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Shelley M. Davis, ISB #6788
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson St., Ste. 102
P.O. Box 2139
Boise, ID 83701-2139
Telephone: (208) 336-0700
Facsimile: (208) 344-6034

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WATER RESOURCES
WESTERN REGION

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)	
CHRIS EMMERT)	
)	BOISE PROJECT BOARD OF
)	CONTROL'S MEMORANDUM IN
)	OPPOSITION TO APPLICANT'S
)	MOTION FOR RECONSIDERATION

COMES NOW, the Protestant, Boise Project Board of Control, by and through its attorneys of record, Barker Rosholt & Simpson LLP, and hereby submits this Memorandum in Opposition to Applicant's Motion for Reconsideration. Applicant's opposition to the Boise Project Board of Control' Motion for Continuance of Hearing was not received by the Boise Project Board of Control or the Idaho Department of Water Resources within the time allowed pursuant to Rule 565 of the Department's Rules of Procedure (IDAPA 37.01.01.565) and no good cause has been demonstrated that would permit this Hearing Officer to invoke his discretion to disregard Applicant's untimely response.

ARGUMENT

The Department's Rule 565 states specifically "when a motion has been filed, all parties joining in, answering or responding to the motion(s) will have fourteen (14) days from the time of filing of the motion in which to respond." IDAPA 37.01.01.565. The Boise Project Board of Control filed and served its Motion for Continuance of Hearing upon all parties and the Hearing Officer on December 16, 2016. The Boise Project Board of Control did not receive service of the

Applicant's Response in Opposition to the Motion until January 3, 2016, outside of the time for service of the same. Applicant argues that the fault for the untimely service lies with the U.S. Postal Service, however, there are alternative, more direct, means of service that would have been effective and timely as of December 28, 2016, had Applicant chosen to avail himself of such methods. Service via email, facsimile and hand delivery were all available to the Applicant and would have avoided the substantial likelihood that its Response would not be timely made if mailed over a long, holiday weekend. Here, the Boise Project Board of Control did not receive service the Response until the afternoon of Tuesday, January 3, 2017, and the Hearing Officer properly failed to consider it when taking up the Boise Project's Motion for Continuance. It is within the Hearing Officer's discretion whether to grant or deny this motion for reconsideration, but where no good cause has been demonstrated for the untimely service, denial is appropriate. *Campbell v. Reagan*, 144 Idaho 254, 258, 159 P.3d 891, 895 (2007).

The Applicant also argues that this Hearing Officer should now address the merits of the Applicant's Response in Opposition, and therefore, the Boise Project will make a brief response to the substance of the argument. The Boise Project Board of Control demonstrated good cause to continue the hearing. It had substantial trouble finding a qualified hydrologist, familiar with the Lake Lowell hydrology, who also did not have a pre-existing conflict with representation. Since submitting its Motion for Continuance, the Boise Project has engaged the services of such a hydrologist, and made timely supplemental discovery responses to Applicant demonstrating the same. There is no impermissible attempt to delay the proceedings, and the six to eight week continuance granted by this Hearing Officer will allow the Boise Project to be properly prepared for hearing.

Applicant argues that the Boise Project has had five years to prepare for the hearing in his matter. This is incorrect. When the first of its protests to new Lake Lowell groundwater applications began to be filed in 2013, the Boise Project Board of Control, on several occasions attempted to consolidate certain of the proceedings, of which Applicant's counsel is well aware. All such efforts were rejected. The Emmert's applications are the first of all of the protested applications to go to hearing, and the Boise Project has understood from the beginning that each application must stand or fall on its own merits. Therefore, based on the fact that Applicant only supplied its' draft hydrologic report in August of 2016, and the matter was not set for hearing until mid-October 2016, the Boise Project Board of Control has not unreasonably delayed its efforts to effectively respond with the preparation of its own expert hydrologic report.

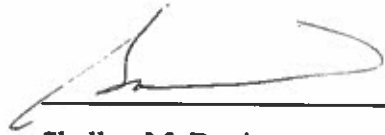
Applicant alternatively argues that it will be prejudiced by the delay because it needs additional water to supply its crops. In its original Motion for Continuance of Hearing, the Boise Project supplied an exhibit that demonstrated that Applicant has for the last ten (10) growing seasons used a supply of water commensurate with the appropriate duty of water for the Lake Lowell farming vicinity. Applicant attached its draft hydrologic report wherein it argues that it requires more water, however, there is no indication that the current supply of water to farm the property has negatively impacted, or will cause harm to the Applicant.

CONCLUSION

For the reasons set forth in the Boise Project's Motion for Continuance of Hearing, and for the reasons also set forth herein, the Boise Project Board of Control requests that this Hearing Officer DENY the Applicant's Motion for Reconsideration.

DATED this 5th day of January, 2017.

BARKER ROSHOLT & SIMPSON LLP



Shelley M. Davis

Attorneys for Boise Project Board of Control

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of January, 2017, I caused to be served a true and correct copy of the foregoing **BOISE PROJECT BOARD OF CONTROL'S MEMORANDUM IN OPPOSITION TO APPLICANT'S MOTION FOR RECONSIDERATION** by the method indicated below, and addressed to each of the following:

Original to:

Idaho Department of Water Resources
Western Region
2735 Airport Way
Boise, ID 83705-5082
Fax No. (208) 334-2348

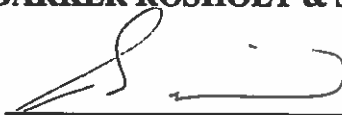
☐ Hand Delivery
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☒ Facsimile
☐ Overnight Mail
☐ Email

Copy to:

John Marshall
JOHN MARSHALL LAW, PLLC
575 W. Bannock St., Ste. B
Boise, ID 83702

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BARKER ROSHOLT & SIMPSON LLP



Shelley M. Davis
Attorneys for Boise Project Board of Control

ALBERT P. BARKER
JOHN A. ROSHOLT
JOHN K. SIMPSON
TRAVIS L. THOMPSON
SHELLEY M. DAVIS
PAUL L. ARRINGTON
SCOTT A. MAGNUSON



1010 W. Jefferson, Suite 102
Post Office Box 2139
Boise, Idaho 83701-2139
(208) 336-0700 telephone
(208) 344-6034 facsimile
brs@idahowaters.com

163 2nd Avenue West
Twin Falls, Idaho 83301-5672
(208) 733-0700 telephone
(208) 735-2444 facsimile

Shelley M. Davis
smd@idahowaters.com

January 5, 2017

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JAN 09 2017

WATER RESOURCES
WESTERN REGION

VIA U.S. MAIL

IDWR Western Region
2735 Airport Way
Boise, ID 83705-5082

Re: Consolidated Application Nos. 63-34079 and 34080 in the name of Emmert

Dear Clerk:

Enclosed herewith, please find one copy of *Boise Project Board of Control's Memorandum in Opposition to Applicant's Motion for Reconsideration*. Please conform the copy and return to our office in the enclosed postage-prepaid self-addressed envelope.

Please contact me should you have any questions. Thank you for your assistance.

Very truly yours,
BARKER ROSHOLT & SIMPSON LLP

Heather A. Rice, Assistant to
Shelley M. Davis

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Enclosure