

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT)
LICENSE NO. 63-9206 IN THE NAME OF)
BOISE PROJECT BOARD OF CONTROL)
_____)

ORDER ON RECONSIDERATION

FINDINGS OF FACT AND PROCEDURAL HISTORY

In 1979 the Department of Water Resources (“Department”) issued Permit No. 63-9206 (“Permit”) to the Boise Project Board of Control (“Boise Project”). The Permit authorized the Boise Project to generate power at a structure called the Mora Drop in the Mora Canal using 900 cfs of water diverted from the Boise River for irrigation purposes. The permit included an approval condition stating, “This permit is a new use of existing water rights.”

The Mora Drop power generation facility came on line in the fall of 2006, when the irrigation season was winding down. On January 9, 2007, the Boise Project submitted a proof of beneficial use statement for 700 cfs of water for power generation at the Mora Drop facility. The water right record shows that the Boise Project actually used a maximum rate of 450 cfs of water for power generation at the Mora Drop facility in the fall of 2006 before submitting its proof statement. The water right record shows that after submitting its proof statement, the Boise Project regularly used more than 450 cfs to generate power at the Mora Drop facility, with the maximum usage of 597 cfs occurring on July 7, 2014.

Rule 35.01.o of the Department’s Beneficial Use Examination Rules (IDAPA 37.03.02) states:

The amount (rate and/or volume) of water shall be limited by the smaller of the permitted amount, the amount upon which the license examination fee is paid, the capacity of the diversion works **or the amount beneficially used prior to submitting proof of beneficial use**, including any statutory limitation of the duty of water. [Emphasis added]

Rule 40.02 of the Department’s Beneficial Use Examination Rules states:

The rate of diversion measurement shall be conducted as close as reasonably possible to the source of supply and shall be measured with the project works fully in place operating at normal capacity. For example, if a sprinkler system is used for irrigation purposes, discharge from the pump must be measured with the sprinkler system connected.

On November 24, 2015, the Department issued Water Right License No. 63-9206 (“License”) as a preliminary order of the Department. The License confirms the Boise Project

established a right to use 450 cfs of water diverted from the Boise River for irrigation purposes to generate power at the Mora Drop facility. The License authorizes the use of water for power generation only when the water has already been diverted for irrigation purposes pursuant to other water rights. The licensed right is non-consumptive, and it is subordinated to all junior water rights except other hydropower rights.

On December 8, 2015, the Boise Project filed a timely petition for reconsideration of the License (“petition”). The petition asserts that the Department should issue the license for 597 cfs, not 450 cfs. The four components of the petition’s argument can be summarized as follows:

1. When water is already in the Mora Canal for other purposes, primarily irrigation, restricting the Boise Project’s ability to use it for incidental hydropower generation serves no benefit to anyone. *Petition* at 5 & 8.
2. Restricting the ability of the Boise Project to use water already in the Mora Canal for other purposes is financially prejudicial to the patrons of the Boise Project’s member irrigation districts by increasing the assessment costs to those patrons. *Petition* at 5 & 7 & 9.
3. Limiting the license to “the amount beneficially used prior to submitting proof of beneficial use,” as directed in Beneficial Use Examination Rule 35.1.o, is not consistent with Idaho Code § 42-217. *Petition* at 6.
4. The Department’s examination to confirm beneficial use was not consistent with Beneficial Use Examination Rule 40.02. *Petition* at 6-7.

ANALYSIS

The Department responds to each of the four arguments raised in the petition as follows:

1. **Argument:** When water is already in the Mora Canal for other purposes, primarily irrigation, restricting the Boise Project’s ability to use it for incidental hydropower generation serves no benefit to anyone.

Response: Water rights are limited by quantity, either diversion rate or diversion volume or both, to ensure maximum development of this important public resource and to make certain that water is not wasted to the detriment of others who might use it for beneficial purposes. The water Boise Project uses for power generation at the Mora Drop is diverted pursuant to the priority dates and limitations of its irrigation water rights during the irrigation season. Because the power generation use is non-consumptive and returns all the water it uses to the irrigation canal system, no additional water over and above the irrigation water is diverted for power generation. Moreover, the power generation use is fully subordinated to existing junior water rights and future water rights from the Boise River for purposes other than hydropower. With those three protections – the power generation use does not change the amount or timing of water diverted from the Boise

River, the power generation use is non-consumptive, and the power generation use is subordinated to junior and future water rights – it is not possible for the incidental power generation use, in and of itself, to cause injury to other current water right holders or to reduce the amount of water available for future development. Because of the protections, the Department agrees, as described more fully below, that the license should be issued for 597 cfs.

2. **Argument:** Restricting the ability of the Boise Project to use water already in the Mora Canal for other purposes is financially prejudicial to the patrons of the Boise Project's member irrigation districts by increasing the assessment costs to those patrons.

Response: The Department's role in water right licensing is to confirm beneficial use of water in accordance with a permit authorizing the establishment of a water right. Incidental power generation is beneficial when some entity acquires and uses the power or when the power generator derives revenue from the act of generating power. Maximizing the incidental power generated at the Mora Drop facility maximizes the power available for use and maximizes the revenue available to the patrons of the Boise Project's member irrigation districts. The Boise Project's Mora Drop turbines generate more revenue-generating power with 597 cfs of water than with 450 cfs of water. Therefore, authorizing the Boise Project to use more than 450 cfs in connection with the License would be beneficial to the patrons of the Boise Project's member irrigation districts.

3. **Argument:** Limiting the license to "the amount beneficially used prior to submitting proof of beneficial use," as directed in Beneficial Use Examination Rule 35.1.o, is not consistent with Idaho Code § 42-217.

Response: The relevant part of Idaho Code § 42-217 states:

Upon receipt of such proof and the fee as required in section 42-221, Idaho Code, by the department of water resources the department shall examine, or cause to be examined. . .

2. The capacities of the ditches or canals or other means by which such water is conducted to such place of use, and the quantity of water which **has been** beneficially applied for irrigation or other purposes. [Emphasis added]

The phrase "has been" must be relative to a point in time, but the statute does not explicitly state what point in time. Administrative rules add details to broad statutory mandates. "Because [a] statute normally does not contain all details, the designated agency must interpret the Legislature's intent and develop a method to implement the program." *The Idaho Rule Writer's Manual* at 1. Idaho Code § 42-1805(8) authorizes the Director of the Department to promulgate rules "effectuating the powers and duties of the department." The Director promulgated Rule 35.01.o of the Department's Beneficial Use Examination Rules consistent with Chapter 52 of Title 67 of Idaho Code to effectuate his duty to

confirm beneficial use of water as directed in Idaho Code § 42-217. Because Idaho Code § 42-217 is not specific as to when the beneficial use of water is to have occurred, Beneficial Use Rule 35.01.o helps the Director accomplish his duty by defining when beneficial use is to have occurred in connection with a permit to appropriate water. Beneficial Use Examination Rule 35.01.o is not inconsistent with Idaho Code § 42-217.

4. **Argument:** The Department's examination to confirm beneficial use was not consistent with Beneficial Use Examination Rule 40.02.

Response: Beneficial Use Examination Rule 40.02 governs the location and timing of a flow measurement during a beneficial use field examination. The Department does not dispute that the Boise Project uses more water for incidental power generation during the peak of the irrigation season, when more water is in the Mora Canal, than it does during the time of year that the 450 cfs was used. However, at question is whether the Department can issue a water right license based on an extent of beneficial use that was not established until after the Boise Project submitted its proof of beneficial use statement. The Boise Project did not use more than 450 cfs until after it submitted its proof of beneficial use statement in January of 2007.

CONCLUSIONS OF LAW

The key issue in this matter is whether the Department can deviate from the statement in Beneficial Use Examination Rule 35.01.o that the proof of beneficial use submittal date is a limiting factor in the determination of an appropriate diversion rate for a license. Beneficial Use Examination Rule 35.01.o properly interprets and implements Idaho Code § 42-217, which lacks detail about the timing in which beneficial use is to have occurred in connection with a permit to appropriate water. For most water appropriations, Beneficial Use Examination Rule 35.01.o brings certainty and order to the water appropriation process by preventing expansion of water use to the detriment of others who would make beneficial use of the water or to the detriment of the public interest in the water resource. For the facts in this case, however, strict application of the rule does not protect any interests, private or public, because it does not limit the amount of water that can be diverted from the Boise River. Instead, application of the rule limits the benefits derived from the incidental generation of power at the Mora Drop facility. Because incidental power generation use does not change the amount or timing of water diverted from the Boise River, the power generation use is non-consumptive, and the power generation use is subordinated to junior and future water rights, Beneficial Use Examination Rule 35.01.o should not be applied to limit the licensed rate to the amount used for power generation before proof of beneficial use statement was submitted.

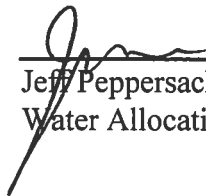
License No. 63-9206 should be issued with a diversion rate of 597 cfs.

ORDER

The diversion rate authorized by Water Right License No. 63-9206 is **REVISED** to 597 cfs.

The Department will issue a revised license document when this order has become final.

Dated this 22 day of December, 2015.



Jeff Peppersack, Chief
Water Allocation Bureau

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of December, 2015, I caused a true and correct copy of the foregoing Order on Reconsideration to be served on the following parties by the indicated methods:

Boise Project Board of Control 2465 Overland Road Boise, ID 83705	☒ U.S. Mail, Certified, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☐ Email
Albert P. Barker Shelley M. Davis Barker Rosholt & Simpson LLP P.O. Box 2139 Boise, ID 83701-2139 (208) 331-0954 (Facsimile)	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☐ Email



Emalee Rushing
Administrative Assistant 2

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer 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 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

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