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DEPARTMENT OF
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF PERMIT TO
APPROPRIATE WATER NO. 51-13106

PETITION FOR RECONSIDERATION
AND REQUEST FOR HEARING

COMES NOW Half Moon, LLC (“Half Moon”), by and through the law firm, McHugh Bromley, PLLC, and hereby files this *Petition for Reconsideration and Request for Hearing* (“Petition”) in response to the Idaho Department of Water Resources’ (“IDWR”) *Permit to Appropriate Water No. 51-13106* (“Permit”).¹ This Petition is filed pursuant to Idaho Code § 42-1701A(3), Idaho Code § 67-5245, and IDAPA 37.01.01.730.

Half Moon files this Petition in response to Condition of Approval No. 10, which states:

This right is for the use of trust water, and it is subject to review 5 years after its initial approval (date of permit approval) to re-evaluate the availability of trust water for the authorized use and to re-evaluate the public interest criteria for reallocating trust water.

Emphasis added.

¹ The Permit was signed by IDWR on October 20, 2015, but was not served until October 21, 2015.

The difficulty Half Moon finds with Condition of Approval No. 10 is the five-year period appears to be written so as to run simultaneously with the five-year development of the Permit. Here, the Permit was approved on October 20, 2015. Condition of Approval No. 1 reflects this, as it provides Half Moon with the traditional five years in which to develop the project for licensing: “Proof of application of water to beneficial use shall be submitted on or before **November 01, 2020.**” Emphasis in original. Therefore, under Condition No. 1, Half Moon would find itself investing time and financial resources in development of the project during the five-year period between 2015 and 2020, only to risk having IDWR invoke Condition No. 10 during the same development period, thereby terminating the Permit. With Condition No. 10, there is risk to develop the Permit into a license.

Half Moon also questions whether it is being treated similarly with other appropriators of trust water. Half Moon’s legal counsel and engineer are unaware of other permits that have been conditioned in this manner. Traditionally, appropriators of trust water received a twenty-year term condition, similar to either of the following:

This right is for the use of trust water and is subject to review 20 years after the issuance of the permit to determine availability of water and to re-evaluate the public interest.

....

Any license issued by IDWR pursuant to the right or portion thereof for the use of trust water is subject to a term review of 20 years after the date of this approval to determine the availability of water for the use and to re-evaluate the public interest at the end of the term.

Emphasis added.

If IDWR has changed its policy from a twenty-year term to a five-year term, Half Moon needs to know, so it can assess how it is being treated.

Lastly, Half Moon sees no reason for inclusion of Condition No. 10, as Condition No. 11 takes care of any concern of injury to the Swan Falls minimum water rights. Half Moon understands the prior appropriation doctrine, and agrees that its Permit, with a September 27, 2013 priority date, is junior to the Swan Falls minimum water rights. To the extent water is available for appropriation, development of the Permit cannot be denied. Idaho Const. Art. XV § 3. Therefore, the remedy under the prior appropriation doctrine is curtailment, absent mitigation,² not effective denial. To the extent the Swan Falls minimums are not met, junior-priority water rights should be curtailed during the period of the breach. Conditioning the Permit so as to effectively disallow development of a water right is in contravention of these principles, and is arbitrary when Half Moon has no notice of what the review could look like in five years. Condition No. 11 clearly sets forth the legal requirement that Half Moon will be curtailed if the Swan Falls minimums are not satisfied. Because of Condition No. 11, there is no need for Condition No. 10.

Based on the foregoing, Half Moon respectfully requests removal of Condition No. 10 from the Permit. Additionally, Half Moon requests a hearing in this matter.

RESPECTFULLY SUBMITTED this 3rd day of November, 2015.

MCHUGH BROMLEY, PLLC



CHRIS M. BROMLEY
Attorneys for Half Moon, LLC

² Half Moon may find it is able to mitigate any depletions it may cause to the Swan Falls minimums, like other users of water in Basin 51. *See e.g. Permit to Appropriate Water No. 51-13067* (twenty-year term review and ability to use water to mitigate for a Swan Falls breach).

CERTIFICATE OF SERVICE

I certify that on this 3rd day of November, 2015, I caused to be served a true and correct copy of the foregoing *Petition for Reconsideration* to be served upon the following persons by the method(s) indicated:

Idaho Department of Water Resources
Idaho Water Center, Sixth Floor
322 East Front Street
Boise, ID 83702

Hand Delivery

A handwritten signature in black ink, appearing to read "C. M. Bromley", written over a horizontal line.

CHRIS M. BROMLEY