

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

IN THE MATTER OF APPLICATION FOR)	
PERMIT NO. 63-34318)	PRELIMINARY ORDER
IN THE NAME OF THE CITY OF BOISE)	APPROVING APPLICATION
PUBLIC WORKS DEPARTMENT)	FOR PERMIT
_____)	

BACKGROUND

In 2014, the Idaho Department of Water Resources (“Department”) issued the City of Boise Public Works Department (“City of Boise”) Permit No. 63-33467 authorizing 200 cfs for water quality improvement at the City of Boise Dixie Phosphorous Removal Facility (“Dixie Facility”) with a season of use from April 1 to October 15. One condition of approval for Permit No. 63-33467 is that “[t]he right holder shall achieve an overall annual total phosphorous removal efficiency of 70%.” *Order Granting Petition for Reconsideration; Amended Preliminary Order* (“Amended Order”) at 34, In the Matter of Application for Permit No. 63-33467 in the Name of City of Boise Public Works Department (Mar. 21, 2014).

On November 15, 2016, the City of Boise filed Application for Permit No. 63-34318 (“Application”) with the Department seeking authorization to “allow the Dixie Drain project to operate year-round”¹ to “meet phosphorus reduction targets and/or Clean Water Act permit limits.” *Application* at 2. The Application seeks to appropriate 200 cfs from the Dixie Slough for water quality improvement from October 16 to March 31. The Application also proposes year-round storage and diversion to storage purposes of use. *Id.* at 1.

The Department published notice of the Application as required by Idaho Code § 42-203A. Riverside Irrigation Ltd. (“Riverside”) and the U.S. Bureau of Reclamation (“BOR”) filed protests against the Application, but withdrew their protests on condition that any permit issued pursuant to the Application include a condition stating:

The source of this right is wastewater. The wasting of water may be discontinued at any time. This right remains 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 or manner of wasting it, or to recapture.

Riverside and BOR agreed to cease involvement in this contested case except as related to the proposed condition and reserved the right to participate further should the Department not include the condition in approving the Application. The Department subsequently sent a letter to

¹ The Dixie Drain is another name for the Dixie Slough. *See Application at Narrative in Support of Permit Application for City of Boise* (Nov. 14, 2016), p.1.

Riverside and the BOR stating “[t]he Department will accept the proposal to include the proposed condition on the permit if [the Application] is approved.”

The City of Greenleaf (“Greenleaf”), Energy Resource Group (“ERG”), and Greg and Ann Obendorf/GO Investments, LLC (“GO”) also filed protests against the Application. On January 18, 2018, the City of Boise, Greenleaf, ERG, and GO filed a *Stipulated Hearing Schedule* with the Department, wherein the parties agreed that the “sole issue remaining for resolution by the [Department] is whether an efficiency standard should be included as a condition of approval, should a Permit be issued by the Department, and, if so, what the efficiency standard should be.”

On May 8, 2018, the City of Boise and Greenleaf filed a *Stipulated Conditional Withdrawal* whereby Greenleaf withdrew its protest on condition that “the right holder shall achieve an overall annual total phosphorus removal efficiency of 40%.” On May 14, 2018, the hearing officer issued an *Order Accepting Settlement and Acknowledging Withdrawal of Protest* (“Order Accepting Settlement”) accepting the proposed condition “as a minimum total phosphorous removal efficiency,” but noting “[t]he Department may require an efficiency standard greater than 40% if the record so warrants.” *Order Accepting Settlement* at 2.

On May 16 and 17, 2018, the Department conducted a hearing regarding the Application. Charles E. Brockway (“Brockway”) and Kate Harris (“Harris”) testified in support of the Application. Richard Kelsey (“Kelsey”), Steve Martinez (“Martinez”), and Greg Obendorf (“Obendorf”) testified in favor of conditionally approving the Application with an efficiency standard of at least 70%.

On June 29, 2018, the Department received the *Applicant’s Post-Hearing Brief* and *Protestants’ Post Hearing Brief*. After carefully reviewing and considering the record, the hearing officer finds, concludes, and orders as follows.

FINDINGS OF FACT

1. High concentrations of total phosphorus in a natural water body can result in elevated “algae and negatively impact ecological and recreational conditions such as dissolved oxygen, pH, macroinvertebrate and fish abundances and community composition, swimming, fishing, boating, and aesthetics.” Ex. 5 at xvi.
2. In 2012, the City of Boise received a National Pollutant Discharge Elimination System (“NPDES”) permit for the discharge from its West Boise Wastewater Renewal Facility (“WRF”)² into the Boise River. *Amended Order* at 14. The Environmental Protection Agency issued the permit pursuant to the NPDES program in compliance with the Clean Water Act, 33 U.S.C. § 1251 et seq., as amended by the Water Quality Act of 1987, P.L. 100-4. *Id.*

² The *Amended Order* uses the term “Wastewater Treatment Facility”. The City of Boise now employs the term “Wastewater Renewal Facility” for the same physical infrastructure formerly called a “Wastewater Treatment Facility.” *Harris Testimony*.

3. The 2012 NPDES permit included total phosphorous limits for May 1 to September 30 each year. *Id.* at 14-15; *Application at Letter from Erika E. Malmen to Cody Parker Re: Application for Permit No. 63-34318* (Mar. 6, 2017) (“Malmen Letter”) at 2.
4. The City of Boise’s 2012 NPDES permit allowed the City to meet total phosphorous requirements by removing phosphorous at the West Boise WRF and the Dixie Facility. *Amended Order* at 14-15. The Dixie Facility is located approximately 0.25 miles upstream and southerly of the Dixie Slough confluence with the Boise River. *Ex. 107* at 1. The removal of total phosphorous at the Dixie Facility in lieu of removal at the West Boise WRF is termed an “offset credit.” *Amended Order* at 15.
5. In 2014, the Department issued the City of Boise Permit No. 63-33467 authorizing 200 cfs for Water Quality Improvement at the Dixie Facility with a season of use from April 1 to October 15.
6. Subsequent to the issuance of Permit No. 63-33467, the City of Boise constructed the Dixie Facility and began using it to remove phosphorous from the Dixie Slough. Both particulate and dissolved forms of phosphorous are removed at the Dixie Facility. *Ex. 8* at 3. Dixie Slough water is diverted into the Dixie Facility using a bladder gate, the water is screened and enters an “Intake Pump Station”, which pumps the water into a sedimentation pond where sediment and associated phosphorous settle to the bottom. *Id.* Water then flows into the “Flash Mix Facility” where a coagulant (PAX-Polyaluminum Chloride) is added to bind with dissolved phosphorous to form flocculent. *Ex. 8* at 3; *Brockway Testimony*. The chemically treated water then flows into a settling pond where the particulate flocculent settles to the bottom and is later removed and sent to the “Floc Management Area” to dry. *Ex. 8* at 3. Except for water stored in the sedimentation and settling ponds and water lost to evaporation from the ponds, treated water exits back to the Dixie Slough. *Id.*
7. The Dixie Facility is designed for the diversion and use of up to 200 cfs of water, but the Dixie Facility can remove phosphorous from lower flows when 200 cfs is not available. *Harris Testimony*.
8. Permit No. 63-33467 requires that “[t]he right holder shall achieve an overall annual total phosphorous removal efficiency of 70%.” *Amended Order* at 34. This removal efficiency was one factor the City of Boise considered “to be determinative of its request to divert 200 cfs from the Dixie Slough.” *Id.* at 16. The City of Boise applied a 70% efficiency standard in its calculations in that matter “based on the experience of its experts in the industry.” *Id.*
9. In August 2015, the Idaho Department of Environmental Quality developed the *Lower Boise River TMDL, 2015 Total Phosphorous Addendum* (“2015 TMDL”). *Ex. 5*. Final point source allocations to satisfy instream targets in the 2015 TMDL are 0.1 mg/L total phosphorous from May 1 through September 30 and 0.35 mg/l total phosphorous from October 1 through April 30. *See Ex. 5* at xxiii, Table E, and xxvi, Table F.
10. The City of Boise’s NPDES permit expired in 2017, but was administratively extended. *Ex. 8* at 2. Because the 2015 TMDL establishes both winter (October –April) and summer (May-

September) total phosphorous allocations, the City of Boise “is certain” it will have “year-round total phosphorous effluent limits in the reissued (or any future) NPDES permit.” *Id.* The City of Boise expects that a new NPDES permit will be issued by 2022 and that the year-round total phosphorous effluent limits will be updated to 2015 TMDL allocations. *Harris Testimony*; Ex. 9 at 2; *Malmen Letter* at 2.

11. On November 15, 2016, the City of Boise filed the Application seeking authorization to “allow the Dixie Drain project to operate year-round” to “meet phosphorus reduction targets and/or Clean Water Act permit limits.” *Application* at 2. The City of Boise will not rely solely on the Dixie Facility to meet its phosphorous reduction targets in the winter, but rather it will use the Dixie Facility in the winter to complement the phosphorous reduction at its West Boise WRF. *Harris Testimony*.
12. Financial “resources required to effectuate year-round operation [of the Dixie Facility] are expected to be paid through the City Water Renewal Fund.” *Malmen Letter* at 2. The City of Boise also has taxing authority. *Id.*
13. The Application proposes:
 - Applicant: City of Boise Public Works Department
 - Source: Dixie Slough
 - Point of Diversion: SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 36, Twp 5 North, Range 5 West
 - Priority Date: November 15, 2016

 - Beneficial Use: Water Quality Improvement
 - Diversion Rate: 200 cfs
 - Season of Use: October 16 to March 31
 - Place of Use: NE $\frac{1}{4}$ SW $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 36, Twp 5 North, Range 5 West, Canyon County

 - Beneficial Use: Diversion to Storage
 - Diversion Rate: 200 cfs
 - Season of Use: January 1 to December 31

 - Beneficial Use: Water Quality Improvement Storage
 - Storage Volume: 144.8 AFA
 - Season of Use: January 1 to December 31
 - Place of Use: NE $\frac{1}{4}$ SW $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 36, Twp 5 North, Range 5 West, Canyon County
14. The Diversion to Storage and Water Quality Improvement Storage uses in the Application are for the year-round impoundment of water in the sedimentation pond and the settling pond.³ The volume of water requested for storage includes water to fill the two ponds and

³ The City of Boise did not claim diversion to storage, or storage, as a beneficial use when it filed Application for Permit No. 63-33467, but “the storage elements of the instant application indicate a year-round period of use to

water to replace evaporation losses from the ponds. *Application at Narrative in Support of Permit Application for City of Boise* (Nov. 14, 2016), p. 2.

15. USGS flow records show that 200 cfs of water was available in the Dixie Slough approximately 14% of the time between October 15 and March 31 from 1981-2018. Ex. 9 at 5.
16. There are no water rights diverted from the Dixie Slough between the City of Boise's proposed point of diversion and the point that water diverted to the Dixie Facility returns to the Dixie Slough. *Malmen Letter* at 1; March 22, 2017 *Memorandum Re: Sufficiency of Rule 40 Info* attached to *Application*.
17. Water Right No. 63-4594, the only water right diverted from the Dixie Slough downstream of the Dixie Facility, has a diversion rate of 0.19 cfs. An analysis of discharge through the Dixie Slough shows that lowest average flow in winter months is 68 cfs. Ex. 7 at 13.
18. Kelsey's *Summary and Basis of Opinion Evaluation of Project Removal Efficiencies Dixie Drain* dated February 27, 2018, was admitted into the record at hearing as Exhibit 6. Brockway's *Expert Report for Application for Permit 63-34318*, dated February 28, 2018, was admitted into the record at hearing as Exhibit 8.
19. Kelsey's *Rebuttal of Expert Report Dixie Drain* dated March 15, 2018, was admitted into the record at hearing as Exhibit 7. Brockway's *Rebuttal Report of Expert Witness Report by Richard Kelsey on Application for Permit 63-34318 "Evaluation of Project Removal Efficiencies-Dixie Drain"* was admitted into the record at hearing as Exhibit 9.
20. Kelsey's expert reports and ERG and GO assert that the City of Boise should be required to achieve an overall annual total phosphorous removal efficiency of 70% for the proposed wintertime operation of the Dixie Facility. Exs. 6 & 7; *Protestant's Post-Hearing Brief* at 10.
21. Brockway's expert reports and the City of Boise assert that a phosphorus removal efficiency for wintertime operation of the Dixie Facility should not exceed 25%. Exs. 8 & 9; *Applicant's Post-Hearing Brief* at 14.
22. The most important factors affecting the amount of phosphorous that can be removed at the Dixie Facility are the quantity of water available, the concentration of phosphorous, and the type and dosage of coagulant employed. *Kelsey Testimony*. However, many other factors may affect the Dixie Facility's ability to remove phosphorous in the winter, including water temperature, water pH, water alkalinity, and ice buildup. *Brockway Testimony*; Ex. 11.
23. Among the factors affecting the Dixie Facility's ability to remove phosphorous, the City of Boise has most control over the type and dosage of coagulant employed. However, the relationship between coagulant dosage and phosphorous removal is not linear; there is a point

cover storage for the summer right and bring it into conformance with current IDWR policy." *Applicant's Post-Hearing Brief* at 5.

of diminishing returns. In addition, discharging large doses of the coagulant into the Dixie Slough could itself be detrimental to the environment. Therefore, coagulant dosage cannot be relied upon to overcome all other relevant factors to achieve a high phosphorous removal efficiency. *Harris Testimony*.

CONCLUSIONS OF LAW

Criteria for Evaluating an Application

1. Idaho Code § 42-203A(5) lists the following criteria the Department must consider when evaluating an application to appropriate water:
 - Potential for injury to existing water right holders.
 - Sufficiency of the water supply.
 - Application is made in good faith and not for delay or speculative purposes.
 - Sufficiency of the applicant's financial resources.
 - Local public interest.
 - Conservation of water resources in Idaho.
 - Effects on the local economy.
2. Idaho Code § 42-202B(3) defines 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.”
3. The applicant bears the ultimate burden of persuasion regarding all the criteria set forth in Idaho Code § 42-203A. IDAPA 37.03.08.040.04.c.
4. The criteria in Idaho Code § 42-203A(5) shall be evaluated as described in Rule 45 of the Water Appropriation Rules. IDAPA 37.03.08.045.
5. Idaho Code § 42-204 states:

[I]t shall be the duty of the department to approve all applications, made in proper form, which contemplate the application of water to beneficial use; provided, that the department may deny any such application, or may partially approve and grant a permit for a lesser quantity of water than applied for, or may grant a permit upon conditions

Potential for Reduction to Existing Water Rights

6. Rule 45.01.a of the Water Appropriation Rules establishes three criteria for determining whether the proposed use will reduce the quantity of water under existing water rights:
 - 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.

IDAPA 37.03.08.045.01.a.

7. An application for permit to divert and use water from a stream must be evaluated for potential injury to senior appropriators who divert downstream from the proposed point of diversion. Water Right No. 63-4594, the only water right diverted from the Dixie Slough downstream of the Dixie Facility, has an authorized diversion rate of 0.19 cfs. An analysis of discharge through the Dixie Slough shows that the lowest average flow in the winter months is 68 cfs. Ex. 7 at 13. The proposed Water Quality Improvement use will not injure Water Right No. 63-4594 because the entire diverted flow is returned to the Dixie Slough upstream from the diversion point for Water Right No. 63-4594. The proposed Diversion to Storage use could take the entire flow of the Dixie Slough and injure Water Right No. 63-4594. However, the watermaster of Water District No. 63 has authority to regulate diversions of water from the Dixie Slough by priority. As long as the City of Boise maintains a measuring device and controlling works on its diversion from the Dixie Slough, the watermaster can use them to limit the City of Boise's diversions so they do not injure Water Right No. 63-4594 or, for that matter, any senior water rights diverted from the Boise River downstream of its confluence with the Dixie Slough.
8. The potential for the City of Boise's proposed project to reduce the supply of water available to existing ground water rights is not in question. Adjacent to the Dixie Slough, the "ambient water table is at most four or five feet below ground surface." *Amended Order* at 14. The City of Boise's proposed diversion of surface water from the Dixie Slough is not anticipated to lower the water table any appreciable amount, and would therefore not diminish either the amount of ground water available to holders of existing rights or their ability to access it.
9. The City of Boise's proposed project will improve water quality in the lower Boise River, not make the quality of the water available to the holder of an existing water right unusable for the purposes of the existing user's right.
10. The City of Boise met its burden to demonstrate that the proposed use will not reduce the quantity of water under existing water rights.

Sufficiency of the Water Supply

11. Rule 45.01.b of the Department's Water Appropriation Rules states:

The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible (direct benefits to applicant must exceed direct costs to applicant), unless there are noneconomic factors that justify application approval.

IDAPA 37.03.08.045.01.b.

12. The quantity of water available is a major factor influencing how much phosphorous the Dixie Facility can remove from the Dixie Slough. ERG and GO argue that because 200 cfs is not always available, the Dixie Facility cannot meet the City of Boise's NPDES permit phosphorous removal requirements, and therefore cannot be economically viable, unless a high phosphorous removal standard is imposed and achieved. *Kelsey Testimony*. However, the most important factor in the economic feasibility evaluation is that the Dixie Facility is already constructed. Additional factors in the City of Boise's favor are that it will not rely solely on the Dixie Facility to meet its wintertime waste load allocations and that the Dixie Facility can remove phosphorous from lower flows when 200 cfs is not available. Finally, removing any amount of phosphorous from the Dixie Slough is beneficial because it will contribute to the objectives of the 2015 TMDL. For these reasons, the water supply is sufficient for the proposed beneficial use even though 200 cfs is not always available.
13. The City of Boise met its burden of persuasion regarding the sufficiency of the water supply for the proposed uses.

Application is Made in Good Faith and not for Delay or Speculative Purposes

14. Rule 45.01.c of the Department's Water Appropriation Rules states:

An application will be found to have been made in good faith if:

- i. The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way. Approval of applications involving Desert Land Entry or Carey Act filings will not be issued until the United States Department of Interior, Bureau of Land Management has issued a notice classifying the lands suitable for entry; and
- ii. The applicant is in the process of obtaining other permits needed to construct and operate the project; and
- iii. There are no obvious impediments that prevent the successful completion of the project.

IDAPA 37.03.08.045.01.c.

15. The City of Boise has legal access to the property necessary to operate the proposed project because it owns the property and the infrastructure on the property. Moreover, the Dixie Facility has already been built and can begin wintertime operation upon approval of the Application. The City of Boise filed the Application in good faith.
16. Water Appropriation Rule 45.01.c states: “Speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence.”
17. The City of Boise’s NPDES permit expired in 2017, but was administratively extended. Ex. 8 at 2. Because the 2015 TMDL establishes both winter (October–April) and summer (May–September) total phosphorous allocations, the City of Boise “is certain” it will have “year-round total phosphorous effluent limits in the reissued (or any future) NPDES permit.” Ex. 8 at 2. The City of Boise expects that a new NPDES permit will be issued in 2022 and that the year-round total phosphorous effluent limits will be updated to 2015 TMDL allocations. The City of Boise filed the Application to have the Dixie Facility operate year round to “meet phosphorus reduction targets and/or Clean Water Act permit limits.” *Application* at 2. The City of Boise did not file the Application for delay or speculative purposes.

Sufficiency of the Applicant’s Financial Resources

18. The sufficiency of the City of Boise’s financial resources is not in dispute. The Dixie Facility is already been built. “Any additional resources required to effectuate year-round operation are expected to be paid through the City Water Renewal Fund.” *Malmén Letter* at 2. The City of Boise also has taxing authority. *Id.* The City of Boise has the financial resources to complete and operate the proposed project.

Local Public Interest

19. Idaho Code § 42-202B(3) defines “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 water use on the public water resource.”
20. “The federal Clean Water Act requires that states and tribes restore and maintain the chemical, physical, and biological integrity of the nation’s waters.” Ex. 5 at xiii. The City of Boise’s proposed project will contribute to the restoration and maintenance of the environmental health of the lower Boise River. The proposed project is not in conflict with the local public interest.
21. The potential for a water resource to accomplish an alternative benefit is an appropriate component of the public interest review criterion. Through long experience, Idaho has learned to be wary of allowing a large, senior, downstream, non-consumptive appropriation to close the door on future upstream water use and the economic development it supports. The Swan Falls matter from the 1980s, which pitted downstream hydropower interests

against irrigation and other Snake River development interests, illustrates this point.⁴ Idaho Code §§ 42-203A(5) and 42-202B(3) require that the Department consider “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” when evaluating whether to issue a new permit. In the case of this Application, as Obendorf and Martinez described in their testimony, property owners in the Dixie Slough drainage would be affected if the City of Boise became entitled to all of the water in the Dixie Slough drainage when flows are less than 200 cfs and most of the water in the drainage when flows exceed 200 cfs. For example, without some protection, new Dixie Slough area ground water uses that reduce the ground water level and reduce the flow of water in the Dixie Slough could be subject to priority curtailment to satisfy the City of Boise’s water right. *See In Matter of Distribution of Water to Various Water Rights Held By or For Ben. of A & B Irrigation Dist.*, 155 Idaho 640, 642-43, 315 P.3d 828, 830-31 (2013). In general, preventing future optimal use of the water resource in favor of cleaning up the resource for the benefit of the City of Boise conflicts with the local public interest because the City of Boise has other options for addressing its phosphorous waste load allocation while the property owners along the Dixie Slough may not have other water resource options. Subordination to future development has been the local public interest protection measure implemented on hydropower water rights in Idaho. Subordination has also been employed for non-hydropower water rights, such as Permit No. 63-33467 issued to the City of Boise for operation of the Dixie Facility in the summertime and other permits for large non-consumptive diversions in the Boise River drainage.⁵ To protect the local public interest in the matter of this Application, the City of Boise’s proposed appropriation should be subordinate to future upstream water uses that would deplete the flow of the Dixie Slough unless the City of Boise demonstrates, on a case-by-case basis, that its water quality improvement project outweighs proposed alternative uses of the public water resource. To protect its investment, the City of Boise’s proposed appropriation should not be subordinate to other projects specifically designed to remove phosphorous from the Dixie Slough.

22. The City of Boise met its burden of persuasion regarding the local public interest.

Conservation of Water Resources in Idaho

23. The Idaho legislature implemented the conservation of water resources requirement for water appropriations in 1990. The Department’s Application Processing Memorandum No. 48, which addressed the requirement, states:

The term “conservation” is not defined in the legislative intent or in the amendment. . . . Due to lack of stated legislative intent, the department will apply the criterion in terms of efficiency as is generally suggested by the term.

⁴ Many resources describe the Swan Falls matter. For one example, see *Understanding the 1984 Swan Falls Settlement*; Idaho Law Review Vol. 52 No. 1, 2016, by Clive J. Strong and Michael C. Orr.

⁵ For example, see Water Right No. 63-32467 authorizing a diversion of 20.0 cfs from the Boise River for Wildlife purposes: “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 use, except that this right shall not be subordinate to future water rights for similar wildlife, recreation and/or aesthetic uses.”

The requirement has been interpreted by the Department to require standards of water use efficiency so that the proposed beneficial use is accomplished while preserving as much water as possible for other benefits.

24. Idaho Code § 42-204 requires the Department to find that the application will be for a beneficial use. To find beneficial use, there is need for some standard to distinguish beneficial use from wastefulness, or at least from a diversion that offers no benefit. For example, as ERG and GO observe, irrigation water rights are limited to the amount of water needed to grow a successful crop on the number of acres to be irrigated. *Protestants' Post-Hearing Brief* at 4. Kelsey's expert reports and ERG and GO assert that the City of Boise should be required to achieve an overall annual total phosphorous removal efficiency of 70% for the proposed wintertime operation of the Dixie Facility. Exs. 6 & 7; *Protestant's Post-Hearing Brief* at 10. For Permit No. 63-33467, 70% efficiency was required because there was need for a standard and the City of Boise's expert witness testified that 70% efficiency would be achievable. For this Application, the potential cumulative impact of the factors effecting efficiency brings the ability to cost-effectively achieve 70% phosphorous removal efficiency in the winter into credible doubt. *See Findings of Fact 22 and 23.* Moreover, the need for a high efficiency is diminished in the winter because the potential alternatives for the resource are likely fewer and less consumptive than summer uses, which would include irrigation. The hearing officer already ordered a minimum phosphorous removal efficiency of 40% in this case. *Order Accepting Settlement.* If the City of Boise achieves a 40% total annual phosphorous removal efficiency, it will achieve progress toward meeting the waste load allocation requirements of its NPDES permit and toward meeting the 2015 TMDL objectives for the lower Boise River. Requiring a total annual phosphorous removal efficiency greater than 40% is not necessary for beneficial use to be achieved.
25. The City of Boise asserts that an efficiency standard "does nothing" to conserve water resources because its proposed Water Quality Improvement use is non-consumptive and its sediment ponds are lined to prevent seepage losses. *Applicant's Post hearing brief* at 10. As noted above, the Department is required by Idaho Code § 42-204 to find that the application will be for a beneficial use. That means that the diversion of water must *do something* beneficial. It is a principal tenet of the Doctrine of Prior Appropriation that if the proposed use will not be beneficial, the water should be available to others, including potential upstream junior water users, who may need it for some beneficial purpose. *See Colthorp v. Mountain Home Irr. Dist.*, 66 Idaho 173, 179–80, 157 P.2d 1005, 1007–08 (1945). The City's argument that its use is immune from an efficiency standard because it is not depletionary ignores the potential for future upstream diversions for beneficial use. The efficiency standard ensures that the City's diversion of water will achieve the beneficial use requirement of Idaho Code § 42-204 and, therefore, enables it to call for water in priority during a time of shortage, subject to the subordination provisions discussed in the Local Public Interest section above.
26. The Department's approval of Permit No. 63-33467 contains the following approval condition:

Should a water right license be issued in connection with this permit, the total annual

diversion volume limit shall not exceed the amount consistent with a 70% total phosphorous removal efficiency.

For this Application, the City of Boise is opposed to such a volume limit based on historical diversion rates and achieved efficiency because of uncertainty surrounding the factors that influence wintertime removal efficiencies and because the City has no control over source quantity and quality. *Applicant's Post Hearing Brief* at 11. IDAPA 37.03.02.035.01.j lists the beneficial uses that are exempt from a volume limit at licensing. Water Quality Improvement is not among the exempt uses. Therefore, as in the matter of Permit No. 63-33467, at licensing it will be necessary for the Department to establish an annual volume limit consistent with the beneficial use accomplished by the City of Boise during the permit development period. It may even become necessary to ascertain what the licensed volume limit should be if the City of Boise does not accomplish the required phosphorous removal efficiency. Because Idaho Code § 42-219(1) states that a license "in no case shall be an amount in excess of the amount that has been beneficially applied," one option would be to void the permit and issue no license because of the failure to meet the beneficial use requirement. The alternative, as the Department found in issuing Permit No. 63-33467, would be to limit the license to the volume consistent with the efficiency requirement, based on the phosphorous concentration measurements and the pounds of phosphorous removed.

Effects on the Local Economy

27. This criterion applies only to "out-of-basin" appropriations; it does not apply in this case.

ORDER

IT IS HEREBY ORDERED that Application for Permit No. 63-34318 in the name of the City of Boise Public Works Department is **APPROVED**.

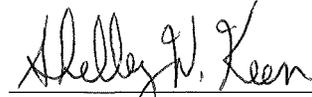
IT IS FURTHER HEREBY ORDERED that the following conditions shall apply to the approval of Application for Permit No. 63-34318:

1. Proof of application of water to beneficial use shall be submitted no sooner than April 1, 2023, and received no later than the beneficial use due date of September 1, 2023.
2. This right shall be 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. Water Quality Improvement and Water Quality Improvement Storage are for the removal of phosphorous from the water flowing in the Dixie Slough.
5. This right does not grant any right-of-way or easement across the land of another.

6. The source of this right is wastewater. The wasting of water may be discontinued at any time. This right remains 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 or manner of wasting it, or to recapture.
7. 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.
8. Use of water under this right may 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 of water pursuant to this right shall be junior and subordinate to future upstream water rights authorizing the diversion and use of water from the Dixie Slough and its tributaries, including ground water. However, the right holder shall not be precluded from participating in the statutory process to demonstrate, on a case-by-case basis, that its water use should not be subordinate to a particular water use proposal. This right shall not be subordinate to future water rights for similar water quality improvement purposes and to water rights for hydropower. This right shall also not be subordinate to future upstream non-consumptive water rights authorizing the diversion and use of water from the Dixie Slough and its tributaries, including ground water, if the return flows from the future upstream non-consumptive water rights discharge into a different water body, such as the Boise River, or return to the Dixie Slough downstream from the right holder's point of diversion, thereby making the water unavailable to this water right holder.
11. The right holder shall achieve an overall annual total phosphorous removal efficiency of 40% for the period from October 16 to March 31. By May 31 of each of its years of operation prior to submitting proof of beneficial use, the right holder shall submit to the Department a report showing:
 - The total volume of water diverted from the Dixie Slough for the period from October 16 to March 31.
 - The total phosphorous concentration at inflow and outflow.
 - The average monthly lbs/day of total phosphorous removal.
 - The overall annual total phosphorous removal efficiency.

Should a water right license be issued in connection with this permit, the total annual diversion volume limit shall not exceed the amount consistent with a 40% total phosphorous removal efficiency.

Dated this 29th day of August 2018.



Shelley W. Keen
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2018, I served a true and correct copy of Preliminary Order Approving Application for Permit No. 63-34318 by U.S. Mail, postage prepaid, to the following:

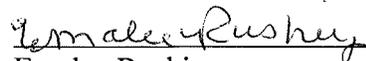
PERKINS COIE
ATTN ERIKA MALMEN
PERKINS COIE
1111 W JEFFERSON ST STE 500
BOISE ID 83702-5391

ENERGY RESOURCE GROUP LLC
G O INVESTMENTS IDAHO LLC
C/O CHARLES L HONSINGER
HONSINGER LAW PLLC
PO BOX 517
BOISE ID 83701

CITY OF GREENLEAF
C/O CHERESE MC LAIN
MSBT LAW CHTD
950 W BANNOCK ST STE 520
BOISE ID 83702

E GAIL MCGARRY
BUREAU OF RECLAMATION
1150 N CURTIS RD STE 100
BOISE ID 83706

RIVERSIDE IRRIGATION DISTRICT
ATTN ALBERT P BARKER
BARKER ROSHOLT & SIMPSON LLP
1010 JEFFERSON ST STE 102
PO BOX 2139
BOISE ID 83701


Emalee Rushing
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer 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 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case 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 this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.