

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS)	
FOR PERMIT NO. 35-14240 THRU)	ORDER DENYING COALITION'S
35-14244 IN THE NAME OF LANCE)	REQUEST FOR
<u>AND/OR LISA FUNK PARTNERSHIP</u>)	DEPARTMENT MEMORANDUM

On September 4, 2014, Protestants Burley Irrigation District, A&B Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company and Minidoka Irrigation District ("Coalition") filed a Request for Department Memorandum Addressing Questions ("Request") with the Hearing Officer for the above-referenced contested cases. The Request listed ten separate questions to be addressed in the proposed memorandum.

These contested cases have been scheduled for a joint administrative hearing on December 11th and 12th, 2014. The ten questions presented in the Request ask the Department to outline what type of analysis will be used to decide the pending cases. The Coalition's questions are very specific and, to a large degree, seek to have the Department conduct analysis prior to assembling the administrative record. To respond to the questions would pre-judge the case and would unreasonably constrain all of the parties in their presentation of evidence relating to the sufficiency of the proposed mitigation.

In filing the Request, the Coalition may simply be trying to understand which statutes and rules govern mitigation associated with applications for permit. These statutes and rules were identified in the Interlocutory Order Addressing Legal Question (issued on July 14, 2014). However, in the interest of clarity, the statutes and rules are restated below. After conducting an administrative hearing, the Department may find that there are other statutes and rules applicable to the question of mitigation.

Idaho Code § 42-203A(5) states in pertinent part:

In all applications whether protested or not protested, where the proposed use is such: (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho . . . the director of the [Department] may reject such application and refuse issuance of a permit therefor

An applicant bears the burden of proof for Idaho Code § 42-203A(5)(a) relating to the reduction of quantity of water under existing water rights. (See IDAPA 37.03.08.40.04)

Rule 45.01.a of the Department's Water Appropriation Rules (IDAPA 37.03.08) sets forth the criteria used to determine whether a proposed use will reduce the quantity of water under existing water rights.

A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:

- i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.
- ii. The holder of an existing water right will be forced to an unreasonable effort or expense to divert his existing water right. Protection of existing groundwater rights are subject to reasonable pumping level provisions of Section 42-226, Idaho Code; or
- iii. The quality of the water available to the holder of an existing water right is made unusable for the purposes of the existing user's right, and the water cannot be restored to usable quality without unreasonable effort or expense.
- iv. An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director.

Whether a mitigation proposal sufficiently mitigates losses of water to existing water right holders is usually a fact-specific question that can only be addressed after a review of the evidence provided by the parties. Applicants and protestants may choose to provide hydrology reports, Eastern Snake Plain Aquifer Model results, private agreements, or any number of other documents to support or attack a proposed mitigation plan.

On April 30, 1993, the Department issued an Amended Moratorium Order ("1993 Moratorium") which restricted the processing and approval of applications within the trust water area. The points of diversion described in Applications 35-14240 thru 35-14244 are located within the trust water area. The 1993 Moratorium allows certain applications to be processed and approved on a case-by-case basis if "[t]he Director determines that the development and use of the water . . . will have no effect on prior surface and ground water rights because of . . . mitigation provided by the applicant to offset injury to other rights." (1993 Moratorium, page 5)

On May 3, 2010, Jeff Peppersack, the Department's Water Allocation Bureau Chief, issued Application Processing Memo #72 ("Memo #72") to "provide guidance to Department staff regarding the evaluation of mitigation plans submitted with an application for permit" (Memo #72, page 1) As an administrative memo, Memo #72 does not constitute binding legal authority. However, the memo may help the parties understand how the Department has dealt with past mitigation proposals and how the Department may view future or pending proposals. Previous filings by the parties confirm that the parties already have a copy of Memo #72. Therefore, the provisions of that memo will not be restated in this order.

ORDER

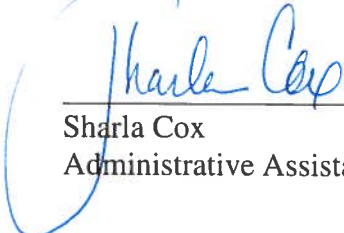
IT IS HEREBY ORDERED that the Coalition's Request for Department Memorandum Addressing Questions is DENIED.

Dated this 12th day of September, 2014.


James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 12th day of September 2014, I mailed a true and correct copy, postage prepaid, of the foregoing ORDER DENYING COALITION'S REQUEST FOR DEPARTMENT MEMORANDUM to the person(s) listed below:



Sharla Cox
Administrative Assistant

US MAIL

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