.
- Recharge from on farm losses recharges the aquifer with about 677,000 AF per year. *Id.*
- So, between incidental recharge from farming and canal seepage, 1,265,000 AF are added to the aquifer annually.
- About 578,000 AF is discharged annually from the aquifer to drains. *Id.*
- Groundwater pumping accounts for about 125,000 of annual withdrawal from the aquifer. *Id.* p. 11.
- **During an average year, Lake Lowell gains 3,752 AF per year from the aquifer.** *Id.* p. 13; *see also* Exhibit 110, page 20.
- Although not addressed directly, the balance of approximately 558,248 AF of the 1,265,000 AF added to the aquifer is discharged directly from the aquifer to the Boise and Snake Rivers. *See e.g. Id.* p 17 and 18.

Several facts stand out. First, Mr. Emmert seeks to withdraw an average annual volume of 265 AF from an aquifer that receives over 1.2 million AF a year from incidental recharge. This same

aquifer discharges around 1 million AF annually into the Boise and Snake Rivers through surface drains and recharge. Almost all of this water flows out of Idaho and into Oregon. Second, Lake Lowell on average gains water from the aquifer. Consequently, Mr. Schmidt's budget shows that the allegation of induced seepage is not true. If anything, Mr. Emmert's pumping may reduce the amount of groundwater flowing into Lake Lowell, and that by an immeasurable amount, but as the Hearing Officer correctly ruled, the Boise Project is not entitled to maintenance of groundwater inflows into the reservoir.

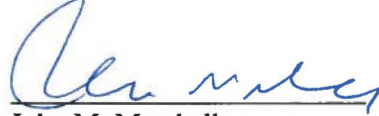
All this goes to show that there simply is no factual basis on which to conclude that groundwater pumping is inducing leakage out of Lake Lowell. As a consequence, the allegation of injury by the Boise Project is incorrect, and the Director should approve Emmert's applications without any mitigation requirement.

#### CONCLUSION

Based on all the above, Emmert requests that the Director approve his permit applications without any mitigation requirement. In the alternative, he requests approval of the applications with imposition of the Condition no. 12 from the *Original Order*.

Dated this 3rd day of August, 2017.

JOHN MARSHALL LAW PLLC



John M. Marshall

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of August, 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.

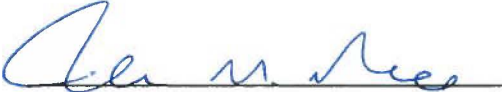
Shelley M Davis  
Barker Rosholt & Simpson LLP  
1010 W. Jefferson St Ste 102  
PO Box 2139  
Boise, ID 83701-2139

☒ U.S. Mail  
☐ Overnight Mail  
☐ Hand Delivery  
☐ Fax  
☐ Email

Courtesy copy sent to the Municipal Coalition as follows:

Christopher H. Meyer  
Givens Pursley LLP  
601 W. Bannock St.  
Boise, ID 83702

☐ U.S. Mail  
☐ Overnight Mail  
☐ Hand Delivery  
☐ Fax  
☒ Email

  
John M. Marshall