

Nov 04, 2022

DEPARTMENT OF WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR)
PERMITS FOR THE DIVERSION AND USE)
OF SURFACE AND GROUND WATER)
WITHIN THE SNAKE RIVER BASIN)
)
)
)
_____)

PETITION FOR HEARING

The Board of Commissioners of Elmore County, through undersigned counsel of record, hereby files this Petition for Hearing pursuant to Idaho Code Section 42-1701A(3) and the Department’s Rules of Procedure, IDAPA 37.01.01, including Procedural Rules 002.14, 152, and 300.

I. BACKGROUND

1. On October 21, 2022, Elmore County received the Department’s Amended Snake River Basin Moratorium Order (the “Order”).

2. The Order “suspends further action on the processing and approval of presently pending and new applications for permits to appropriate water from the Snake River upstream from Swan Falls Dam....” (Order, p. 27).

II. ELMORE COUNTY’S SNAKE RIVER APPLICATION

3. On or about March 3, 2017, Elmore County filed its Application for Permit 2-10535 (the “Application”).

4. The Application proposes to divert up to 20 cfs of water from points of diversion on the Snake River upstream of Swan Falls Dam, downstream of King Hill, and within the jurisdiction of Water District 02.

5. The Application proposes diversion of Trust Water pursuant to Idaho Code Sections 42-203B and 42-203C.

6. The Application’s proposed purposes of use are for groundwater recharge on the Mountain Home Plateau, municipal uses within the City of Mountain Home, and irrigation.

7. The place of use for the application includes groundwater recharge sites, the improvement of which have been partially funded by the Idaho Water Resource Board (“IWRB”).

8. Notices of protest to the Application were filed by Cat Creek Energy LLC, Idaho Conservation League, IWRB, the U.S Bureau of Land Management, Idaho Power Company, and the Idaho Department of Lands.

9. All of those protests have been withdrawn, either unconditionally or based upon stipulations between the protestant and Elmore County.

10. The final Withdrawal of Protest was filed by the IWRB on May 13, 2019.

11. Since May 13, 2019, the Application has been awaiting processing by the Department.

III. IMPACTS OF THE ORDER ON THE APPLICATION

12. The Order specifically applies to “presently pending” applications and does not distinguish between pending applications that have merely been filed with the Department and those for which publication has occurred and all protests resolved.

13. Therefore, the Order suspends further processing of the Application.

14. While the Order “does not prevent the Director from reviewing for approval on a case-by-case basis” certain applications, those case-by-case determinations are entirely discretionary with the Director.

IV. THE ORDER IS NOT NECESSARY AND VIOLATES IDAHO LAW

15. Applications for permit for diversions from the mainstem Snake River between King Hill and Swan Falls Dam should be excluded from the Order, rather than be subject to case-by-case evaluation, for the following reasons.

16. Most of the time, average flows at the Murphy Gage remain above the minimum stream flows described in Paragraph 77 of the Order.

17. Pursuant to Idaho Code Section 42-203C, applications for diversions of Trust Water are already subject to an evaluation of the public interest.

18. Pursuant to Idaho Code Section 42-203A(5), 42-204(1), and other legal authorities, the Department and Director may impose conditions of approval on such applications as necessary to protect minimum stream flows and to otherwise comply with the prior appropriation doctrine.

19. Water District 02 is capable of regulating new diversions from the King Hill-Swan Falls reach of the Snake River pursuant to Idaho Code Section 42-607 to protect minimum stream flows and to otherwise comply with the prior appropriate doctrine.

20. Power generation from wind and solar sources within Elmore County can offset impacts to power production attributable to reduced flow.

21. For the above reasons, suspending processing of applications for permit between King Hill and Swan Falls Dam (including the County's Application) is not "necessary to protect existing vested water rights or to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violation of minimum flow provisions of the state water plan" pursuant to Idaho Code Section 42-1805(7) and Water Appropriation Rule 055.01(a).

22. Further, imposing a moratorium that is not "necessary" pursuant to Section 42-1805(7) prevents the "optimum development of water resources" required by Article XV, Section 7 of the Idaho Constitution. *See also* IDAHO CODE § 42-203C(2)(a)(iv) (requiring "promotion of full economic and multiple use development of the water resources of the state of Idaho" when evaluating proposed appropriations of Trust Water).

V. SUMMARY, CONCLUSION, AND REQUESTED RELIEF

23. Pursuant to Idaho Code Section 42-1701A(3), any person "who is aggrieved by the action of the director" and who has not already been afforded an opportunity for a hearing on the matter is entitled to a hearing upon filing of a written petition stating the grounds for contesting the action within fifteen days after receipt of written notice of the action.

24. Elmore County has been aggrieved by the issuance of the Order.

25. Elmore County has not previously been afforded a hearing regarding the Order.

26. Therefore, Elmore County is entitled to a hearing regarding the propriety of the Order as described herein.

DATED THIS 4th day of November, 2022.

Varin Thomas LLC

By: 

Dylan B. Lawrence
Attorneys for Elmore County, Board of
County Commissioners

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2022, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Original:

Idaho Department of Water Resources
322 E. Front Street
Boise, Idaho 83702
file@idwr.idaho.gov

U.S. Mail
 Overnight Mail
 Hand Delivery
 Fax
 Email



Dylan B. Lawrence