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BEFORE THE IDAHO 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

**EXCEPTIONS TO ORDER DENYING
PETITION TO RE-OPEN HEARING
AND PRELIMINARY ORDER
DENYING APPLICATION**

Applicant Boyd Foster, (hereinafter “Foster” or the “Applicant”), by and through his attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submits these *Exceptions to Order Denying Petition to Re-Open Hearing and Preliminary Order Denying Application*. This petition is in response to both the original *Preliminary Order Denying Application* issued on February 25, 2021 (the “Preliminary Order”), as well as the *Order Denying Petition to Re-Open Hearing and Petition for Reconsideration* issued on March 16, 2021 (the “Hearing Order”), both of which were issued by Hearing Officer James Cefalo (the “Hearing Officer”).

I. STANDARD OF REVIEW

The *Preliminary Order* is a preliminary order as defined in IDAPA 37.01.01.730.01 because it was “issued by a person other than agency head . . . ,” which will become a final order

of the agency “unless reviewed by the agency head (or the agency’s head’s designee) pursuant to Section 67-5245, Idaho Code.” The Hearing Officer is a person other than the agency head, and therefore, because it is a preliminary order, it is subject to an appeal within the agency to the agency head. Foster elected to file a petition for reconsideration with the Hearing Officer, which is permitted pursuant to Rule 730.02.a. The exceptions petition must be filed with the Department within fourteen days (14) after the service date of a denial of a petition for reconsideration (Idaho Code § 67-5245(3) and IDAPA 37.01.01.730.), which, in this case, is no later than 5:00 p.m. on March 30, 2021.

Idaho Code § 67-5245(7) provides that the Director is not bound by the fact-finding and analysis of the Hearing Officer in the *Preliminary Order*. The Director “shall exercise all of the decision-making power that he would have had if the agency head had presided over the hearing.” In other words, the Director’s review is akin to a *de novo* review in a court setting. “The term ‘de novo’ generally means a new hearing or a hearing for the second time, contemplating an entire trial in the same manner in which the matter was heard and a review of previous hearing. On such a hearing the court hears the matter as a court of original and not appellate jurisdiction.” *Knight v. Department of Ins., State of Idaho*, 119 Idaho 591, 593, 808 P.2d 1336,1338 (Idaho App. 1991) (quoting *Beker Industries, Inc. v. Georgetown Irrigation District*, 101 Idaho 187, 190, 610 P.2d 546, 549 (1980)). According, with the filing of exceptions, the Hearing Officer’s *Preliminary Order* and *Hearing Order* are not reviewed under an abuse of discretion standard.

In reviewing the evidence presented at the hearing in this matter, “[t]he agency’s experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.” Idaho Code § 67-5251; Rule 600. The Director may therefore step into the shoes of the Hearing Officer and make factual findings and legal conclusions as though he was the

hearing officer in the first place. The Director may further “schedule oral argument in the matter before issuing a final order[,]” and may also “remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.” Rule 730.01.d. Opposing parties “shall have fourteen (14) days to respond to any party’s appeal within the agency.” *Id.*

In addition, “[t]he agency head (or designee) may review the preliminary order on its own motion.” IDAPA 37.01.01.730.01.c. As of the date of submission of these exceptions, the Director has not provided notice of a motion to review the *Preliminary Order* on his own.

II. PROCEDURAL HISTORY AND BACKGROUND.

On January 9, 2020, Foster filed the application for 74-16229. *Preliminary Order* at 1. A pre-hearing conference was held on June 26, 2020. *Id.* On October 22, 2020, the Department issued a *Notice of Hearing and Scheduling Order* providing notice of a hearing to be held on February 11, 2021, with an expert report disclosure deadline of January 14, 2021, and a lay witness and exhibit disclosure deadline of January 28, 2021. The scheduling order also indicated that under Rule 602 of the Department’s procedural rules, the Hearing Officer would take official notice of the following documents:

- Exhibit 201 Application for Permit 74-16229
- Exhibit 202 Notice of Protest filed by High Bar Ditch Association
- Exhibit 203 Sherl L Chapman Report from 1976 –
“Lemhi River Basin Geology and Hydrogeology and
Irrigation Efficiency”
- Exhibit 204 Proof Report for Water Right 74-14993
- Exhibit 205 Lemhi River Streamflow Records for 2013 and 2019
USGS 13305310 Lemhi River below L5 Diversion
- Exhibit 206 Summary of IWRB subordination agreements for 2020
used to augment stream flow in the lower Lemhi River

Foster timely disclosed, as an exhibit, a report from 1998 entitled *Surface-Water/Ground-Water Relations in the Lemhi River Basin, East-Central Idaho*. This was denoted as Exhibit 1 by the Hearing Officer.

On January 29, 2021, a day after the witness/exhibit disclosure deadline, the Hearing Officer provided notice of the following:

Dear Parties:

Exhibit 1 identified by the Fosters is a 1998 report titled "Surface-Water / Ground-Water Relations in the Lemhi River Basin, East-Central Idaho." The report cites a number of references, two of which are reports found in the Department's records. These reports may contain data and information that would be useful in deciding the current contested case. Therefore, I am notifying the parties that I may take official notice of all or parts of the following reports at the hearing:

Hydrologic Consideration for the Proposed Finding of Water Rights in the Lemhi River Basin, Idaho
FW Haws, Joel Fletcher, and Eugene Israelsen - 1977

<https://idwr.idaho.gov/files/adjudication/19770408-hydrologic-consideration-lemhi-river-basin-haws-fletcher-israelson.pdf>

A Spreadsheet Notebook Method to Calculate Rate and Volume of Stream Depletion by Wells in the Lemhi River Valley Upstream from Lemhi, Idaho
Joe Spinazola - 1998

<https://idwr.idaho.gov/files/adjudication/199803-Stream-Depletion-by-Wells-in-Lemhi-River-Valley-Spinazola.pdf>

I will bring printed copies of the relevant portions of the reports to the hearing.

James Cefalo
Hearing Officer

According to Foster, the printed copies referred to in the email were not provided, and it is somewhat unclear whether the documents referred to in the email were utilized by the Hearing Officer in issuing the *Preliminary Order*.

The hearing was held on February 11, 2020, in Salmon, Idaho. *Preliminary Order* at 1. The only protestant to the matter, High Bar Ditch Association ("HBDA"), did not introduce any exhibits (neither lay exhibits nor expert exhibits). HBDA also did not call any expert witnesses.

In the *Preliminary Order*, the Hearing Officer did hold that there was sufficient water supply, that the application was made in good faith and not for delay or speculative purposes, that

Foster had sufficient financial resources, and that the application was consistent with the conservation of water resources. *Id.* at 7-8. However, the Hearing Officer ultimately denied the application for 74-16229. The Hearing Officer determined that 74-16229, if issued, would injure existing water rights and such injury was not in the local public interest. *Id.* at 6-8.

On March 11, 2021, Foster filed a *Petition to Re-Open Hearing or In the Alternative Petition for Reconsideration*. *Hearing Order* at 1. Foster requested that the Hearing Officer re-open the record in this matter and reconvene the hearing for the limited purpose of allowing Foster to address the technical reports relied upon by the Hearing Officer in the *Preliminary Order*. More specifically, this petition requested to re-open the hearing for the limited purpose of taking evidence on the matters addressed in this petition for reconsideration (injury to other water rights and local public interest) pursuant to Rule 59(a)(3) of the Idaho Rules of Civil Procedure. *See* IDAPA 37.01.01 (certain Idaho Rules of Civil Procedure apply to procedures of the Idaho Department of Water Resources). The critical question that remains unanswered at the time of the filing of the petition, and remains unanswered today, is the extent, or magnitude, and timing of the effects from ground water pumping on surface water sources. The answer to this question is a necessary component to the question of injury to other water rights. In the alternative, Foster requested reconsideration of the Hearing Officer's injury and local public interest findings and conclusions. Foster did not challenge the other conclusions of law in the *Preliminary Order*.

Foster's petition was denied as described in the *Hearing Order*. Foster now seeks relief from the Director through filing of these exceptions.

III. ARGUMENT.

A. The Director should grant Foster's requests to re-open the hearing for the limited purpose of taking evidence on the water right injury and local public interest matters pursuant to Rule 59(a)(3) of the Idaho Rules of Civil Procedure.

As described above, the filing of exceptions before the Director results in a *de novo* review of the issues presented, meaning that the Hearing Officer's *Preliminary Order* and *Hearing Order* are not reviewed under an abuse of discretion standard. Accordingly, the arguments presented here are similar to the arguments originally raised before the Hearing Officer, but with some additions.

There are several nuances that exist for water right administration and appropriation in the Lemhi River Basin. Primary of these nuances is that new water right appropriations in the Lemhi River Basin, including those for groundwater, are subject to the provisions of the partial decree for two federal reserved water rights on the main stem of the Salmon River, WR 75-13316 and WR 77-11941. This partial decree and the agreement associated with this partial decree are referred to in a shorthand manner herein as the "Wild and Scenic Agreement."

The actual Wild and Scenic Agreement documents speak for themselves, but briefly, this agreement establishes certain minimum flow amounts for different time periods during a calendar year to satisfy the federal minimum stream flow rights decreed as WR 75-13316 and WR 77-11941. However, despite the priority date of WR 75-13316 and WR 77-11941 (July 23, 1980), these rights are subordinated to all water rights decreed in the SRBA; applications for permit with a proof due date after November 19, 1987 (the commencement date of the SRBA) that are ultimately licensed; water right licenses with proof due dates after November 19, 1987 on file with IDWR as of effective date of the Wild and Scenic Agreement; domestic uses; stockwater uses; certain municipal use; and—of importance to the proceedings associated with 74-16229—new water rights up to a total combined diversion of 150 cfs (including no more than 5,000 acres of irrigation with a maximum diversion rate of 0.02 cfs/acre). As to these new water rights, IDWR

has tracked these new appropriations with a spreadsheet, which include several groundwater rights.

The State of Idaho, including the Idaho Water Resource Board, fought long and hard to arrive at the conditions contained in the Wild and Scenic Agreement entered a mere 17 years ago in 2004, including the preservation of 150 cfs of new water right development not subject to the priority date of the wild and scenic rights (as well as 225 cfs of new water right development that is subject to the priority date of the wild and scenic rights). 74-16229 is simply an action to develop a portion of this preserved water negotiated for by the State of Idaho for the benefit of Lemhi County residents, like Foster. However, the effective conclusion reached by the Hearing Officer in the *Preliminary Order* is that any new appropriation of groundwater is unapprovable because pumping impact automatically equals injury. The philosophy upon which this holding is based will bar new groundwater appropriations, and that is a significant conclusion that warrants a complete record on important technical questions, but at this point, there is no such complete record.

HBDA did not provide expert testimony or argument on these issues, and while the Hearing Officer has described that he has an independent obligation to protect existing water rights (even those not represented or appearing in the contested case), the Hearing Officer's decision to rely upon portions of existing expert reports to make certain conclusions places Foster in an odd posture, one that potentially raises due process concerns. This is because one of the parties in a case is tasked with rebutting technical information that the opposing party did not introduce or advocate for, but instead, Foster must address the decision-maker's technical evidence that is being introduced in a manner more like a trial participant rather than a judge. And this evidence was only explained for the first time in the *Preliminary Order*. Judges frequently assert that they are like baseball umpires, calling balls and strikes, but not becoming participants in the game itself.

See, e.g., United States Chief Justice John Roberts nomination process, *available at* <https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process#:~:text=%E2%80%9C%E2%80%A6,the%20rules%2C%20they%20apply%20them.> It 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 upon by the Hearing Officer now described, but it was unknown which portions of these reports the Hearing Officer was going to rely upon in writing the *Preliminary Order* for Foster to address at the hearing.

For all the above reasons, Foster requests an additional hearing date pursuant to Rule 59(a)(3) of the Idaho Rules of Civil Procedure. This rule provides the following:

(3) Further Action After a Non-Jury Trial. On a motion for new trial in an action tried without a jury, the court may open the judgment, if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Idaho Rule of Civil Procedure 59(a)(3). Where the hearing in this matter was tried without a jury, this rule allows the Hearing Officer to “open the judgment ... [and] take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.” *Id.* The Idaho Court of Appeals has concluded “that when a judge is sitting without a jury, he or she may reopen a case to hear additional evidence, prior to final judgment, regardless of the enumerated restrictions in I.R.C.P. 59(a).” *Davison's Air Serv., Inc. v. Montierth*, 119 Idaho 991, 993, 812 P.2d 298, 300 (Ct. App. 1990), *aff'd*, 119 Idaho 967, 812 P.2d 274 (1991). This leaves the matter of re-opening the hearing for the limited purpose requested herein to the Director’s discretion. *Id.* This is consistent with IDWR’s procedural rules, which provide that the Director may “remand the matter for further evidentiary hearings if further factual

development of the record is necessary before issuing a final order.” Rule 730.01.d. As set forth herein, Foster believes further development of the record is necessary before issuing a final order.

Relative to injury to water rights and local public interest, the Hearing Officer primarily relied on three technical hydrologic documents: (1) Sherl L. Chapman Report from 1976—*Lemhi River Basin Geology and Hydrogeology and Irrigation Efficiency* (the “Chapman Report”); (2) *Hydrologic Consideration for the Proposed Finding of Water Rights in the Lemhi River Basin, Idaho* (Haws, et al., April 8, 1877) (the “Dye Test Report”); and (3) *Surface-Water/Ground-Water Relations in the Lemhi River Basin, East-Central Idaho*, United States Geological Survey, Mary M. Donato, 1998 (the “USGS Report”). While we acknowledge that there are general overarching principles from these reports that establish a physical interaction between ground water and surface water flows, the *Preliminary Order* suggests that these reports quantify these interactions (both in timing and magnitude) with sufficient detail to deny Foster’s application fir 74-16229. We respectfully disagree, as there is language present from each of these reports suggesting they are not intended to be as comprehensive or persuasive as the *Preliminary Order* suggests. There is also technical information in these reports that support Foster’s position and cut against the Hearing Officer’s findings and conclusions.

The Dye Test Report was used as a basis for denying 74-16629, but the primary reason for preparation of this report in the 1970s was to justify a higher “duty of water” in the proposed findings of fact for the Lemhi Decree. *See* Dye Test Report at 2-5 (“The Problem” section of this report). The dye test component of this report was included “to confirm the suspicion that the excess water which was applied to irrigated lands near the headwaters of the Lemhi River would reappear as streamflow, . . .” Dye Test Report at 75. This added benefit of diverting additional water above the originally proposed duty of water amount was supported by the dye test. The

rudimentary dye test served its intended purpose—to establish evidence of a connection between ground water and surface water sources—but it would likely not meet today’s more robust scientific standards to be used as it has in the *Preliminary Order*. Further refinement of this dye test has even recently been proposed by NOAA. See https://www.webapps.nwfsc.noaa.gov/apex/f?p=309:19:::::P19_PROJECTID:35403277.

The *Preliminary Order* uses this report to indicate that evidence of *surface* applied dye peaking after six weeks after land application is equivalent to the propagation of *below-surface* ground water pumping effects. *Preliminary Order* at 6 (“The effects from pumping the proposed well will propagate to the Lemhi River soon after pumping, but the peak effects would appear in the river six weeks after pumping begins.”). This correlation attempts to use the dye test information like a scalpel, when it is more like a blunt instrument. Evidence of the effects of pumping at Foster’s proposed location—through preparation of a ground water model or other analysis to be introduced at the re-hearing—will provide more direct evidence on the actual quantification and timing of these interactions. Understanding the timing of these interactions is a necessary component for this proceeding, as impacts that show up in the river at the end or after the irrigation season will not injure existing water rights as there are no storage rights in priority and unused water is lost to the Lemhi River system as it flows out through the Salmon River. At this point in this matter, Foster’s request is to be provided an opportunity to address the Hearing Officer’s use of the Dye Test Study information in the *Preliminary Order*, and to provide more direct evidence on these questions.

Additionally, only certain portions of the Chapman Report were relied upon by the Hearing Officer. Like the Dye Test Report, the purpose of the Chapman Report was to provide evidence to support the duty of water findings of the Lemhi Decree. *See, e.g.*, cover letter to Chapman

Report. This is further evident by reviewing these conclusions and recommendations of the Chapman Report:

Conclusions and Recommendations

Based on the data generated by these authors, other researchers and the Department of Water Resources, several conclusions and recommendations can be made regarding the Lemhi River Basin. These are as follows:

- (1) The normal irrigation season of April 1 to November 1 of each year should be extended because of the possibility of flood runoff occurring prior to the April 1st date which would allow the diversion of those flood flows onto crop land on the terraces.
- (2) That the diversion of high waters or flood waters onto the benches and the application of irrigation water to the crop land provides recharge to the aquifers in the Lemhi River Basin and subsequently contributes to the stream flow during the late summer and fall months.
- (3) That the court should declare diversion of such high waters or flood waters as a beneficial use. Since that diversion tends to provide water diverted by wells for domestic and stock usage, as well as augmenting summertime flows that are in turn diverted in the lower basin for irrigation.
- (4) The investigations showed that actual irrigation efficiencies in the Lemhi River Basin range from 10 to 28 percent. This correlates very well with the industry's general assumption of less than 30 percent for the type of terrain and methods used in the Lemhi Basin.
- (5) The consumptive use should not be reduced by the amount of precipitation. Reducing the C.U. assumes that all precipitation is used by the crop. This is erroneous because the precipitation very often comes at a time when the crop cannot utilize it.
- (6) In light of the evidence presented and the practices existent in the Lemhi Basin, 9.0 acre feet per acre is a much more reasonable figure for the annual irrigation water requirement in the Lemhi River Basin. The poor irrigation efficiency is not unusual nor adverse since nearly 80 percent of the 9.0 acre feet diverted is returned to the river at some future time.

The *Preliminary Order* relies upon several statements from the Chapman Report, but ignores others, including a statement that “[t]he rest of the ground water that is not captured by wells moves out of the valley at the mouth and into the Salmon River Basin, presumably to enter the Salmon River as sub-surface flows.” Chapman Report at *15. It would be in Idaho’s interest to capture and use ground water before it exits Idaho via the Salmon River, and this statement supports this position. However, this statement, similar to several others that the Hearing Officer did rely upon, is not supported with more up-to-date data and information and such data and information can and should be provided now that Foster knows which portions of the Chapman Report are relied upon.

Finally, the most recent of the hydrologic reports, the USGS Report, acknowledges that more information is needed in its Summary and Conclusions Section:

A comprehensive hydrologic model of the Lemhi River Basin is not yet available, and much additional data are needed to complete such a model. This report combines new and previously collected data to describe several parts of the Lemhi River hydrologic system in a semiquantitative way. Information presented will provide the basis for future investigations into the complex interactions between ground and surface water in the Lemhi River Basin.

...
Although this study gives some insight as to the complex interactions of ground and surface water in the basin, **understanding the hydrologic system is still incomplete**. Additional work, including geophysical studies to explore the three-dimensional shape of the aquifer, is needed. Seismic profiling at carefully selected transects across the alluvial deposits to determine their thickness and uniformity, especially in the vicinity of Lemhi, would contribute greatly to understanding the nature of ground-water flow between the upper and lower Lemhi River Basin. Opportunities to study lithologic logs and to perform aquifer tests in future newly drilled wells should be taken whenever they arise.

Exhibit 1 at 19. Allowing Foster to prepare more technical information would aid in moving the understanding of the Lemhi River hydrologic system forward.

Furthermore, even with the limited scope of the USGS Report, substantive evidence from the report indicates that the magnitude and timing of pumping impacts to the Lemhi River are not as extensive as the *Preliminary Order* finds. The proposed well site under 74-16229 is located southwest—upgradient—from the City of Leadore. Reach 1 of the Lemhi River is from the “BOR gaging station at Leadore to Big Springs inflow.” *Id.* at 9. The reach gains to the Lemhi River between August and October differ by just over 2% (76.5 cfs compared to 74.9 cfs), which suggests that pumping will have no or negligible effects on river reach gains on this reach as the reach gains are steady and not influenced in any significant way by ground water pumping or other influences. *Id.* These reach gain numbers make sense given that in the vicinity of Leadore, the aquifer is “likely 200 feet thick,” *Preliminary Order* at 7, and relatively wide as depicted on the following figure taken from Exhibit 1 at 2:

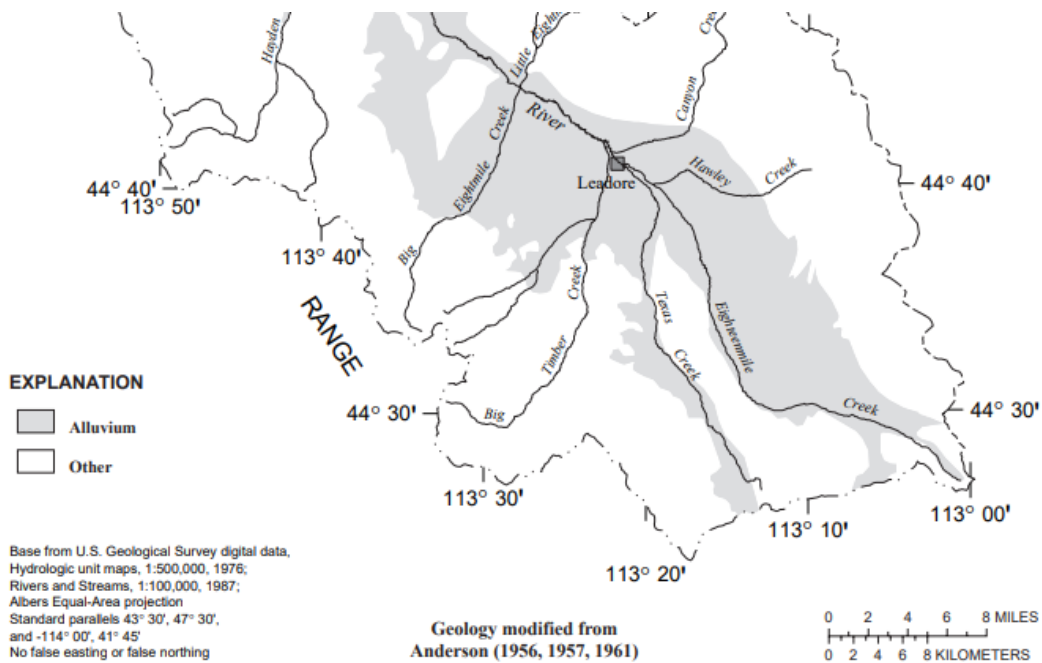


Figure 1. Lemhi River Basin study area, east-central Idaho.

At a minimum, the Hearing Officer’s failure to consider this evidence warrants a re-hearing. Even without a re-hearing, the Director should reverse the Hearing Officer based on this


evidence, as the technical evidence is the record (discussed herein) is that reach gains in Reach 1 are steady throughout a majority of the irrigation season (August through April). This evidence was not discussed or analyzed in the *Preliminary Order*.

Under Idaho law, there can be impact without injury. *See, e.g.*, Idaho Code § 42-226 (reasonable pumping levels for ground water wells). The legal maxim “*de minimis non curat lex*,” means “[t]he law does not concern itself with trifles.” BLACK’S LAW DICTIONARY 496 (9th ed. 2009). As a legal maxim, it is a “traditional legal principle that has been frozen into a concise expression.” BLACK’S LAW DICTIONARY 1068 (9th ed. 2009). It is part of the common law. *See Sivak v. State*, 130 Idaho 885, 888-89, 950 P.2d 257, 260-61 (Ct. App. 1997). As such, this principle “remains in effect unless modified by the legislature.” *Hoagland v. Ada Cty.*, 154 Idaho 900, 908, 303 P.3d 587, 595 (2013) (citing Idaho Code § 73-116 (which, since 1863, has incorporated the common law into the corpus of Idaho law)). This specific principle has been applied in Idaho for more than a century. *See Wood Live Stock Co. v. Woodmansee*, 7 Idaho 250, _____, 61 P. 1029, 1030 (1900). It has not been modified by the legislature and is still applied in appropriate circumstances. *See, e.g., Blangers v. State, Dep’t of Revenue & Taxation*, 114 Idaho 944, 964, 763 P.2d 1052, 1072 (1988).

If the impact equals injury principle followed by the Hearing Officer today was always the law in Idaho, then it would have made no sense for Idaho to negotiate the Wild and Scenic Agreement and preserve additional water development—specifically including groundwater—for future needs to then only later determine that no new appropriations can occur because diversions under any new water right permit will cause impacts that automatically equate to injury.

Consistent with these principles, in the context of a transfer application, IDWR follows a three part test to determine if mitigation is required as summarized in this slide prepared by


IDWR's Shelley Keen (the entire presentation is available at <https://idwr.idaho.gov/files/water-rights/20190610-ESPA-Transfer-Analysis-for-IWUA.pdf>):



Three Part Test to Determine Whether Mitigation is Required for Transfer Approval

The transfer will not be approved or mitigation will be required if...

- 1.) The depletion to any reach increases by 10% or more, unless . . .
- 2.) The depletions in the reach increase by 2 ac-ft/trimester or less, or . . .
- 3.) The depletion to the reach is *no greater* than 10% of the total volume pumped.



This policy is based on a principle that impact can occur, but not necessarily injure other water users. Accordingly, the impacts must be of sufficient quantity and magnitude to be reasonably certain or measurable. It is our understanding from conversations with Department staff that the 10% number for the three part test is based on a general estimate that measuring devices are accurate +/- 10%. Where the transfer statute (Idaho Code § 42-222) adopts the injury standards of the permit statute (Idaho Code § 42-203A), the same principle of recognizing that impact does not always equal injury should equally apply to Foster's application.

On all these issues, at a minimum, a re-hearing is warranted to address these technical questions. Foster anticipates utilizing an expert hydrogeologist to address the technical questions of impacts to other water rights. Now that Foster understands which portions of expert reports the Hearing Officer relied upon after the Hearing Officer introduced them for the hearing, it is critical

to ensure an opportunity for Foster to address them, particularly given the significant precedential effect the *Preliminary Order* will have on future applications for groundwater development in the Lemhi River Basin. For these reasons, Foster requests that the Director re-open the hearing for additional testimony on these technical issues as it relates to the injury to other water rights and local public interest criteria under Idaho Code § 42-222. If granted, Foster proposes logistically to have a scheduling conference to schedule disclosure deadlines and the re-hearing date.

B. In the alternative, the Director should reverse the *Preliminary Order* and issue a permit for 74-16229 because of the shortcomings of the hydrologic studies and because there is no sufficient evidence that pumping under 74-16229 will result in timing or magnitude of injurious actions during the irrigation season.

As argued above, at a minimum, a re-hearing is warranted for all the reasons specified. Alternatively, even if the Director denies the request for a re-hearing, the Director should reverse the Hearing Officer based on evidence in the record, as set forth herein. For all the reasons set forth above, there are legitimate questions of how the information from the hydrologic studies were applied in this matter. Specifically, the most relevant evidence suggests an opposite result from the denial of a permit for 74-16229 in that reach gains remain relatively steady over the latter portion of the irrigation season (between August and October) in Reach 1 (near where the proposed well will be drilled), despite use of irrigation wells in the Leadore area.

Further, as set forth above, the Hearing Officer misapplied the principles from the technical reports, including the conclusion that the peak effects of pumping “would appear in the river six weeks after pumping begins.” *Preliminary Order* at 6. The premise upon which this is based is faulty. The *Preliminary Order* uses this report to indicate that evidence of *surface* applied dye peaking after six weeks after land application is equivalent to the propagation of *below-surface* ground water pumping effects.

Additionally, 74-16229 will be a supplemental ground water right, used only when surface water is not available. Given its limited supplemental use, proximity to the city of Leadore, and the distance away from surface water sources, it appears that any pumping impacts would show up in the Lemhi River at the end of the irrigation season and over the winter months. As a result, there will be no injury to existing water rights.


Further, it is in the local public interest to use unappropriated water that would otherwise flow out of Idaho unused during the non-irrigation season (to the extent there are significant impacts during this time period). And it would not be in the local public interest to write off the ability for any future water development in the Lemhi River Basin that was preserved under the Wild and Scenic Agreement.

For all these reasons, the Director should reconsider the *Preliminary Order*, and issue an amended preliminary order approving the issuance of a permit for 74-16229.

IV. CONCLUSION.

For the above reasons, the Director should re-open the hearing for the limited purpose of taking evidence on the matters addressed in this petition for reconsideration (injury to other water rights and local public interest) pursuant to Rule 59(a)(3) of the Idaho Rules of Civil Procedure. In the alternative, Foster hereby requests that the Director reconsider portions of the *Preliminary Order* as set forth herein, reverse the Hearing Officer, and issue a permit for 74-16229.

DATED this 30th day of March, 2021.



Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March, 2021, I served a copy of the following described pleading or document on the attorneys and/or individuals listed below by the method indicated below.

DOCUMENT SERVED: EXCEPTIONS TO ORDER DENYING PETITION TO RE-OPEN HEARING AND PRELIMINARY ORDER DENYING APPLICATION

ORIGINAL VIA EMAIL AND FIRST-CLASS MAIL TO:

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Robert L. Harris

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