

JEFF REPPERSACK -



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DEPARTMENT OF
WATER RESOURCES

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

December 19, 2008

DM

Dave Tuthill
Director
Idaho Department of Water Resources
STATEHOUSE MAIL

Re: In the Matter of Permit No. 37-07372 in the Name of State of Idaho, Department of Lands
IDL's Brief in Support of Petition for Reconsideration Request for Oral Argument

Dear Director Tuthill:

Enclosed is *IDL's Brief in Support of Petition for Reconsideration - Request for Oral Argument* in the above-named matter for your files. It was fax filed with your office today, December 19, 2008. I have also enclosed a copy of the *Brief*. Please conform the copy to the fax filed date of December 19, 2008 and return it to Deputy Attorney General David Stanish. A self-addressed Statehouse Mail envelope is enclosed for your convenience.

Thank you for your help.

Sincerely,

PATRICIA BOEHM, PLS
Secretary
Natural Resources Division

Encl.
/pb

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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 NO. 37-07372 IN)	
THE NAME OF STATE OF IDAHO,)	IDL'S BRIEF IN SUPPORT OF
DEPARTMENT OF LANDS)	PETITION FOR
)	RECONSIDERATION
)	
)	REQUEST FOR ORAL
)	ARGUMENT
)	
)	

The Permittee, Idaho Department of Lands, hereby submits its brief in support of its *Petition for Reconsideration* filed in the above-entitled administrative matter.

I. BACKGROUND

On October 13, 2000, IDWR issued an *Amended Preliminary Order* providing for the following: (a) advancing the priority date of the permit to May 26, 1999; (b) setting a proof of beneficial use date of November 1, 2004; and (c) making development of the permit contingent upon approval of a sufficient mitigation plan. Emphasizing the importance of mitigation in this

case, the *Amended Preliminary Order* forbid the Permittee from constructing its well or from using the water until its mitigation plan was approved by IDWR:

Construction of a well and diversion and use of water under Permit No. 37-07372 shall not commence or continue until a plan to mitigate injury to prior rights from the Thousand Springs is submitted to and approved by the Department.

Amended Preliminary Order at 8.

Within five months of the *Amended Preliminary Order*, IDL submitted a mitigation plan to IDWR on March 7, 2001. Letter from Howard Kestie, IDL Area Supervisor, to Norman Young, Water Management Division Administrator (Mar. 7, 2001). In a November 26, 2001 letter, IDL indicated that it had contacted IDWR in order to inquire into the status of its mitigation plan. Letter from Bryce Taylor, IDL Area Supervisor, to John Faulkner, IDL lessee (Nov. 26, 2001) (cc'ing Norman Young, Water Management Division Administrator). According to the letter, IDWR indicated that it had not completed its review of the mitigation plan and that it was uncertain as to when it would be able to do so. It was not until December 10, 2004—more than three and one-half years after initial submission of the mitigation plan and more than one month after proof of beneficial use was due—did IDWR complete its review. Letter from Gary Spackman, IDWR, to Tim Duffner, IDL Area Supervisor (Dec. 10, 2004).

The November 2004 proof of beneficial use due date was ultimately extended to November 2008. On October 31, 2008, Permittee requested an additional extension of time. On November 21, 2008, IDWR issued a preliminary order denying Permittee's request for extension of time and canceling the permit.

II. ARGUMENT

The file memo of December 11, 2007 by Jeff Peppersack discusses Permittee's attempts over the years to compensate for the time lost resulting from the delays in the review of its mitigation plan. The memo summarizes the situation as follows:

A five-year development period was justified based on the original permit and a three-year extension is justified based on IDWR's inaction to approve or deny the proposed mitigation plan. This totals to eight years from the amendment approval in 2000 in a proof due date of November 1, 2008.

It is entirely consistent with this analysis that Permittee should not be prejudiced by the more than three and one-half years delay resulting from IDWR's processing of the mitigation plan. Instead, Permittee should be granted the full benefit of a "good cause" extension pursuant to Idaho Code § 42-204(5). This conclusion is supported in the record as follows. The request for extension of time filed in September 2005 was approved for a two-year period, making proof due in November 2007. IDWR described this extension as having been based on "government delay." Based upon the time between when the mitigation plan was submitted and when the mitigation plan was reviewed, the September 2005 extension should have been for three and one-half years, not two. Alternatively, the delay in this case is analogous to the exception provided for in Idaho Code § 42-204(1) related to delays caused by "litigation of any nature"

III. REQUEST FOR ORAL ARGUMENT

Permittee requests that oral argument on this matter be heard at the Director's convenience.

IV. CONCLUSION

Development of this permit was contingent upon IDWR's review and approval of a mitigation plan. By no fault of Permittee, IDWR was unable to review IDL's plan for more than three and one-half years after it was submitted. Permittee should not be prejudiced by this delay. Instead, IDL should be granted the maximum extension possible under Idaho Code § 42-204.

Dated this 19th day of December, 2008.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division



DAVID I. STANISH
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF SERVICE

I certify that on the 19th day of December 2008, I caused to be served the original and/or copy of this **IDL'S BRIEF IN SUPPORT OF PETITION FOR RECONSIDERATION and REQUEST FOR ORAL ARGUMENT** on each of the following persons by the method indicated:

1. Original to:

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- U.S. Mail, postage prepaid
- Facsimile: 287-6700
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2. Copies to

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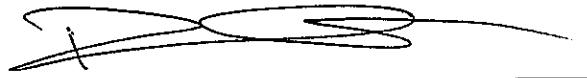
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