

**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**IN AND FOR THE STATE OF IDAHO**

**IN THE MATTER OF APPLICATION TO )  
APPROPRIATE WATER NO 29-13778 IN ) FINAL ORDER  
THE NAME OF DIAMOND T RANCH, LLC. )  
\_\_\_\_\_ )**

On June 15, 2005, Diamond T Ranch, LLC. (“Diamond T”) filed an application to appropriate water with the Idaho Department of Water Resources (“IDWR” or “Department”). IDWR assigned no. 29-13778 to the application. Notice of the application was published on February 1 and February 8, 2007. William A. Egan (“Egan”) protested the application.

On March 18, 2008, IDWR conducted a hearing for the contested case created by the protest. Randall C. Budge, Attorney at Law, represented Diamond T. Reed W. Larsen, Attorney at Law, represented Egan.

On July 15, 2008, the hearing officer issued a preliminary order, served on July 16, 2008, denying application no. 29-13778, without prejudice.

On July 30, 2008, Diamond T petitioned the hearing officer to reconsider the preliminary order.

On August 20, 2008, the hearing officer issued an amended preliminary order again denying application no 29-13778 without prejudice.

On September 3, 2008, Diamond T filed exceptions with the Director.

On July 16, 2009, the hearing officer was appointed as the interim director of the Department. Because of the appointment, the authority to issue the final order is now vested with the hearing officer who conducted the contested case hearing.

## EXCEPTION ISSUES PRESENTED

### **“Authorized” vs. “Guaranteed” Water Right Deliveries & Reliability of Egan’s Water Supply**

Diamond T argues that the amended preliminary order’s denial of its application and accompanying mitigation plan without prejudice coupled with guidance requiring full season delivery of the flow rate authorized by Egan’s water right as mitigation for any subsequently filed application grants Egan a “‘guaranteed’ amount, rather than an ‘authorized’ maximum that can be diverted if the water is available.”

Diamond T also argues that the amended preliminary order incorrectly determined water has historically always been available to Egan at the authorized points of diversion for water right no. 29-4382. Diamond T argues that the hearing officer ignored the testimony of Phillip Adams, Charles Brockway, and Roger Warner, and relied on the unsubstantiated testimony of William Egan.

The two arguments of Diamond T are linked in the preliminary order and in this final order. As a result, the arguments will be addressed as a single exception.

#### Supply Reliability

The director/hearing officer did not ignore the testimony of Adams, Brockway, and Warner. In 2001 or 2002, Warner observed flows in the upper portion of Potter Creek near the embankment constructed by Adams, but did not observe flows in lower Potter Creek, and specifically did not observe flows at Egan’s points of diversion. On one occasion in July of 2005, Charles E. Brockway observed and estimated flows in Potter Creek. Brockway testified that Potter Creek dried up in the mid-to-lower reaches of the stream, and that waste water, some of which was discharging to the stream as a result of irrigation by Adams, recharged flows in Potter Creek upstream of the Egan points of diversion. This testimony is supportive of Egan’s testimony of water availability. The only conflict is between Adams’ testimony of periodic observations of no flow where Potter Creek crosses Marsh Valley Road and the testimony of Egan, who farms the place of use for water right no. 29-4382. The director/hearing officer assigned greater weight to the testimony of Egan because of Egan’s residential proximity and Egan’s personal interest in the water supply for irrigating his property.

#### Basis for Denial of Application

The interim director/hearing officer determined that construction of the embankment and the associated piping would negatively affect delivery of Egan’s water right. In a larger water drainage and associated stream, these changes may not cause significant negative impact to a downstream user. In a small water course such as Potter Creek, however, these changes can result in significant impact to the natural flows of the stream.

In addition, the director/hearing officer determined that the remote location of the proposed dam and reservoir and the difficulty of simultaneously measuring and adjusting to account for inflows and outflows imposed an unreasonable administrative burden and were causes for denial of the application.

Finally, Diamond T proposed to dedicate a portion of a Marsh Creek surface water right for mitigation bearing a priority date junior to Egan's water right. The interim director/hearing officer determined the Marsh Creek water right would not provide sufficient mitigation for depletions caused by Diamond T.

Some of the facts supporting the denial of the application are discussed further in this analysis of Diamond T's exceptions.

#### Suggested Full Season Mitigation

The interim director/hearing officer weighed the evidence and found Egan's testimony that water had always been available to satisfy his water right until 2007 was the most credible testimony presented about delivery of Egan's water right (29-4382). Water was always available for Egan's use until after construction of Diamond T's embankment in 2001.

This finding was included as support for the primary reasons for denial of the application set forth above, but also for the purpose of suggesting a more straight forward, uncomplicated, and probably less expensive and less troublesome method for mitigating for the diversion and storage proposed by Diamond T's application. Nonetheless, the mandate in the preliminary order did not allow Diamond T any latitude to propose other alternative plans that would address the deficiencies in mitigation and administration set forth above and in the preliminary order. This final order will remove the mandate, and will suggest providing the water to Egan for the entire season as an alternative for mitigation. Diamond T will also have the latitude to suggest additional alternatives to address the mitigation deficiencies in this final order.

#### **Uncertainty of Conceptual Mitigation Plan**

Diamond T argues that the conceptual nature of the mitigation plan is not grounds for denial of the application.

Through the future organization of water districts and appointment of watermasters in the water districts, IDWR will almost certainly be required to regulate water rights in Marsh Creek and its tributaries (1) according to the priorities of the water rights describing points of diversion inside the Marsh Creek drainage; and also (2) in the larger Portneuf River and Snake River drainages. Mitigation with a water right bearing a priority date that is later than the priority date of the right being mitigated will not create the requisite certainty of mitigation to ensure that Egan's water right will not be injured.

## **Complexity of the Conceptual Mitigation Plan**

Diamond T argues that the proposed conceptual mitigation plan is not complex and should be approved.

The hearing officer determined that the level of oversight and complexity of monitoring and delivering water to Egan under the conceptual mitigation plan is unacceptable. The inflow to and outflow from the reservoir would need to be measured at approximately the same time as the flow diverted by Egan is measured. At any time Egan is not receiving the entitlement of his water right, a regulating authority, presumably IDWR or a future watermaster, would be required to inquire of Diamond T whether it wanted to release storage from the reservoir or provide mitigation from Marsh Creek. If Diamond T chooses to deliver mitigation water from Marsh Creek, mitigation would be provided under authority of right no. 29-2295F, for which no transfer has been filed. The regulating authority would have to determine how much water must be delivered.

If at any time during this transitional period, the flows in Potter Creek are not maintained, there is the possibility of dewatering Potter Creek because too much water is retained in the reservoir. Dewatering would then require rewetting the Potter Creek channel and attempting to reestablish the flows. Beginning at the time Egan is not receiving sufficient water to satisfy his water right, the regulating authority, exercising almost continuous oversight, would be required to release from storage the same amount of water flowing into the reservoir. The regulating authority would be required to frequently measure the inflow and adjust the outflow based on changing inflows, evaporation, and possible changes in seepage resulting from decreased reservoir levels. At the same time, the regulating authority would need to measure the amount of water diverted by Egan and how much extra water is being provided from Marsh Creek or from the reservoir. These measuring locations are remote from each other, and the measurements and adjustments would require significant dedication of resources to implement.

At some point in the carefully attended monitoring, regulating, and water delivery process described above, the regulating authority would be asked to determine that the call for water by Egan is futile. The complexities described above would place an unreasonable burden on the resources of IDWR or some future watermaster to develop the conceptual plan into a workable plan and to administer the components of the plan. The concepts, when attempted to be implemented, are likely to cause injury to the senior right holder.

Finally, the applicant for a new water right bears the burden of proof of establishing that the proposal will not reduce the quantity of water under existing water rights. The applicant did not satisfy its burden of proof that the proposed storage of water and the associated proposed conceptual mitigation plan would adequately protect Egan's prior water right.

## **Finding About Water Deliveries from Marsh Creek**

Diamond T contests inclusion of the following text in Finding of Fact no. 27 because there is not evidence in the record to support the finding:

27. During recent drought years, water users diverting water from Marsh Creek have complained to IDWR about water shortages.

In an administrative proceeding, an administrative agency may apply its expertise to the analysis of evidence presented at a hearing. IDWR is charged with the responsibility of administering the water rights of the state of Idaho. It is because of these and other broad water management responsibilities and duties that IDWR is granted the authority to consider whether an application should be approved or denied. The finding is not an out-of-court statement offered for the proof of the matter asserted and is not hearsay. It is a finding of the results of IDWR's interactions with water users while performing its water management duties. The finding was written to support an ultimate finding that IDWR will likely be administering the water rights of Marsh Creek within the Marsh Creek Basin and in relation to the water rights on downstream rivers to which Marsh Creek is tributary. This type of finding is necessary to determine the adequacy of a mitigation plan offering a water right for mitigation that bears a priority date junior to the senior priority date of the water right that will be impacted by the proposal. Finding of Fact no. 27 is an appropriate finding by IDWR.

## **Public Interest**

Diamond T argues that IDWR cannot conclude that an application is not in the public interest on the basis that an accompanying mitigation plan is too complex to administer. Diamond T states that an application "cannot be contrary to the local public interest" when a government agency is "authorized and directed" . . . "by statute" . . . "to perform the duties and responsibilities . . ." that are part of the mitigation plan.

IDWR can use its expertise as an agency to determine whether a particular mitigation plan is administrable, given the complexity of a particular mitigation plan and the resources available to administer the plan. If the plan cannot be administered, it is not in the local public interest to approve a water right supported by the mitigation plan.

## **SUMMARY OF PROCEEDINGS**

On June 15, 2005, Diamond T Ranch, LLC ("Diamond T") filed an application to appropriate water with the Idaho Department of Water Resources ("IDWR" or "Department"). IDWR assigned number 29-13778 to the application. Notice of the application was published on February 1 and February 8, 2007. William A. Egan ("Egan") protested the application.

On March 18, 2008, IDWR conducted a hearing for the contested case created by the protest. Randall C. Budge, Attorney at Law, represented Diamond T. Reed W. Larsen, Attorney at Law, represented Egan.

After considering the testimony, exhibits, and other evidence, the hearing officer finds, concludes, and orders as follows:

### FINDINGS OF FACT

1. Application to appropriate water no. 29-13778 proposes the impoundment of water in a storage reservoir as follows:

Purpose of Use:	Recreation Storage
Source:	Potter Creek, tributary to Marsh Creek
Storage Volume:	30 acre feet ("af")
Period of Use:	1/1 to 12/31
Point of Diversion (Dam site):	NWNWNW <sup>1</sup> , Section 15, T11S, R36E
Place of Use:	NWNW, Section 15, T11S, R36E

2. Marsh Creek flows into and is tributary to the Portneuf River near Inkom, Idaho. The Portneuf River flows into and is tributary to the Snake River west of Pocatello, Idaho.

3. The principal officer of Diamond T is Phillip Adams ("Adams").

4. Diamond T owns approximately 6,500 acres in the Marsh Valley area approximately four miles west and a little north of Downey, Bannock County, Idaho. Potter Creek flows through the Diamond T property. Potter Creek starts on national forest ground in the mountains west of the Diamond T property, flows east through the Diamond T property, and ultimately discharges to Marsh Creek. Shrives Spring emits from the ground on Diamond T property and contributes a significant portion of the flow to Potter Creek.

5. In 2001, Adams constructed an embankment across Potter Creek in the NWNWNW, Section 15, T11S, R36E. Using earth-moving equipment, Adams scraped fill material from the outer banks of the Potter Creek drainage and transported the fill to the embankment. Adams placed two horizontal culverts through the embankment roughly parallel to and at the same elevation as the creek channel to pass the flows of Potter Creek downstream.

6. Adams connected two vertical PVC pipes to the horizontal culverts. The largest of the vertical pipes is an 18 inch diameter pipe with a perforated section exposed approximately six feet above the original channel bottom elevation. Another 12 inch vertical PVC pipe also extends approximately one foot above the elevation of the original channel elevation with perforations in the top of the cap. (See Exhibit no. 4K) The vertical, elevated intakes were constructed to prevent clogging of the inlet by debris and silt carried by Potter Creek. Potter Creek water must pond at the location of the intakes to the elevation of the perforations before the creek water will flow through the horizontal culverts.

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<sup>1</sup> In this decision, the public land survey numeric descriptor "1/4" is assumed to follow each two alpha character public land survey locator when the numeric descriptor is missing and other full descriptors are abbreviated or eliminated. For instance, in this example, the full description would be the NW1/4NW1/4NW1/4, Section 15, Township 11 South, Range 36 East, Boise Meridian.

7. The channel has silted in as a result of the standpipe outlets that require pooling of water before the water can enter the inlets to the stand pipes leading to the outlet culverts. (See Exhibit no. D and compare to Exhibit no. 4K).

8. Adams testified he constructed the embankment as a farm equipment crossing and as a dam to impound water for a recreational amenity for fish and wildlife. Application no. 29-13778 seeks a water right for the recreational impoundment of water. The application states the dimensions of the embankment will be approximately 285 feet long, 25 feet wide at the top and 20 feet high.

9. Egan owns property located generally east of the Diamond T property.

10. Downstream from the embankment constructed by Adams, the Potter Creek channel runs easterly approximately one-mile (the distance scaled on a map labeled as Exhibit 9 is one and one quarter miles) to an old dam site in the NWSW, Section 11, T11S, R36E also located on Diamond T property. The old dam impounded a small volume of water. A water delivery structure was located at the old dam site for irrigation of a portion of Egan's property. The dam at the old dam site has been breached.

11. From the old dam site, Potter Creek flows easterly for approximately 600 feet into one parcel of Egan's property. Once Potter Creek crosses into Egan's property, it flows southeasterly approximately 1,000 feet to the south boundary line of Egan's property. From this location, the channel proceeds eastward approximately 500 feet, and approximate follows the property boundary between a parcel owned by Egan and a parcel owned by Diamond T until it intersects with the Marsh Valley Road. The channel turns south at Marsh Valley Road and continues south for approximately 600 feet where it crosses under Marsh Valley Road to the east and discharges into additional lands owned by Egan. (See Exhibit No. 9 for the location of the Potter Creek channel and other locational information.)

12. Egan holds decreed water right no. 29-4382. Water right no. 29-4382 bears a priority date of June 1, 1936. Water right no. 29-4382 authorizes diversion of 0.36 cubic feet per second ("cfs") from Potter Creek in the NESW and the SWSE, Section 11, T11S, R36E where the Potter Creek channel crosses Marsh Valley Road into Egan's property. Egan is the sole water right holder authorized to divert and beneficially use the flows of Potter Creek. The place of use described by water right no. 29-4382 is 18 acres located in the SWSE, Section 14, T11S, R36E where the channel crosses Marsh Valley road into Egan's property. Egan flood irrigates this property with the water from Potter Creek. Egan described much of this land irrigated by Potter Creek water as a riparian area. He described the place of use as a wet boggy area that is sometimes difficult to walk in because of the significant water at that location.

13. Egan's points of diversion are located approximately one and one half to two miles from the constructed embankment.

14. Egan purchased his property irrigated from Potter Creek in 1971. From 1971 until 2007, Potter Creek has always delivered sufficient water to satisfy water right no. 29-4382.

15. Potter Creek loses water from its channel as it flows downstream through Diamond T's property. Based on Charles Brockway's observations, in July of 2005, Potter Creek flowed approximately 300 gallons per minute (0.67 cfs) near the constructed embankment, between 100 (0.22 cfs) and 200 gallons per minute (0.44 cfs) near the location of the breached old dam, and diminished to zero gallons per minute where the Potter Creek channel crosses the Egan property line. Flows in the creek regenerated downstream in the channel before it reached Marsh Valley road and continued on to Egan's place of use described by water right no. 29-4382. Inflows back to Potter Creek were a direct result of irrigation of Diamond T property adjacent to the Potter Creek Channel with Marsh Creek water.

16. In 2001 or 2002, Roger Warner, who was employed at the time by IDWR, observed flows in Potter Creek at the location of the new embankment. Roger Warner estimated the flows at between one-half and one cubic foot per second.

17. Based on modeled recurrence calculations of high flows in Potter Creek, sufficient flow will annually discharge down Potter Creek prior to the irrigation season to fill the proposed impoundment of 30 acre-feet.

18. Water will evaporate from the storage reservoir, particularly in the summer months. In addition, because the pond is unlined, approximately one to two acre-feet of water will percolate daily into the ground from the reservoir. Approximately one-half to one cubic foot per second must flow into the reservoir continuously to keep the reservoir full given the estimated seepage and evaporation from the pond.

19. The character of the Potter Creek channel will change as a result of a 30 acre-feet on-stream storage reservoir on a small stream. The stream channel within the confines of the impoundment will not be well defined because of siltation and changes in the natural riparian area.

20. The quantity of water in Potter Creek throughout the irrigation season is not sufficient to fill water right no. 29-4382 plus satisfy the quantity of water needed to maintain the water level in the requested 30 acre-feet reservoir proposed by application no. 29-13778.

21. Diamond T recognizes it must mitigate for losses to flows in Potter Creek to compensate Egan for the losses that diminish Egan's ability to divert water. Diamond T proposed a "conceptual" mitigation plan. To compensate for the proposed storage of water, the mitigation plan proposed measurement of inflow into and outflow from the proposed reservoir to determine losses and measurement of water diverted by Egan downstream. Simultaneous measurement of available water to Egan and measurement of inflows to and outflows from the reservoir would be evaluated to determine whether additional water must be provided by Diamond T.

22. The conceptual mitigation plan proposed by Diamond T offers an unquantified portion of water right no. 29-2295F held by Diamond T, or alternatively, release of storage as mitigation for depletions to stream flows caused by Diamond T's impoundment of water.



Diamond T's water right no. 29-2295F bears a priority date of November 27, 1950, and authorizes diversion of 1.4 cfs from Marsh Creek for irrigation of 70 acres.

23. The conceptual mitigation plan contemplates Marsh Creek water or storage water in the reservoir would be delivered to Egan for mitigation when water flowing in Potter Creek would have reached the Egan place of use for water right no. 29-4382. To determine whether water would have reached the Egan place of use, the conceptual mitigation plan proposes the following complex procedures. The inflow to and outflow from the reservoir would need to be measured at approximately the same time as the flow diverted by Egan is measured. The reservoir is not near the Egan points of diversion. At any time Egan is not receiving the entitlement of his water right, a regulating authority, presumably the Department or a watermaster, would be required to ask Diamond T whether it wanted to release storage from the reservoir or provide mitigation from Marsh Creek. If Diamond T chooses to deliver mitigation water from Marsh Creek, mitigation would be provided under authority of right no. 29-2295F, for which no transfer has been filed. The regulating authority would have to determine how much water must be delivered.

24. If at any time during this transitional period, the flows in Potter Creek are not maintained, there is the possibility of dewatering Potter Creek because too much water is retained in the reservoir. Dewatering would then require rewetting the Potter Creek channel and attempting to reestablish the flows. Beginning at the time Egan is not receiving sufficient water to satisfy his water right, the regulating authority, exercising almost continuous oversight, would be required to release from storage at least the same amount of water flowing into the reservoir. The regulating authority would be required to frequently measure the inflow and adjust the outflow based on changing inflows, evaporation, and possible changes in seepage resulting from decreased reservoir levels. At the same time, the regulating authority would need to measure the amount of water diverted by Egan and also measure how much extra water is being provided from Marsh Creek or from the reservoir. These measuring locations are remote from each other, and the measurements and adjustments would require significant dedication of resources to implement.

25. At some point in the carefully attended monitoring, regulating, and water delivery process described above, the regulating authority would be asked to determine that the call for water by Egan is futile. Upon determination by the regulating authority that Egan's call for water is futile, Diamond T would cease mitigating for the upstream losses caused by the reservoir.

26. The conceptual mitigation plan does not identify the quantity of water that must be delivered to Egan. The conceptual mitigation plan does not propose to transfer or move any of water right no. 29-2295F. The conceptual mitigation plan does not determine the number of irrigated acres that must be dried up to provide mitigation water with water right no. 29-2295F.

27. The conceptual mitigation plan does not evaluate the deliverability of water right 29-2295F in times of shortage.

28. The director/hearing officer searched IDWR's water right records for water rights authorizing diversion of water from Marsh Creek in Bannock County. The priority date of November 27, 1950 is a relatively late priority date for Marsh Creek. There are many water rights authorizing diversion of water from Marsh Creek that bear priority dates earlier than November 27, 1950. The total flow rate authorized by these water rights bearing priority dates predating November 27, 1950, without adjusting for possible combined limits, is 55.34 cfs. The total flow rate authorized for Marsh Creek water rights bearing priority dates between June 1, 1939 (the priority date for water right no. 29-4382) and November 27, 1950 (the priority date for water right no. 29-2295F) is 10.30 cfs. *See Attachment A.*

29. During recent drought years, water users diverting water from Marsh Creek have complained to IDWR about water shortages.

30. Seven water delivery entities holding natural flow water rights authorizing diversion of surface water from the Snake River at or near Milner Dam have petitioned IDWR to deliver their natural flow water rights. These entities hold substantial natural flow rights authorizing diversion from the Snake River downstream from the mouth of the Portneuf River to which Marsh Creek is tributary. All but one of the natural flow water rights held by these seven water delivery entities bear priority dates predating November 27, 1950.

31. Determination of the mitigation requirement as proposed by the conceptual mitigation plan would require additional data collection by Diamond T and analysis by IDWR staff, Diamond T, and Egan. In addition, administration of the conceptual mitigation plan to ensure delivery of water to Egan would require significant oversight and frequent monitoring. There is not an active water district or watermaster on Marsh Creek and Potter Creek to administer delivery of the mitigation water. The conceptual mitigation plan does not identify who will oversee delivery of the mitigation water to ensure 0.36 cfs is available at the point of diversion for right 29-4382.

## ANALYSIS

Adams testified that, from the time he acquired the Diamond T property in 1998, he drove along Marsh Valley Road 30 to 40 times a year, and, on numerous occasions, there was no water crossing Marsh Valley Road. This testimony may conflict with Egan's testimony. Egan testified that, until 2007, Potter Creek has always provided the water for irrigation of the place of use described by water right no. 29-4382. Egan permanently resides in Arimo, Idaho, near the Potter Creek drainage, and has farmed the place of use described by water right no. 29-4382 since 1971. Egan also relies on water from Potter Creek for irrigation. Adams does not rely on flows in Potter Creek for irrigation. Consequently, Adams' observations were more casual and sporadic than Egan's observations. To the extent Egan's testimony conflicts with Adams' testimony, the hearing officer finds Egan's testimony on this subject to be more credible.

The conceptual mitigation plan lacks sufficient analysis and detail about the quantities of replacement water needed, the duration of replacement, how the measurements of inflows, outflows, water diverted, and water replaced will be conducted and coordinated, and by whom.

The conceptual mitigation plan assumes that Egan's call for delivery of water authorized by water right no. 29-4382, at times, will be futile. Because of the anticipated futile call, the plan also assumes that the quantity of water offered for mitigation would be less than that necessary to provide a full irrigation supply to Egan under water right 29-4382. The plan further assumes that because of the anticipated futile call less acreage served by water right no. 29-2295F would need to be dried up to supply mitigation water. These assumptions conflict with Egan's testimony that Potter Creek has always provided a full supply of water for water right no. 29-4382.

Finally the conceptual mitigation plan proposes mitigation with a November 27, 1950 priority water right, which is junior to the June 1, 1939 priority water right for which mitigation is offered. Because of present uncertainties about water administration and possible curtailment, any surface water right offered for mitigation must bear a priority date earlier than the right for which mitigation is offered, or the regulatory process must be more certain and the regulatory relationship between the water rights that are the subject of the proposal for mitigation must be determined.

### **CONCLUSIONS OF LAW**

1. Idaho Code § 42-203A 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, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

2. The applicant bears the ultimate burden of proof regarding all the factors set forth in Idaho Code § 42-203A.

3. Idaho Code § 42-202B(3) defines local public interest:

"Local public interest" is defined as the interests that the people in the area affected by a proposed water use have in the effects of such use on the public water resource.

### **Sufficiency of the water supply for the purposed use**

4. Modeled recurrence calculations establish that spring runoff prior to April 1 is sufficient to fill a 30 acre foot impoundment.

5. Within the Marsh Creek Drainage and tributaries there is water available for appropriation during the non-irrigation season to satisfy a June 15, 2005 priority water right.

6. During the irrigation season, there is insufficient water in Potter Creek to maintain storage of a 30 acre-feet on-stream storage reservoir and still satisfy existing water rights.

### **Reduction of the quantity of water under existing water rights**

7. During the irrigation season when there is sufficient water in Marsh Creek to fill a water right with a priority of November 27, 1950, water diverted under water right 29-2295F could be used to mitigate for a reduction in the quantity of water available to fill water right 29-4382.

8. Diamond T's conceptual mitigation plan assumes the capability of simultaneously measuring and coordinating measurements of inflow to the proposed reservoir, outflow from the proposed reservoir, deliveries of mitigation water, and measurement of water delivered to Egan. The conceptual mitigation plan also assumes that calls for delivery of water by Egan during extended periods of the irrigation season would be futile based on these coordinated measurements and that IDWR would be responsible for the determination of the futile calls. These assumptions ignore the testimony of Egan that, until 2007, there has always been sufficient water delivered for irrigation of the place of use for water right no. 29-4382. Construction of the Diamond T impoundment likely contributed to the 2007 interruption of the water supply for water right no. 29-4382.

9. As a result, the conceptual mitigation is unduly complex, cannot be administered by any water delivery organization or IDWR under existing law and with present resources, and cannot be relied on as a means of determining injury because of the hydrologic impacts on Potter Creek caused by the on-stream impoundment of water.

### **Good faith, delay, and speculation**

10. The applicant is prepared to impound water behind the constructed embankment.

11. Impounding water would require adherence to applicable dam safety provisions in Idaho Code § 42-1711.

### **Financial resources**

12. The applicant has sufficient financial resources to complete the proposed project.

### **Local public interest**

13. It is not in the local public interest, as defined in Idaho Code § 42-202B, to approve application no. 29-13778, when the administration of a conceptual mitigation plan cannot be implemented because: (a) water rights naming Potter Creek as a source of water are not currently regulated by a watermaster; (b) at a future date when a watermaster is regulating water rights diverted from Potter Creek, the monitoring and regulation to administer the conceptual plan would require an unreasonable dedication of IDWR and watermaster services, (c) full regulation of the rights of Potter Creek, Marsh Creek, and other water rights naming sources of water located downstream of the point of diversion of water right no. 29-2295F (offered for mitigation) would likely result in curtailment of right no. 29-2295F earlier in the irrigation season than curtailment of water right no. 29-4382, resulting in no mitigation being provided for ongoing storage proposed by application no. 29-13778.

### **Conservation of water resources**

14. The application is not contrary to conservation of water resources within the state of Idaho.

### **Potential adverse affects on the local economy**

15. The application will not adversely affect the local economy.

## **ORDER**

**IT IS HEREBY ORDERED** application for permit no. 29-13778 is **Denied without prejudice**.

**IT IS FURTHER ORDERED** that, prior to the Department accepting and considering a subsequent application to store water at the location proposed by application no. 29-13778, Diamond T or its successor must propose a mitigation plan to IDWR that will deliver to the holder of water right no. 29-4382, the quantity of water the holder of water right no. 29-4382 is entitled to under the water right. The plan must address the following factors that are the basis for denial and rejection of application for permit no. 29-13778 and the rejection of the associated mitigation plan:

- a. The remote location and difficulty of access to the proposed reservoir;
- b. If a watermaster were regulating water rights in the Marsh Creek drainage, the inordinate and almost continuous monitoring effort that must be employed by a watermaster.
- c. Difficulties in accurately measuring and comparing inflows and outflows to the proposed reservoir, simultaneously comparing water available for water right no. 29-4382, and adjusting the outlet works or delivering mitigation water from Marsh Creek, all in real time.

- d. Proposed mitigation with a water right that bears a priority date later in time than the priority date of water right no. 29-4382.
- e. Changes to the hydrologic condition of the channel and patterns of flow caused by construction of the dam and impoundment of water in the reservoir.

One acceptable method of mitigation is to provide to the holder of water right no. 29-4382, during the entire irrigation season and at the authorized points of diversion, the 0.36 cfs authorized by water right no. 29-4382. If a surface or ground water right is offered for mitigation, the right offered for mitigation must bear a priority date that is senior to the priority date for water right no. 29-4382.

Dated this 7<sup>th</sup> day of September, 2010.

  
\_\_\_\_\_  
GARY SPACKMAN  
Interim Director

**CERTIFICATE OF SERVICE**


I HEREBY CERTIFY that on this 7<sup>th</sup> day of September, 2010, a true and correct copy of the document(s) described below were served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Documents served: Final Order and Explanatory Information sheet

REED W LARSEN  
COOPER & LARSEN  
PO BOX 4229  
POCATELLO ID 83205-4229

RANDY BUDGE  
RACINE OLSON NYE BUDGE & BAILEY  
PO BOX 1391  
POCATELLO ID 83204-1391

DIAMOND T RANCH  
1705 N HWY 38  
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Deborah Gibson  
Administrative Assistant