

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

**IN THE MATTER OF APPLICATION)
FOR PERMIT NO. 74-16229 IN THE)
NAME OF BOYD FOSTER)**

**ORDER DENYING PETITION
TO RE-OPEN HEARING AND
PETITION FOR RECONSIDERATION**

The Idaho Department of Water Resources (“Department”) conducted an administrative hearing for this contested case on February 11, 2021. On February 25, 2021, the hearing officer for the Department issued a *Preliminary Order Denying Application* (“Preliminary Order”). On March 11, 2021, Applicant Boyd Foster (“Foster”) filed a *Petition to Re-Open Hearing or in the Alternative, Petition for Reconsideration* (“Petition”). Foster’s Petition was timely filed. See IDAPA 37.01.01.730.02.a.

Idaho Code § 42-203A(5) states that the director of the Department may reject an application for permit that will “reduce the quantity of water under existing water rights” or will “conflict with the local public interest as defined in section 42-202B, Idaho Code.” The applicant bears the burden of proof for all of the review criteria set forth in Idaho Code § 42-203A(5).¹ IDAPA 37.03.08.40.04. In this contested case, Foster bears the burden of demonstrating that the proposed permit will not reduce the quantity of water under existing water rights and that the proposed permit will not conflict with the local public interest. The hearing officer concluded that Foster did not satisfy his burden of proof for these two criteria. *Preliminary Order* at 8. Therefore, Application 74-16229 was denied. *Id.* at 9.

The *Preliminary Order* summarizes technical evidence in the record, which confirms a substantial connection between the local aquifer and the Lemhi River. Foster acknowledges this “physical connection between ground water levels and surface water flows.” *Petition* at 7. Based on the evidence in the record, the hearing officer determined that the proposed diversion of ground water could reduce flows in the Lemhi River during a time when junior water rights are curtailed on the river. Foster has been aware of this issue from the time High Bar Ditch Association (“HBDA”) filed its protest on February 18, 2020. The HBDA protest states a concern that the proposed ground water diversion might cause water users on the Lemhi River to be shut off earlier in the irrigation season. The issue of ground water pumping impacting river flows was discussed at length during the pre-hearing conference on June 26, 2020. In fact, during the pre-hearing conference, Foster asked for time to collect information about the impacts of ground water pumping on river flow.²

¹ Protestants and applicants share the burden of coming forward with evidence related to factors for which they are knowledgeable under the local public interest review criterion.

² Foster’s request for additional time is corroborated by a June 26, 2020 email from the hearing officer to the parties, wherein the hearing officer granted Foster’s request for additional time to collect information about the effects of ground water pumping on river flow.

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Prior to the hearing, the hearing officer took official notice of certain historical records and reports from the Department's files. Consistent with IDAPA 37.01.01.602, the hearing officer provided the parties a copy of the official notice documents. Most of the documents were provided as an enclosure with the *Notice of Hearing* (sent to the parties on October 22, 2020). Two of the official notice documents were provided to the parties by email on January 29, 2021. The hearing officer provided a hard copy of these two documents to the parties at the beginning of the hearing. The official notice documents, in conjunction with a technical report offered into the record by Foster ("1998 Report", Exhibit 1), validate HBDA's concern that ground water diversions in the Lemhi River basin could reduce the flow in the Lemhi River and could reduce the quantity of water under existing Lemhi River water rights.

On October 22, 2020, the hearing officer issued a *Notice of Hearing and Scheduling Order*. According to the *Scheduling Order*, any party who intended to call an expert witness, had to file an expert report with the hearing officer on or before January 14, 2021. Although Foster was aware of the issue of ground water pumping reducing flow in the Lemhi River long before the hearing, Foster did not retain an expert to address that issue. The only technical evidence provided by Foster is the 1998 Report, which simply confirms the substantial connection between the local ground water aquifer and the Lemhi River. Ex. 1 at 10-14. The official notice documents identified by the hearing officer also confirm the substantial connection between the local aquifer and the Lemhi River.

Foster now asks the hearing officer to re-open the administrative record³ to grant Foster another opportunity to provide technical evidence about "the extent, or magnitude, and timing of the effects from ground water pumping on the surface water sources." *Petition* at 4. Specifically, Foster wants to retain an expert hydrogeologist to address technical questions of injury to other water rights. *Id.* at 11. Foster also proposes to provide a ground water model or other technical analysis prior to the rehearing. *Id.* at 8.

The official notice documents and the 1998 Report provided by Foster validate the concerns about ground water pumping affecting flows in the Lemhi River. Foster wants an opportunity to challenge and rebut the hearing officer's findings and conclusions related to injury. *Petition* at 8. It appears that Foster might not understand the basis for the denial. Application 74-16229 was denied based on Foster's failure to satisfy his burden of proof related to injury and local public interest. It is not the Department's (or the protestant's⁴) burden to prove injury. Rather it is the applicant's burden to demonstrate that a proposed project will not injure existing water rights.

³ Foster makes this request pursuant to Rule 59(a)(3) of the Idaho Rules of Civil Procedure. Pursuant to Rule 52 of the Department's Rules of Procedure, however, "[u]nless required by statute or otherwise provided by these rules, the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence do not apply to contested case proceedings conducted before the agency." IDAPA 37.01.01.052.

⁴ Foster notes that the protestant HBDA "did not introduce any exhibits (neither lay exhibits nor expert exhibits)" and "did not call any expert witnesses." *Petition* at 3. A protestant, however, does not bear the burden of proving injury. Rather the burden of proof falls on the applicant to demonstrate that a proposed project will not injure existing water rights. Further, as explained in the *Preliminary Order*, an applicant must demonstrate that a proposed project will not injure any existing water rights, even water rights held by non-parties. *Preliminary Order* at 6.

Foster had nearly one year to retain a hydrogeologist to study how his proposed ground water diversion would affect flows in the Lemhi River. Foster declined to do so. There is not sufficient justification to re-open the record to give Foster a second chance to satisfy his burden of proof. The protest filed by HBDA, in addition to the injury issues discussed during the pre-hearing conference, in addition to Foster's own representations that he intended to provide technical data about the impact of ground water diversions on the flows in the Lemhi River, confirm that Foster was aware of the primary issues of the case long before the expert report deadline. To allow Foster a second opportunity to present evidence on issues that have been before the Department since the beginning of this contested case would prejudice the protestant, HBDA.

Foster contends that "[i]t would be beneficial for a decision with the precedential magnitude of the *Preliminary Order* to have a full record with technical information from Foster to address the technical information relied on by the Hearing Officer." *Petition* at 6. Application 74-16229 was denied because Foster failed to demonstrate that the proposed use would not injure existing water rights. The denial was based on Foster's failure to provide evidence of non-injury. Therefore, the decision likely has little or no precedential value. Unlike Foster, future applicants proposing to divert ground water might choose to provide technical evidence about the magnitude and timing of the impacts of their proposed ground water diversions on the Lemhi River.

ORDER

IT IS HEREBY ORDERED that the *Petition to Re-Open Hearing, or in the Alternative, Petition for Reconsideration* filed by Foster is DENIED.

Dated this 16th day of March, 2021.



James Cefalo
Hearing Officer

CERTIFICATE OF MAILING

I hereby certify that on the 16th day of March 2021, I mailed a true and correct copy of the foregoing PRELIMINARY ORDER DENYING PETITION TO RE-OPEN HEARING AND PETITION FOR RECONSIDERATION, with the United States Postal Service, postage prepaid and properly addressed to the person(s) listed below:

Document Served:

Order Denying Petition to Re-Open Hearing and Petition for Reconsideration

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