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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 RESPONSE TO
	)	APPLICANT'S EXCEPTIONS TO
	)	AMENDED PRELIMINARY ORDER
	)	

COMES NOW, the Protestant Boise Project Board of Control, through its counsel of record, the law firm Barker Rosholt & Simpson LLP, and hereby responds in opposition to the argument advanced by the Applicant, Emmert, in his Exceptions to Amended Preliminary Order. This Response is made in conformance with Department Rule 720.c. While the Hearing Officer granted the Petition for Reconsideration on matters not raised by the Boise Project Board of Control ("Boise Project") in its Petition for Reconsideration, the determination to reject the applications without prejudice was well reasoned and supported by the Department's rules and the law of Idaho.

ARGUMENT

I. Injury to the Boise Project's Water Rights in Lake Lowell is Undisputed as Both the Applicant's and Boise Project's Experts Found the Same Injury to the Lake:

Pursuant to Idaho Code § 42-203A(5) where the application “will reduce the quantity of water under existing water rights...the director of the department of water resources may reject such application and refuse issuance of a permit therefor[.]” The evidence established at hearing determined that the proposed groundwater pumping by the Applicant will reduce the quantity of water under existing water rights. Here, both SPF on behalf of the Applicant, and Mr. Schmidt on behalf of the Boise Project, modeled impacts to Lake Lowell which demonstrated that between 2.1 and 2.6% of the depletion from the new pumping of the two wells would be felt in Lake Lowell. Ex. 1, p. 23, Ex. 110, p. 26. While on the stand, Mr. Petrich was reluctant to admit that this equates with injury, he did admit that it would “impact” Lake Lowell. Petrich testimony.

Where a new water right will reduce the quantity of water available to existing water rights, such a permit may be rejected. I.C. § 42-203A(5). Here, the Hearing Officer properly granted the Petition for Reconsideration and rejected the applications because the Applicant failed to meet his burden of proof concerning the mitigation available to ameliorate the injury to the Boise Project Board of Control’s water rights in Lake Lowell, which are delivered through the New York Canal, and not from any other source. For this reason, it was necessary and appropriate that the Hearing Officer amended condition no. 12 in the two rejected rights to require that the water be supplied from either the Rental Pool or the Water Supply Bank, since those are the two sources of water that can be diverted and delivered into the New York canal. As both experts agree that there will be a reduction in the water available to be provided to the irrigation districts downstream from Lake Lowell, the issue of injury is not in question.

II. Lake Lowell Levels Have Steadily Declined for Decades, and Additional Losses

Cannot be Tolerated:

During his rebuttal testimony at hearing, Dr. Petrich raised some issues that he asserted cast doubt on some of the findings of Mr. Schmidt's report regarding the impact that groundwater pumping has had on the Boise Project's irrigation delivery facilities. Primarily, Dr. Petrich alleged that groundwater pumping has not resulted in an increase of 40,000 AF/yr loss from the Mora Canal, and alleged that the causal correlation between increased canal losses and groundwater pumping could not be borne out. In his earlier testimony and in his report, however, Mr. Schmidt made clear that the 30 year period of study between 1967 and 1997, during the period after 1977 when groundwater pumping increased substantially in the Lake Lowell vicinity, losses from the Mora Canal increased dramatically. Ex. 110, pp. 13-15. He testified that the Boise Project Board of Control had made no changes in the canal system that would have created such an impact, and further that a 1956 USGS report on groundwater hydrology indicates a small highly permeable zone of Terrace Gravels resulting in high seepage loss and elevated groundwater levels near Richard's Point along the southern boundary of Lake Lowell. When groundwater pumping increased in 1977, groundwater levels in this area declined and Mora Canal segments gradually became percolating, resulting in increased canal seepage. Gflow model results indicate that a small portion of the Mora Canal remains in contact with the ground water in this area and is head dependent. These are losses that Mr. Tim Page, manager of the Boise Project Board of Control, testified that the Project cannot afford.

Whatever condition of Lake Lowell and the canals that the Applicant complains of as "leaky" or inefficient, does not shift the burden of proof regarding injury to the Boise Project. The undisputed record demonstrates that the two new wells will cause injury to Lake Lowell. Frankly, despite the Hearing Officer's rejection of the opinions of Mr. Schmidt, the Boise Project believes that the injury to its ability to deliver water to the 50,000 acres of irrigation districts

served by Lake Lowell is much greater. Unlike the Scanlan and Petrich report, Mr. Schmidt also modeled the total volume of groundwater pumping that is sought through application nos. 63-34079 and 63-34080. Mr. Schmidt's modeling results predict that if the entire application amounts were pumped, 668 AF, it would result in additional induced seepage from the Mora, Deer Flat Highline and New York canals amounting to a loss of 126.58 AF. Ex. 110, p. 31. Even at the amount modeled in the Petrich/Scanlan report of 235 AF, the three canals would experience a loss through induced seepage of 44.5 AF. *Id.*, p. 32.

What is striking about the Hearing Officer's rejection of Mr. Schmidt's conclusions concerning impact to the canals, is that the SPF report produced for the Applicant found that the majority of the impact from pumping the new wells will be felt in drains, but failed to model any impact on the canals. How is it possible that the drains are in direct hydraulic connection with the shallow groundwater aquifer, but impossible that the reaches of the canals that Mr. Schmidt modeled are in not in direct hydraulic connection? In the SPF report, the experts "arbitrarily" determined to model an average annual pumping rate of 235 AF. Ex. no. 1. Based on the model results, the predicted injury to Lake Lowell is estimated to be 6.1 AF per year. *Id.* p. 23. However, the vast majority of the injury predicted by the model is to the drains in the vicinity of Lake Lowell. The impact to the drains is predicted to be 69.5% percent of the losses induced by the groundwater pumping proposed under the two applications. *Id.*, p. 21-22. The TVHP model is a steady-state model and was unable to model the impacts to the canals in the vicinity of Lake Lowell.

Mr. Schmidt's model, which employed the analytic elements model, which he had previously used in his 2003 report titled "Analysis of Hydrologic Impacts of New Groundwater Pumping in the Dry Lake Area of Canyon County, Idaho," is capable of modeling the effects of

the new well pumping on those reaches of canals and drains that are in direct hydraulic connection with the shallow groundwater table. Ex. 112. His model predicted that 26.5% of the groundwater pumping would be felt by the connected canal reaches, and 36.6% of the new pumping would be felt in the drains. Ex. 100, p. 26. The combination of those two impacts, from the two different sources, equate to 63.1%, a number remarkably close to the amount of impact that SPF predicted would only be affected by the drains. 19% of the impacts to the canals is predicted in the Mora, Deer Flat Highline, and New York canals, the primary delivery canals for the downstream acres served by the Boise Project. Only Boise River water can be diverted into the New York canal for delivery to Lake Lowell.

III. The Hearing Officer Was Correct When he Determined that the Mitigation Emmert Initially Proposed was Not Sufficient:

The Applicant now raises again its original proposal for mitigation, which is to forgo diversion of 3.1 AF of surface water delivery in each year. Foregoing the surface water supply would simply result in additional groundwater pumping to meet Applicant's 4 A/F acre he claims he needs to irrigate his seed crop. Increased groundwater pumping would simply mean increased losses to Lake Lowell and the canals. The Hearing Officer was correct when he stated at Conclusion of Law 6 that "because surface water seeps and evaporates from Lake Lowell, foregoing delivery of an acre foot does not mean that an acre foot of water will remain in Lake Lowell and be available for to others for use." *Order Granting Petition for Reconsideration*, FOF 6. Additionally, he found "mitigating by reducing the surface water deliveries to Emmert will entice him to divert more ground water to make up the difference, which will increase mitigation required, ad infinitum." *Id.* Emmert's zero sum math does not add up in the context of this analysis.

IV. The Record Does Not Contain Sufficient Information to Calculate Conveyance Loss from the Head of the New York Canal to Lake Lowell:

Applicant takes the position that there is sufficient information in the record to make the necessary conveyance loss determination by relying on Mr. Schmidt's report. Ex. 110, p. 13. A review of the information that Applicant relies upon reveals that the analysis regarding an approximately 37% loss from the Mora canal is related to Mr. Schmidt's model results demonstrating that between the years 1967 and 1997 "about 37 percent of the total annual diversion to the Mora Canal, seeped from the canal somewhere along its 38 mile length." *Id.* His analysis thereafter goes on to find "that increased Mora canal seepage is associated with increased groundwater pumping in the South Lake Lowell area[.]" and that "[c]anal losses increase significantly in 1979 and 1981, and remain generally at a higher level from then on." *Id.* at 13 and 14. The approximately 37% canal seepage loss between 1967 and 1997 in the Mora Canal, which has since increased significantly as the result of increased groundwater pumping in the south Lake Lowell area, does not provide an appropriate conveyance loss calculation for water delivered from the Boise River to Lake Lowell through the New York canal. It doesn't even accurately represent the current 2017 conveyance loss to the Mora Canal which has increased significantly since 1977.

Additionally, Applicant improperly suggests that determining the mitigation amount necessary to mitigate the injury to the Boise Project's Lake Lowell water rights should be determined sometime in the future, and not at the time any permit might issue for the Emmert applications. The Hearing Officer properly rejected the rights because injury is undisputed and the amount of the required mitigation has not been sufficiently proven. I.C. 42-203A(5).

V. The Boise Project's Protest to the Emmert Applications is not Contrary to the Conservation of Water nor Does it Implicate the Maximum Use Doctrine:

The Boise Project Board of Control and its member irrigation districts have built and maintained the infrastructure that supplies irrigation water to the vast majority of the irrigated acres in the Treasure Valley. They have an obligation to protect the water rights that allow them to make those deliveries. In this action, injury is undisputed on the record before the hearing officer, despite the Applicant's now contrary protestations. In addition to Emmert's applications, there are pending applications in the South Lake Lowell vicinity that if granted would total over 130 cfs of new groundwater pumping. Since the Boise Project serves approximately 50,000 irrigated acres from Lake Lowell, its efforts to protect its irrigation district water rights in that water is necessary and is not contrary to the conservation of water. In fact conserving its water from depletion by new groundwater pumping is what this case is about.

As we have stated, "*Any interference with a vested right to the use of water, whether from open streams, lakes, ponds, percolating or subterranean water, would entitle the party injured to damages, and injunction would issue perpetually restraining any such interference.*" Bower, 27 Idaho at 181, 147 P. at 502. (emphasis added). The district court did not err in holding that there was substantial evidence supporting the finding of material injury to the Spring Users' water rights.

Clear Spring Foods, Inc. v. Spackman, 150 Idaho 790, 811, 252 P.3d 71, 92 (2011).

Furthermore, at hearing on these applications, no evidence was submitted that the Boise Project employs unreasonable diversion methods, or that their delivery systems waste water. Nor was there any evidence or argument to the hearing officer that would implicate the maximum use doctrine. Here the Boise Project protested two new water rights which, if granted, will injure the Boise Project's water rights in Lake Lowell by *inducing additional seepage losses* from Lake Lowell and its delivery canals. This determination does not have the potential to "curtail further

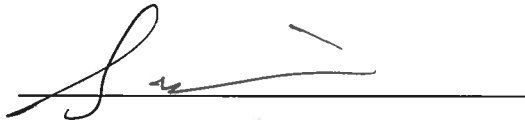
appropriation of a vast water resource.” It has the potential to put new water right applicants to their proof that they will not injure the Boise Project’s vested water rights in Lake Lowell and its delivery canals. There is no evidence in the record before the Director that the Boise Project employs unreasonable diversion methods, conveyance efficiencies, or conservation practices. Therefore, this newly raised legal theory is not properly before the Director.

CONCLUSION

For the foregoing reasons, the Director should affirm the Hearing Officer’s Order Granting Petition for Reconsideration; Amended Preliminary Order Rejecting Applications for Permit.

DATED this 11th day of August, 2017.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in black ink, appearing to read 'Shelley M. 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 11th day of August, 2017, I caused to be served a true and correct copy of the foregoing **BOISE PROJECT BOARD OF CONTROL'S RESPONSE TO APPLICANT'S EXCEPTIONS TO AMENDED PRELIMINARY ORDER** by the method indicated below, and addressed to each of the following:

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