

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATIONS FOR
PERMIT NOS. 63-32459 AND 63-32460 IN
THE NAME OF G.O. INVESTMENTS
IDAHO, LLC

**ORDER ADDRESSING
EXCEPTIONS AND FINAL
ORDER**

G.O. Investments Idaho, LLC (“G.O. Investments”) or its predecessors filed applications to appropriate water nos. 63-32459 (Boise River) and 63-32460 (Unnamed Drain) with the Idaho Department of Water Resources (“Department”). The applications sought the following:

Application no. 63-32459: 24 cfs from the Boise River during the non-irrigation season for wildlife purposes.

Application no. 63-32460: 6 cfs and 40 ac-ft of storage from an unnamed drain during the non-irrigation season for wildlife and storage. (The unnamed drain listed in 63-32460 may be known as the Meadows Drain.)

The applications proposed diversion of water for the filling and maintenance of waterfowl ponds.

Other interested parties protested the applications. The protests were subsequently withdrawn after GO Investments agreed to reduce the flow rate sought to be appropriated by application no. 63-32459 to 6 cfs.

On March 26, 2014, the Department issue Permit Nos. 63-32459 and 63-32460. The permits were issued as preliminary orders pursuant to Rule 730 of the Department’s Rules of Procedure (IDAPA 37.01.01.730). On April 9, 2014, Dana Hofstetter, Attorney for G.O. Investments filed a petition for reconsideration.

On April 30, 2014, John Westra of the Department issued an *Order Addressing Petition for Reconsideration* and amended water right permit nos. 63-32459 and 63-32460.

On May 15, 2014, G.O. Investments filed *Exceptions to Preliminary Order*, objecting to the following condition in the April 30, 2014 order:

This right shall be junior and subordinate to future minimum in-stream flow water rights that may be established for the Boise River and its tributaries.

The *Order Addressing Petition for Reconsideration* contained the following findings of fact:

There are currently 6 authorized wildlife use permits in the lower Boise River area. The cumulative flow rate totals 79.5 cfs.

During the non-irrigation season a 250 cfs flow is maintained in the Boise River (downstream of Lucky Peak) by dedicated storage water from the Bureau of Reclamation (63-3618). Currently, there are no minimum in-stream flow designations/water rights for the river downstream of Lucky Peak.

The Boise River is designated a navigable river in the Notus-Parma area by the Idaho Department of Lands.

The *Order Addressing Petition for Reconsideration* contained the following conclusion of law:

Currently there are no minimum in-stream flow rights applicable to the lower reach of the Boise River (near Notus and Parma). The culmination of the wildlife diversion rate referenced in Fact No. 6 is a high percentage of the current stream maintenance flow (250 cfs) during the non-irrigation season. In the future, the wildlife diversions may have to yield to possible minimum in-stream water rights in certain reaches of the river to provide protection to other interests such as other water uses, water quality, channel stability, fishery, or other public interests.

Idaho Code § 42-203A(5)(e) requires that the Director must determine whether an application to appropriate water is in the local public interest. Idaho Code § 42-202B(3) defines the local public interest as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” In applying the local public interest standard and other statutory criteria to the application to appropriation water:

[T]he director 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. Provided, however, that minimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code.

G.O. Investments cites Idaho Code § 42-1501, which states that the purpose of minimum stream flow rights is “to preserve such water from subsequent appropriation to other beneficial use under the provisions of chapter 2, title 42, Idaho Code.” G.O. Investments also quotes Idaho Code § 42-1503, which states that a proposed appropriation of minimum streamflow “will not interfere with any vested water right, permit, or water right application with priority of right dated earlier

than the date of receipt in the office of the director of a complete application for appropriation of minimum stream flow.” Finally, G.O. Investments refers to Idaho Code § 42-1505, which generally describes how minimum stream flow water rights and other water rights will be jointly administered under Idaho law.

G.O. Investments argues that the above laws support a conclusion that “there is no statutory basis giving IDWR any authority to subordinate other senior water rights to minimum stream flows.”

G.O. Investments overlooks the authorities granted to the Director of the Department by Idaho Code § 42-203A to consider the local public interest and grant a permit for appropriation upon conditions. The Director can grant a permit for a large nonconsumptive use while still protecting instream flow values by subordinating the nonconsumptive use to a possible future minimum streamflow water right. If the Idaho Water Resource Board wants to file for a minimum streamflow in the future, all of the processes described in title 42, chapter 15 must be employed and all the factors for establishment of a minimum streamflow must be addressed. If G.O. Investments is opposed to some future minimum streamflow filing, it can oppose the proposed minimum streamflow. In the meantime, the Director can fully exercise his authorities granted by Idaho Code § 42-203B.

The findings of fact and conclusions of law in the Order Addressing Petition for Reconsideration support a determination that water right nos. 63-32459 and 63-32460 should be subordinated to future minimum streamflow water rights. Six cfs is a sizeable quantity of water to appropriate from the Boise River. Without considering application for permit no. 63-32459, there are six existing water rights authorizing the diversion of 79.5 cfs from the Boise River for wildlife purposes. Approval of application no. 63-32459 would raise the authorized flow rate for nonconsumptive diversions from the Boise River to 85.5 cfs. These are significant nonconsumptive diversions from the Boise River that may substantially deplete flows in the main channel of the river.

During the non-irrigation season, storage water from Lucky Peak Reservoir authorized by water right 63-3618 is released into the Boise River for the purpose of maintaining flows in the Boise River. At least 250 cfs flow is maintained in the Boise River downstream of Lucky Peak to sustain river values. Although there are no minimum streamflow water rights for the Boise River downstream of Lucky Peak, these storage releases are for the specific purposes of keeping at least the 250 cfs in the river.

Finally, there is great public value ascribed to the Boise River as an asset for the local public to enjoy. The aesthetics and wildlife attributes of a flowing river valued by the public are similar to the aesthetics and wildlife attributes of large, private, and nonconsumptive flows of water. By subordinating the large, private, nonconsumptive water rights to future public minimum streamflows, the worth of the nonconsumptive use of water in the future can be balanced against the public value of maintaining water in the river.

ORDER

IT IS HEREBY ORDERED that G.O. Investments' *Exceptions to Preliminary Order* is **Denied**.

Attached are the amended permit documents for Permits Nos. 63-32459 and 63-32460. IT IS FURTHER ORDERED that the Amended Permits Nos. 63-32459 and 63-32460 are final orders of the Department, as amended by the *Order Addressing Petition for Reconsideration*, dated April 30, 2014.

DATED this 21st day of July, 2014.

A handwritten signature in black ink, reading "Gary Spackman", is written over a horizontal line. The signature is cursive and extends to the right of the line.

Gary Spackman, Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of July, 2014, the above and foregoing, was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

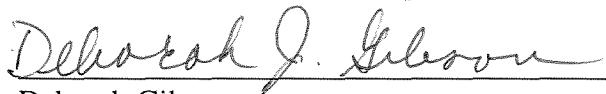
Documents Sent: Order Addressing Exceptions and Final Order and Explanatory Information Sheet for a Final Order when a hearing was not held.

Michael Creamer
Givens Pursley LLP
P.O. Box 2720
Boise, Idaho 83701-2720

Dana L. Hofstetter
Hofstetter Law Office, LLC
608 West Franklin Street
Boise, Idaho 83702

Andrew J. Waldera
Moffatt Thomas
P.O. Box 829
Boise, Idaho 83701-0829

Albert P. Barker
Barker Rosholt & Simpson
PO Box 2139
Boise ID 83701



Deborah Gibson
Admin. Assistant for the Director

State of Idaho
 Department of Water Resources
Amended Permit to Appropriate Water

NO. 63-32459

Priority: April 05, 2005

Maximum Diversion Rate: 6.00 CFS

This is to certify, that G O INVESTMENTS IDAHO LLC
 26358 SAND RD
 PARMA ID 83660

has applied for a permit to appropriate water from:

Source: BOISE RIVER

Tributary: SNAKE RIVER

and a permit is APPROVED for development of water as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>	<u>ANNUAL VOLUME</u>
WILDLIFE	11/16 to 02/28	6.00 CFS	
WILDLIFE STORAGE	11/16 to 02/28		12.0 AF
DIVERSION TO STORAGE	11/16 to 02/28	6.00 CFS	

LOCATION OF POINT(S) OF DIVERSION:

BOISE RIVER L3 (NE1/4NW1/4) Sec. 27, Twp 05N, Rge 05W, B.M. CANYON County

PLACE OF USE: WILDLIFE

Twp Rge Sec	NE				NW				SW				SE				Totals
	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
05N 05W 21																	X
05N 05W 22											X						L 10
											L 5						

PLACE OF USE: WILDLIFE STORAGE

Twp Rge Sec	NE				NW				SW				SE				Totals
	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
05N 05W 21																	X
05N 05W 22											X						L 10
											L 5						

CONDITIONS OF APPROVAL

1. Proof of application of water to beneficial use shall be submitted on or before **May 01, 2019**.
2. Subject to all prior water rights.
3. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.

State of Idaho
Department of Water Resources

Amended Permit to Appropriate Water

NO. 63-32459

4. Prior to the diversion and use of water under this approval, the right holder shall comply with applicable water quality permitting requirements administered by the Department of Environmental Quality or the Department of Agriculture.
5. This right does not grant any right-of-way or easement across the land of another.
6. The Director retains jurisdiction to require the right holder to provide purchased or leased natural flow or stored water to offset depletion of Lower Snake River flows if needed for salmon migration purposes. The amount of water required to be released into the Snake River or a tributary, if needed for this purpose, will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this permit.
7. The right holder shall install or construct a straight length of conduit or ditch suitable for installation of a device for measuring the entire flow of water being diverted in connection with this right. If the right holder uses conduit, the straight length of conduit shall be at least fifteen times the diameter of the conduit and shall be above ground or otherwise easily accessible.
8. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 63.
9. Prior to diversion of water under this right, the right holder shall install and maintain a measuring device and lockable controlling works of a type acceptable to the Department as part of the diverting works.
10. The diversion and use of water described in this right is subject to additional conditions and limitations agreed to by the Haas Ditch Company and the right holder under a separate agreement to which the Department is not a party. Because the Department is not a party, the Department is not responsible for enforcement of any aspect of the agreement not specifically addressed in other conditions herein. Enforcement of those portions of the agreement not specifically addressed in other conditions shall be the responsibility of Haas Ditch Company and the right holder.
11. Wildlife and wildlife storage uses are for habitat improvement during the non-irrigation season.
12. Any obstruction in the Boise River Channel for diversion of water under this right must provide for watercraft and fish passage. The right holder must bypass sufficient flows in the Boise River at the point of diversion to accommodate watercraft navigation and fisheries values in the Boise River downstream of the diversion. The quantity of the bypass flow may be established in the future by the filing of a petition with the Department to establish the bypass flows and subsequent proceedings as described in the Department's Rules of Procedure.
13. This right shall be junior and subordinate to future water rights authorizing the diversion and use of water from the Boise River and its tributaries, including ground water, for consumptive uses, except that this right shall not be subordinate to future water rights for similar wildlife, recreation and/or aesthetic uses
14. This right shall be junior and subordinate to future minimum in-stream flow water rights that may be established for the Boise River and its tributaries.
15. Subsequently approved permits based on earlier-in-time applications may reduce the amount of water available for appropriation under this right and may result in a reduction of the quantity found to be beneficially used at the time of licensing of this right.
16. Water will be diverted from the source via the Haas Ditch. Water will be returned to the Boise River approximately 6 miles downstream via the East End Ditch.
17. This right does not authorize the diversion and use of water released from Lucky Peak Reservoir for stream flow maintenance purposes in connection with Water Right 63-3618.

State of Idaho
Department of Water Resources

Amended Permit to Appropriate Water

NO. 63-32459

18. Prior to construction of any diversion or return works in the Boise River, necessary authorizations must be obtained from the US Corps of Engineers.
19. The pond established by the storage of water under this right shall not exceed a total capacity of 12.0 acre-feet and a total surface area of 10 acres.
20. Wildlife use is for flow through, and return flow water associated with wildlife storage under this right during the non-irrigation season.

This permit is issued pursuant to the provisions of Section 42-204, Idaho Code. Witness the signature of the Director, affixed at Boise, this _____ day of _____, 20_____.

GARY SPACKMAN, DIRECTOR

DRAFT

State of Idaho
 Department of Water Resources
Amended Permit to Appropriate Water

NO. 63-32460

Priority: April 05, 2005

Maximum Diversion Rate: 6.00 CFS

This is to certify, that G O INVESTMENTS LLC
 24034 BATT CORNER RD
 PARMA ID 83660

has applied for a permit to appropriate water from:

Source: UNNAMED DRAIN **Tributary:** BOISE RIVER

and a permit is APPROVED for development of water as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>	<u>ANNUAL VOLUME</u>
WILDLIFE	11/16 to 02/28	6.00 CFS	
DIVERSION TO STORAGE	11/16 to 02/28	6.00 CFS	
WILDLIFE STORAGE	11/16 to 02/28		40.0 AF

LOCATION OF POINT(S) OF DIVERSION:

UNNAMED DRAIN L4 (NE1/4NW1/4NW1/4) Sec. 27, Twp 05N, Rge 05W, B.M. CANYON County

PLACE OF USE: WILDLIFE

Twp	Rge	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
05N	05W	22											X						
05N	05W	27							X				L 5						

PLACE OF USE: WILDLIFE STORAGE

Twp	Rge	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
05N	05W	22											X						
05N	05W	27							X				L 5						

CONDITIONS OF APPROVAL

1. Proof of application of water to beneficial use shall be submitted on or before **May 01, 2019**.
2. Subject to all prior water rights.
3. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.
4. Prior to the diversion and use of water under this approval, the right holder shall comply with applicable water quality permitting requirements administered by the Department of Environmental Quality or the Department of Agriculture.
5. This right does not grant any right-of-way or easement across the land of another.

Amended Permit to Appropriate Water

NO. 63-32460

6. The Director retains jurisdiction to require the right holder to provide purchased or leased natural flow or stored water to offset depletion of Lower Snake River flows if needed for salmon migration purposes. The amount of water required to be released into the Snake River or a tributary, if needed for this purpose, will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this permit.
7. The right holder shall install or construct a straight length of conduit or ditch suitable for installation of a device for measuring the entire flow of water being diverted in connection with this right. If the right holder uses conduit, the straight length of conduit shall be at least fifteen times the diameter of the conduit and shall be above ground or otherwise easily accessible.
8. Prior to diversion of water under this right, the right holder shall install and maintain a measuring device and lockable controlling works of a type acceptable to the Department as part of the diverting works.
9. The waste water diverted under this right is subject to the right of the original appropriator, in good faith and in compliance with state laws governing changes in use and/or expansion of water rights, to cease wasting water, to change the place of use or manner of wasting it, or to recapture it.
10. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 63.
11. The five (5) ponds established by the storage of water under this right shall not exceed a total capacity of 40.0 acre-feet or a total surface area of 10 acres.
12. Wildlife use is for flow through and return flow water associated with wildlife storage under this right during the non-irrigation season.
13. Wildlife storage use is for habitat improvement during the non-irrigation season.
14. This right shall be junior and subordinate to future water rights authorizing the diversion and use of water from the Boise River and its tributaries, including ground water, for consumptive uses, except that this right shall not be subordinate to future water rights for similar wildlife, recreation and/or aesthetic uses.
15. This right shall be junior and subordinate to future minimum in-stream flow water rights that may be established for the Boise River and its tributaries.
16. Subsequently approved permits based on earlier-in-time applications may reduce the amount of water available for appropriation under this right and may result in a reduction of the quantity found to be beneficially used at the time of licensing of this right.
17. The water source is from drain locally known as Meadows Drain. Return flow to the Boise River will be approximately 6 miles downstream via the East End Drain.
18. Water Right No. 63-32910 is subordinate to this water right.

This permit is issued pursuant to the provisions of Section 42-204, Idaho Code. Witness the signature of the Director, affixed at Boise, this _____ day of _____, 20_____.

GARY SPACKMAN, Director

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department 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 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.