

**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 FOSTER'S
PETITION TO REVIEW ORDER AND
EXCEPTIONS; FINAL ORDER
DENYING APPLICATION**

BACKGROUND

On January 9, 2020, Boyd Foster (“Foster”) filed Application for Permit 74-16229 (“Application”) with the Idaho Department of Water Resources (“Department”). High Bar Ditch Association (“HBDA”) filed a protest against the application.

On February 11, 2021, the Department conducted a hearing in Salmon, Idaho. Exhibits 1 and 2 offered by Foster were admitted into the administrative record. HBDA offered no exhibits. Prior to the hearing, the hearing officer took official notice of specific records, reports and data in the Department’s files considered potentially relevant to the contested case. These documents were assigned exhibit numbers 201-208.

On February 25, 2021, the hearing officer issued a *Preliminary Order Denying Application* (“Preliminary Order”). The hearing officer concluded Foster had failed to introduce sufficient substantial, competent evidence to prove non-injury to senior water rights. *Preliminary Order* at 3. Because Foster failed to meet his burden of showing no injury to senior water rights, the hearing officer also concluded the proposed permit was not in the local public interest. *Id.* at 8.

On March 11, 2021, Foster filed a *Petition to Re-Open Hearing or in the Alternative, Petition for Reconsideration* (“Petition for Reconsideration”). On March 16, 2021, the hearing officer denied Foster’s Petition for Reconsideration in the *Order Denying Petition to Re-Open Hearing and Petition for Reconsideration* (“Order Denying Reconsideration”).

On March 30, 2021, Foster timely filed: (1) a *Petition for the Director to Review Order Denying Petition to Re-Open Hearing and Preliminary Order Denying Application* (“Petition for Review”); and, in support, (2) *Exceptions to Order Denying Petition to Re-Open Hearing and Preliminary Order Denying Application* (“Exceptions”).

The Director now denies Foster’s *Petition for Review* and *Exceptions*. Foster’s *Exceptions* are addressed specifically below. The hearing officer’s findings and conclusions in the *Preliminary Order* remain substantively unchanged.

EXCEPTIONS

1. *Due Process and Official Notice.*

Foster's *Exceptions* appear to argue the hearing officer did not properly officially notice Exhibits 201-208, and, therefore, there are potential due process concerns. *Exceptions* at 7. Foster argues:

[T]he Hearing Officer's decision to rely upon portions of existing reports to make certain conclusions [in the Preliminary Order] places Foster in an odd posture . . . 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 than a judge.

Id. This argument misunderstands basic tenets of administrative law and the doctrine of official notice.

Foster applied to the Department for a permit to use a portion of the State of Idaho's ground water resources. Foster is not appearing before a court or judge. He has applied to the regulatory agency with the authority to distribute the State of Idaho's water resources while, among other things, protecting prior beneficial use of those same resources from injury. *See* Idaho Code § 42-203A(5)(a). When analyzing an application for permit, the Department may use "generally recognized technical or scientific facts within the agency's specialized knowledge . . ." Idaho Code § 67-5251(4)(b). In reviewing evidence presented to it as a part of the application process, "[t]he agency's experience, technical competence, and specialized knowledge may be utilized . . ." IDAPA 37.01.01.600.

A corollary to this authority is the ability of the Department to take official notice of technical and scientific information:

Official notice may be taken of any facts that could be judicially noticed in the courts of Idaho and of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified of the specific facts or material noticed and the source of the material noticed, including any agency staff memoranda and data. Notice that official notice will be taken should be provided either before or during the hearing, and must be provided before the issuance of any order that is based in whole or in part on facts or material officially noticed. Parties must be given an opportunity to contest and rebut the facts or material officially noticed. When the presiding officer proposes to notice agency staff memoranda or agency staff reports, responsible staff employees or agents shall be made available for cross-examination if any party timely requests their availability.

IDAPA 37.01.01.602 ("Rule 602"). Rule 602 requires that parties "shall be notified" when, in this case, a hearing officer takes official notice of such information.

Consistent with Rule 602, the hearing officer provided the parties a copy of the officially noticed reports prior to hearing. Most of the documents were included as an enclosure with the *Notice of Hearing* (sent to the parties on October 22, 2020). Two of the official notice documents were emailed to the parties on January 29, 2021. The hearing officer also delivered a hard copy of these two documents to the parties at the beginning of the hearing.¹ As an active participant in the development of the procedural steps leading to the hearing in this matter, Foster was also aware of the process of official notice. He was told about the hearing officer's intention to officially notice Exhibits 201-208 on multiple occasions. By the time of hearing, the officially noticed reports were properly in the record before the Department.

Foster was also aware of the issue of ground water to surface water connectivity and the potential for injury from the inception of the contested case. The HBDA protest expressed concern that Foster's proposed ground water diversion might cause other 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 also 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. Foster's request is corroborated by a June 26, 2020, email from the hearing officer to the parties, where Foster's request for additional time to collect information about the effects of ground water pumping on river flow was granted. *Order on Reconsideration* at 3.

Although Foster was aware of the issue of ground water pumping reducing flow in the Lemhi River well before the hearing, Foster did not retain an expert to address the issue. The only technical evidence presented by Foster was the document referred to as the 1998 Report (Foster Exhibit 1), which confirms the substantial connection between the local ground water aquifer and the Lemhi River. Ex. 1 at 10-14. The officially noticed documents identified by the hearing officer also establish a hydraulic connection between the local aquifer and the Lemhi River. The hearing officer concluded the officially noticed documents, in conjunction with the 1998 Report, validated 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.

Finally, Foster attempts to argue the hearing officer improperly officially noticed Exhibits 201-208 because there was no way for him to know what the hearing officer would use from the officially noticed reports until after issuance of the Preliminary Order. *Exceptions* at 8 and 12. This argument also fails. The hearing officer notified Foster of the officially noticed materials on multiple occasions. Based on HBDA's reasonable concerns, along with the hearing officer's reasonable analysis of the officially noticed information, the hearing officer properly concluded the potential for injury existed. The information contained in Exhibits 201-208 related to the

¹ There appears to be some dispute over whether paper copies were delivered to the parties prior to the hearing. Foster claims he did not receive a paper copy while the hearing officer states hard copies were delivered to the parties. *Exceptions* at 4; *Order on Reconsideration* at 2. However, for purposes of notifying parties pursuant to Rule 602, it is irrelevant whether the hearing officer physically handed the reports to the parties the day of the hearing. Rule 602 requires notice, which was provided for on January 29, 2021, prior to the hearing and issuance of the preliminary order.

interaction between the effects of ground water diversion on senior water users is a basis for concern about injury. This is not to say that HBDA or the hearing officer carried the burden of proving injury: The burden to prove non-injury is, as always, on Foster as the applicant.

There are no legitimate due process concerns because Foster had ample opportunity to both: (a) assume his burden to prove non-injury; and (b) arrange for and present evidence to counter arguments made by protestant HBDA. The officially noticed information supported a conclusion that new groundwater pumping in the Lemhi River Basin could cause injury to senior surface water users. Foster did not offer evidence to rebut this conclusion.

2. Burden of Proof.

Foster asks the Director to re-open the record and grant him another opportunity to present technical evidence of the “extent, or magnitude, and timing of the effects from ground water pumping on the surface water resources.”² *Exceptions* at 5.

Foster’s request to re-open the record is an attempt to correct his failure to present relevant evidence at the hearing. Foster bore the burden at the hearing to prove non-injury. Idaho Code 42-203A(5)(a) states the Director may reject an application for permit that will “reduce the quantity of water under existing water rights.” The applicant bears the burden of proof for all of the review criteria set forth in Idaho Code § 42-203A(5). IDAPA 37.03.08.40.04. Foster bore the burden of showing the proposed permit would not reduce the quantity of water under existing water rights. Foster failed to satisfy this burden. Foster may not reopen the hearing record in a belated attempt to satisfy this burden. To allow Foster a second opportunity to present evidence on the injury issue – an issue Foster has been aware of since the beginning of this contested case – would prejudice the protestant HBDA and offend notions of fairness and efficiency in the Department’s administrative forum.

Foster also argues the case must be re-opened because of its “precedential magnitude.” *Id.* at 6. As the hearing officer indicated, this decision likely has little or no precedential importance. *Order Denying Reconsideration* at 3. Future applicants proposing to divert ground water may simply introduce technical evidence about the magnitude and timing of the impacts of the proposed diversion on senior Lemhi River surface water rights into the record.

3. Reversal of Hearing Officer.

Foster argues “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 [hearing officer’s] denial . . .” *Exceptions* at 16. Foster argues the hearing officer misapplied the principles from the technical reports for the conclusion that groundwater pumping would appear in the Lemhi River in the six weeks after pumping begins. *Id.* Foster

² Foster makes this request pursuant to Rule 59(a)(3) of the Idaho Rules of Civil Procedure. However, pursuant to Rule 52 of the Department’s Rules of Procedure, “[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.

argues groundwater pumping will be supplemental and any pumping impacts would only show up in the Lemhi River: (1) at the end of the irrigation season; and (2) over the winter months. *Id.* As a result, Foster argues the *Preliminary Order* should be overturned and the Director should conclude there is no injury. *Id.*

This argument, again, stems from Foster's belated attempt to create a second opportunity to present evidence on the injury issue – an issue Foster has been aware of since the beginning of this contested case. Foster's after-the-fact conclusory argument that no injury would result from approval of the Application should have been addressed prior-to (through expert or technical record evidence) or at hearing.

As described above, Foster has failed to satisfy his burden of proof as it relates to proving non-injury. The hearing officer reasonably relied on relevant, properly officially noticed information in the record to conclude there could be an injurious impact from Foster's proposed use on senior water users.

4. Local Public Interest.

Finally, Foster argues the Application is actually in the local public interest because it would: (1) use unappropriated water that would otherwise flow out of the state; and (2) fulfill the intent of the Wild and Scenic Agreement. *Exceptions* at 16-17.

Again, as described above, the hearing officer concluded the Application was not in the local public interest because potential injury to senior water rights could result from its issuance and Foster failed to meet his burden of proving otherwise. Because the Director agrees with the hearing officer – that granting the Application could cause injury and Foster failed to meet his burden of proof – the Application cannot be in the local public interest.

FINDINGS OF FACT

1. In Application 74-16229, Foster proposes to divert 3.80 cfs from ground water to irrigate 193.4 acres. Ex. 201.

2. The proposed point of diversion is a new ground water well to be constructed in the NESE, Section 33, T16N, R26E near Leadore. Ex. 201. The proposed well would be completed to a depth of approximately 160 feet. *Id.*

3. The proposed point of diversion and place of use are on property owned by Foster. Foster Testimony. Foster's brother, who is a well driller in the Leadore area, would construct the well. *Id.* Foster already has money and materials set aside to complete the proposed project. *Id.*

4. The proposed irrigation place of use, located in Sections 33 and 34, T16N, R26E, is fully overlapped by existing water right 74-51.

5. Water right 74-51 bears a priority date of June 7, 1909 and authorizes the diversion of 6.4 cfs from Big Timber Creek for the irrigation of 216.4 acres.

6. Water right 74-51 is a junior water right on Big Timber Creek. Foster Testimony. The right is filled during the snow melt runoff period, but is often curtailed by late June. *Id.*; Ex. 2 (delivery records from 2020 show water right 74-51 curtailed by July 1st).

7. The proposed place of use is planted in alfalfa hay. Foster Testimony. Because of elevation and colder temperatures, the growing season at the proposed place of use is short. *Id.* Water right 74-51 is sometimes curtailed prior to the principal growing season for alfalfa hay. *Id.* In certain years, Foster is not able to complete a first crop of hay because water right 74-51 is curtailed prior to the significant growth period for hay. *Id.*

8. The proposed permit would allow Foster to continue to irrigate his hay crop during the principal growing season, after water right 74-51 is curtailed. Foster Testimony. The additional irrigation supply would make the ground more profitable. *Id.*

9. Application 74-16229 included the following statement:

This [proposed permit] will be used for supplemental uses when water from Big Timber Creek is insufficient for irrigation of crops. No more than 6.4 cfs will be used at the place of use at any given time. Big Timber Creek water (water right 74-51) will always be used first.

10. The proposed point of diversion is located approximately one-half mile east of Big Timber Creek, approximately one mile south of the Lemhi River and less than one mile from the town of Leadore.

11. “The headwaters of the Lemhi River are near Leadore, where Canyon, Hawley, Eighteenmile, Texas and Big Timber Creeks flow together.” Ex. 1 at 6. There are also large springs in the Leadore area which contribute to flows in the Lemhi River. Whittaker Testimony. “Streamflow in the Lemhi River is highest during May through July and usually peaks in early June.” Ex. 1 at 6.

12. There are currently over 550 water rights authorizing diversion of water from the Lemhi River for irrigation use. These water rights bear priority dates ranging from 1869 to 2006 and describe more than 500 cfs of diversion.

13. One of the junior water rights in the basin, 74-14993, is held by the Idaho Water Resource Board. Ex. 204. Water right 74-14993 bears a priority date of April 12, 2001 and authorizes the diversion of 35 cfs to create a minimum stream flow between the L-6 diversion on the Lemhi River and the confluence with the Salmon River. *Id.*

14. According to the conditions of water right 74-14993, 15 cfs of the 35 cfs authorized by the right is “subordinated to all diversions, including high water or flood water authorized under the Lemhi River basin decree (Lemhi County Case No. 4948).” Ex. 204.

15. The United States Geological Survey (“USGS”) operates a stream gage on the Lemhi River at the L-5 diversion (“L5 Gage”). Ex. 205. This gage, identified by the USGS as “USGS 13305310 Lemhi River Below L5 Diversion near Salmon, ID” is located in the minimum stream flow reach described in water right 74-14993.

16. Based on stream flow records for the L5 Gage, the streamflow of the Lemhi River falls below the 35 cfs described in water right 74-14993 between late-July and late-September. Ex. 205. In an attempt to maintain streamflow in the lower reaches of the Lemhi River, the Idaho Water Resource Board has entered into agreements with certain water right holders to hold their senior rights unused during the low flow period. Ex. 206. If these agreements were not in place, the flow in the minimum stream flow reach would be very low or the reach would dry up completely in August and September. *Id.*

17. HBDA diverts water from the Lemhi River at Diversions L-41 and L-42, which are located approximately twenty miles downstream of Leadore. According to the Department’s water right records, the following irrigation water rights are delivered at the HBDA headgates (L-41 and L-42):

Right No.	Priority Date	Rate (cfs)	Owner
74-1061	2/12/1875	0.50	Mary Ann & Donald Sabatte; Spiro & Annette Daskalos
74-1077	2/12/1875	1.81	Andrew & Kathleen Knight
74-1845	2/12/1875	0.69	Janet Kibbee
	Total:	3.00	
74-1608B	5/14/1914	3.90	Floyd & Debbie Linger
74-14992	5/14/1914	0.71	William & Charlene Cobb
74-15208	5/14/1914	1.00	Jerry Smith; Marianne Little
74-15209	5/14/1914	0.56	Ray Family Trust
74-15210	5/14/1914	0.68	Franklin & June Yancey
74-15592	5/14/1914	1.53	Jeana Marie Donaldson-Thomas Family Trust
74-15727	5/14/1914	0.40	Rick & Michelle Gerbo
74-15764	5/14/1914	0.50	John & Melanie Hoeck
74-15922	5/14/1914	0.15	Allen & Whitney Teller
74-15923	5/14/1914	0.48	John & Melanie Hoeck
74-16169	5/14/1914	0.48	Rick Gerbo
	Total:	10.39	

18. Most of the irrigation water rights delivered through the HBDA system bear a 1914 priority date. Ex. 202. These rights are fairly junior when compared to other irrigation water rights on the Lemhi River. However, there are over 100 irrigation rights from the Lemhi River, authorizing over 90 cfs of diversion, which are junior to the 1914 rights diverted by HBDA.

19. In an average water year, the available water supply on the Lemhi River declines to a point where junior water rights (including the 1914 rights in HBDA) are curtailed between late

July and late August. Little Testimony. In a drought year, junior water rights are curtailed between mid-July and late September because of a shortage of water in the river. *Id.*

20. The water rights on the Lemhi River are regulated by Water District 74. The water rights on the Lemhi River are regulated separately from many of the tributary streams in the basin. Whittaker Testimony.

21. The ground water aquifer in the Lemhi River drainage is composed of unconsolidated alluvial deposits. Ex. 1 at 3. These alluvial deposits are primarily “gravel with intercalated sand and silt.” *Id.*

22. “In several places in the upper part of the basin [which includes the town of Leadore], the alluvium is at least 200 feet thick.” Ex. 1 at 3. “In a zone immediately downstream from Lemhi [approximately 18 miles downstream of Leadore], the alluvium appears to be less than 20 [feet] thick” *Id.* “This constriction of the aquifer between Lemhi and Tendoy, where bedrock rises to shallow depths and the alluvium is thin, forms a natural (but not necessarily complete) hydrologic barrier to ground-water flow.” *Id.*

23. The surface water streams in the Lemhi River basin are directly connected to the underlying ground water aquifer. Ex. 203 at 10. In the spring time, during the snow melt runoff period, tributary streams sink into the coarse alluvial sediments in the valley terraces and enter the Lemhi River through springs and seeps in the summer months. *Id.* at 11.

24. The Lemhi River gains water from the underlying aquifer through most of its length and throughout most of the irrigation season. Ex. 203 at 11; Ex. 1 (confirming that the Lemhi River gains flow in most sections of the river during the irrigation season). “[P]ractically all the water which percolates into the ground moves toward the river and reappears in numerous seeps and springs in the flood plain of the Lemhi River.” Ex. 203 at 11 (quotation marks and citation omitted).

25. “Ground water flow in the Lemhi River basin is generally from the bounding mountains toward the center of the valley and then northward sub-parallel to the Lemhi River.” Ex. 203 at report pg. 10. “A large percentage of the ground water [in the basin] enters the river as subsurface flow and spring discharge.” *Id.*; *see also* Ex. 1 at 17-19 (the amount of water leaving the Lemhi River basin as underflow (ground water) is less than two percent of the total annual yield of the basin).

26. Ground water levels in the Lemhi River basin are generally highest in August and September. Ex. 203 at 10. Seepage from the creek channels and flood irrigation during the snow melt runoff period causes ground water levels to rise through the early summer. *Id.*

27. Because of increased aquifer levels, the amount of water entering the Lemhi River through springs and seeps reaches a peak in the months of August and September. Ex. 1. In spite of these contributions from the aquifer, there is not sufficient flow to satisfy all irrigation water rights on the Lemhi River and junior rights are curtailed. Little Testimony.

28. In 1976, water users in the Lemhi River basin conducted dye tracer tests to evaluate the time it takes for water entering the local aquifer to appear as gains to the Lemhi River. Ex. 207. The study found that water recharged into the aquifer near Leadore reappears as gains to the Lemhi River within a couple of days and contributes to river flow up to three months after the water enters the aquifer, with the peak river gains occurring six weeks after the aquifer recharge activity. *Id.*

29. Ground water aquifer levels are reduced by diversions from ground water wells. Ex. 1 at 11. For many years, water users on the Lemhi River have been concerned that ground water diversions in the basin could reduce flow in the Lemhi River during times when junior water rights have been curtailed. *See* Ex. 208 (describing a spreadsheet developed in 1998 to quantify the depletion to the Lemhi River caused by a diversion of ground water).

RELEVANT LEGAL PROVISIONS

Idaho Code § 42-203A(5) states in pertinent part:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho . . . the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

The applicant bears the burden of proof for the elements set forth in Idaho Code § 42-203A(5). IDAPA 37.03.08.40.04.

Idaho Code § 42-234(5) states:

The legislature further recognizes that incidental ground water recharge benefits are often obtained from the diversion and use of water for various beneficial purposes. However, such incidental recharge may not be used as the basis for claim of a separate or expanded water right. Incidental recharge of aquifers which occurs as a result of water diversion and use that does not exceed the vested water right of water right holders is in the public interest. The values of such incidental recharge shall be considered in the management of the state's water resources.

ANALYSIS

Reduction to Existing Water Rights

Rule 45.01.a of the Department's Water Appropriation Rules (IDAPA 37.03.08) sets forth the criteria used for determining whether a proposed use of water will reduce the quantity of water under an existing water right:

A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:

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.

...

iv. An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director.

IDAPA 37.03.08.045.01.a.

Foster contends that the proposed permit should be approved because HBDA will not be injured by diversion of ground water under the proposed permit. The Department's injury review under Idaho Code § 42-203A(5), however, is not limited to the water rights held by protestants. The Department's injury analysis extends to all water rights. Therefore, an applicant bears the burden of demonstrating that the proposed project will not reduce water under any existing water rights, even rights held by non-parties.

The technical evidence in the record shows a high probability that water rights will be injured by the proposed project. Stated differently, it is likely that the proposed project will reduce the available water supply for existing water rights. There is a direct connection between the ground water aquifer and the Lemhi River in the Leadore area. Increased aquifer levels result in increased gains to the river through springs and seeps. Conversely, a decrease in aquifer levels will reduce the gains or inflows into the Lemhi River.

Pumping ground water will decrease aquifer levels in the area around the pumped well. This reduction may occur during a time when aquifer levels are rising due to flood irrigation in the Leadore area. If so, the ground water pumping will cause the aquifer levels to not rise as high as they would have without the ground water pumping. 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. If Foster were to begin pumping in late June, when water right 74-51 is curtailed, the peak reduction in Lemhi River flows caused by the pumping,

would occur in mid-August. Junior water rights are curtailed on the Lemhi River in July and August every year. The proposed ground water diversion will reduce the quantity of water available to satisfy existing water rights during this critical time period. Foster has not demonstrated that the proposed water use will not injure other water rights.

Foster contends that any depletion to the Lemhi River caused by pumping ground water for irrigation use under the proposed permit would be offset by the recharge occurring in the early season in the Big Timber Creek drainage. A significant amount of water is recharged in the creek channels throughout the year and when water users divert water for flood irrigation in the spring and early summer.

Idaho Code § 42-234(5) clearly states: “[I]ncidental recharge may not be used as the basis for claim of a separate or expanded water right.” The incidental recharge occurring in the Big Timber Creek drainage cannot be used to mitigate for future ground water irrigation rights. Foster has not identified any other source or means to mitigate for the reduction of water to the Lemhi River caused by the proposed diversion. Foster has not satisfied his burden of showing that the proposed use will not reduce the quantity of water available to fill existing water rights.

Sufficiency of Water Supply

Rule 45.01.b of the Department’s Water Appropriation Rules sets forth the criteria for determining whether the water supply is sufficient for a proposed project: “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” IDAPA 37.03.08.45.01.b.

The aquifer in the Leadore area is likely 200 feet thick. The water levels in this area rise to 40 feet below land surface during the summer months. The water supply in the local aquifer would be available for an adequate time interval and in sufficient quantities to make the project economically feasible.

Lack of Good Faith / Speculation

Rule 45.01.c of the Department’s Water Appropriation Rules sets forth the criteria for determining whether an application is filed in good faith and not for speculative purposes. An applicant must have “legal access to the property necessary to construct and operate the proposed project.” IDAPA 37.03.08.45.01.c.i. An applicant must also demonstrate that it is “in the process of obtaining other permits needed to construct and operate the project” and that there are no obvious legal impediments to prevent successful completion of the project. IDAPA 37.03.08.45.01.c.ii-iii.

The proposed point of diversion and place of use are located on property owned by Foster. Foster has demonstrated that Application 74-16229 was filed in good faith and not for delay or speculative purposes.

Sufficient Financial Resources

Rule 45.01.d of the Department's Water Appropriation Rules sets forth the criteria for determining whether an applicant has sufficient financial resources to complete a project. "An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction or upon a financial commitment letter acceptable to the Director." IDAPA 37.03.08.45.01.d.ii. Foster demonstrated that it is reasonably probable that funding will be available to complete the proposed project. Foster testified that he has already set aside money and materials to complete the project.

Local Public Interest

The local public interest analysis under Idaho Code § 42-203A(5)(e) is meant to be separate and distinct from the injury analysis under § 42-203A(5)(a). Local public interest is defined 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." Idaho Code § 42-202B(3).

It is undisputed that the proposed project would benefit not only Foster, but the entire community of Leadore. Foster would be able to grow a viable crop of alfalfa hay on his property every year, even in drought years. The hay could be used to supply cattle ranchers in the local community, reducing the need for local ranchers to import hay from other areas of the state. Diverting ground water for irrigation use is in the local public interest.

It is not in the local public interest, however, to allow a new project to reduce the amount of water available to satisfy existing water rights. In this case, the ground water diverted by Foster would contribute to flow in the Lemhi River later in the year and forms the water supply for existing irrigation water rights on the Lemhi River. Therefore, a gain in production for Foster would result in a loss in production for other water users on the Lemhi River. After weighing the local public interest factors presented in this case, the hearing officer concludes that the proposed project is not in the local public interest.

Conservation of Water Resources

Diverting water from ground water wells for watering crops through sprinkler irrigation is a common practice in Idaho and is consistent with the conservation of water resources within the state of Idaho.

CONCLUSIONS OF LAW

Foster has demonstrated that the water supply is sufficient to accomplish the proposed project, that the application was made in good faith, that he has sufficient financial resources to complete the project, and that the proposed water use is consistent with the conservation of water resources within the state of Idaho. Foster has not demonstrated that the proposed project will not reduce the quantity of water under existing water rights on the Lemhi River or that the proposed project is in the local public interest. Therefore, Application 74-16229 should be denied.

ORDER

IT IS HEREBY ORDERED Foster's *Petition for the Director to Review Order Denying Petition to Re-Open Hearing and Preliminary Order Denying Application and Exceptions to Order Denying Petition to Re-Open Hearing and Preliminary Order Denying Application* are DENIED.

IT IS HEREBY FURTHER ORDERED Application for Permit 74-16229 in the name of Boyd Foster is DENIED.

Dated this 20th day of May, 2021.



Gary Spackman
Director

CERTIFICATE OF MAILING

I hereby certify that on the 20th day of May 2021, I mailed a true and correct copy of the foregoing ORDER DENYING FOSTER'S PETITION TO REVIEW ORDER AND EXCEPTIONS; FINAL ORDER DENYING APPLICATION, with the United States Postal Service, certified mail with return receipt requested, postage prepaid and properly addressed to the person(s) listed below:


US MAIL - CERTIFIED

RE: APPLICATION FOR PERMIT 74-16229

Boyd Foster
PO Box 118
Leadore, ID 83464

High Bar Ditch Association
PO Box 40
Tendoy, ID 83468

Robert Harris
Holden, Kidwell, Hahn & Crapo
PO Box 50130
Idaho Falls, ID 83405


Megan Jenkins
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) 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.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

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

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

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