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DEPARTMENT OF
WATER RESOURCES

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BEFORE THE STATE OF IDAHO DEPARTMENT OF WATER RESOURCES

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

**APPLICANT'S OPPOSITION TO
RECONSIDERATION**

Applicant Chris Emmert opposes the Boise Project Board of Control's Petition for Reconsideration that asks the Hearing Officer to reconsider his rejection of R.D. Schmidt's analysis concerning the theoretical impact of Mr. Emmert's pumping on canals in the vicinity of Lake Lowell. The rejection of Mr. Schmidt's analysis was the proper conclusion based both on the facts developed in the record and established law in Idaho.

I. The rejection of R.D. Schmidt's analysis is supported by the record.

The hearing in this matter featured competing analyses from applicant Chris Emmert's experts, Scanlan and Petrich, and protestant's expert, R. D. Schmidt. Scanlan and Petrich provided a host of reasons why Mr. Schmidt's analysis and model was not an appropriate tool for assessing the impact of Mr. Emmert's proposed pumping, including the following:

- The seepage losses Mr. Schmidt's model predicts, if induced by groundwater pumping, likely would have coincided with substantial groundwater-level declines in the immediate vicinity of the canal, but these declines do not exist in the historical record.
- The GFlow model constructed by Mr. Schmidt is not an appropriate tool for modeling the impact of the Emmert wells because the model simulates only 2-dimensions, ignoring the vertical groundwater-flow characteristics in the vicinity of the proposed wells; and GFLOW's

identification of "connected reaches" does not distinguish between regional and locally perched aquifers.

- The GFlow model predicts massive, pumping-induced canal losses from specific canal segments the model determines are hydraulically connected to the regional aquifer, but those segments do not show evidence of any hydraulic connection.

On this last point, the Boise Project complains that Terry Scanlan's testimony concerning his lack of any observable connection should have been excluded because Mr. Emmert had never disclosed this as a subject on which Scanlan intended to testify. This is not true. Mr. Emmert's supplemental discovery responses, which the Boise Project attached to its motion for reconsideration, clearly states that Mr. Emmert's experts disagree with Mr. Schmidt's conclusion that the Mora Canal, which was the focus of Mr. Schmidt's analysis, is hydraulically connected to the regional aquifer. The Boise Project unquestionably was on notice that lack of hydraulic connection was an issue.

Moreover, the Boise Project had the opportunity to question Mr. Scanlan about his observations at hearing, and/or to recall Mr. Schmidt to address Mr. Scanlan's observations. The Boise Project chose to do neither. Presumably, this was because earlier in the hearing, Mr. Schmidt unambiguously testified that he never field checked his theoretical results to determine whether the canal segments his model identified as hydraulically connected actually demonstrated any such connection. Any prejudice that occurred because Boise Project presented no evidence to confirm the theoretical analysis of its expert was self-created, not the result of any wrong doing by Mr. Emmert.

The Boise Project's claim that it has been prejudiced in this case is nothing if not ironic. The Hearing Officer will recall the Project filed a motion to continue the hearing set in this matter only a few days before its expert report was due, and over a year after it filed its protest.

The basis for the motion was that the Boise Project could not find a local expert to review Scanlan and Petrich's report that addressed the Project's protest, which asserted injury based on induced seepage from Lake Lowell. However, after the hearing was pushed back, the Boise Project submitted an expert report that completely changed the nature of this case from focusing on Lake Lowell to the Project's delivery canals. At hearing it was clear that Mr. Schmidt's Gflow model for the Dry lake area was not new. It had been around for years. Why the Boise Project waited until the 11th hour to spring Mr. Schmidt, his model, and the new direction of the protest on Mr. Emmert is uncertain. But the effect of causing delay and raising the costs to Mr. Emmert are not. Nor is the effect of discretely adding a major, new, regionally significant issue to this matter with minimal public notice. If anyone suffered prejudice in this matter through manipulation of the hearing process, it was Mr. Emmert, not the Boise Project.

II. The law does not support the Boise Project's contention that canal seepage is a legally protectable interest.

Because the Hearing Officer determined that Mr. Schmidt's model was not an appropriate predictive tool for assessing injury, the Hearing Officer rejected the Boise Project's assertion of injury due to induced canal seepage on this basis alone, without needing to address the legal insufficiency of the Project's position. However, even if the Project had provided factual support for its assertion of canal losses, Mr. Emmert's applications would still be approved because the law does not support the Project's position. As discussed in Mr. Emmert's closing argument brief, the Boise Project is arguing that its canals should be supported by the hydraulic pressure of the aquifer, essentially creating a moratorium and establishing the reasonable pumping level of an aquifer a few feet below ground surface. This position is directly contrary to the established principles of Idaho water law that requires "maximum use and benefit of its water resources" and a reasonable means of diversion. *Mountain Home Irrigation Dist. v.*

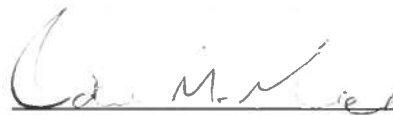
Duffy, 79 Idaho 435, 442 (1957). Mr. Emmert refers the Hearing Officer to its closing argument brief for a more detailed discussion of these principles. Additionally, as also discussed in Mr. Emmert's brief, the Idaho Code § 42-203A(5)(a) standard that states new applications cannot reduce the quantity of water available to senior rights focuses on the seniors' points of diversion, not their delivery systems. In this case there has been no allegation that Mr. Emmert's pumping would reduce the quantity of water in the Boise River at the Project's point of diversion. Accordingly, Mr. Emmert has satisfied § 42-203A, regardless of what the Boise Project can or cannot prove about leakage from its canals.

CONCLUSION

For all the reasons described above, and as further described in Mr. Emmert's prior briefing on closing argument, the Hearing Officer should reject the Boise Project's motion for reconsideration.

Dated this 14th day of July, 2017.

JOHN MARSHALL LAW PLLC

A handwritten signature in dark ink, appearing to read "John M. Marshall", is written over a horizontal line.

John M. Marshall

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of July, 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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