

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)	ORDER REGARDING MOTIONS FOR
FOR PERMIT NO. 36-7999 IN THE)	SUMMARY JUDGMENT AND
<u>NAME OF DEVIL'S CORRAL LLC</u>)	REQUIRING AMENDMENT

BACKGROUND

On August 31, 1981, Robert A. and Bernardine M. Erkins (Erkins) filed Application for Permit No. 36-7999 (Application) with the Idaho Department of Water Resources (Department). The Department published notice of the Application in September 1981 and in 1990. The Application was assigned to Devil's Corral LLC (DC).

The Committee for Idaho's High Desert (CIHD) and the Idaho Department of Fish & Game (IDFG) filed protests to the Application. The Idaho Conservation League (ICL) filed a petition to intervene. The hearing officer granted ICL's petition to intervene on January 18, 2018. The contested case was scheduled for hearing on April 10 and 11, 2018.

On February 13, 2018, IDFG filed a *Motion for Summary Judgment and Motion for Stay* and a *Memorandum in Support of IDFG's Motion for Summary Judgment and Motion for Stay* (IDFG Memo). IDFG asserts the Application should be dismissed because it does not meet any of the exceptions of the *Amended Moratorium Order* issued by the Department in 1993 in the matter of applications for permits for the diversion and use of surface and ground water within the Eastern Snake River Plain Area and the Boise River Drainage Area (Moratorium). *IDFG Memo* at 10-14. In the alternative, IDFG asserts DC must amend the Application to include "a purpose of use of 'storage' . . ." *Id.* at 9.

On February 27, 2018, CIHD and ICL filed a *Joint Motion for Summary Judgment and Motion for Stay* and a *Memorandum in Support of Motion for Summary Judgment* (CIHD/ICL Memo). CIHD and ICL assert the Application should be dismissed because lengthy delays in processing have rendered the Application speculative and DC has not timely responded to the Department's information requests. *CIHD/ICL Memo* at 16. In the alternative, CIHD and ICL assert DC must amend the Application to reflect its proposed development as described by DC's January 29, 2018, responsive materials to the Department's December 28, 2017, request for additional information concerning the Application. *Id.* at 17-18.¹

On February 27, 2018, DC filed *Devils Corral's Opposition to IDFG's Motion for Summary Judgment and for Stay* and the *Affidavit of Michael C. Creamer in Support of Devil's Corral, L.L.C.'s Opposition to IDFG's Motion for Summary Judgment and for Stay*. On March

¹ IDFG and CIHD/ICL request in their respective motions a stay of the scheduled hearing. At the request of the parties, the Department held a status conference on March 8, 2018. On March 9, 2018, the Department issued an order vacating the April 10-11, 2018, hearing and stayed all remaining scheduling deadlines pending a decision on the motions.

13, 2018, DC filed *Devils Corral's Opposition to CIHD's and ICL's Joint Motion for Summary Judgment*. On March 20, 2018, CIHD and ICL filed a *Reply Brief in Support of Motion for Summary Judgment*.

FINDINGS OF FACT

1. Erkins filed the Application on August 31, 1981, proposing the following elements:

Source: Springs – Devils Corral, tributary to Snake River

Points of Diversion: SWNE Section 32, T09S, R18E
SENE Section 32, T09S, R18E
Lot 1 Section 32, T09S, R18E
Lot 6 Section 32, T09S, R18E

Proposed Uses: 48 cfs for fish propagation
48 cfs for hydropower
4 cfs for irrigation

Total Quantity: 48 cfs

Place of Use (fish propagation and hydropower):
SWNE, SENE, Lot 1 and Lot 6, Section 32, T09S, R18E

Place of Use (irrigation of 200 acres):
SWNE, SENE, SWNW, SENW, NESE, Sec. 32, T09S, R18E

2. On December 6, 1989, Erkins amended the Application, removing the irrigation place of use and removing irrigation as a proposed beneficial use. All of the other proposed elements remained the same.

3. No further amendments have been made to the Application. At the present time, the Application, as amended on December 6, 1989, proposes the following elements:

Source: Springs – Devils Corral, tributary to Snake River

Points of Diversion: SWNE Section 32, T09S, R18E
SENE Section 32, T09S, R18E
Lot 1 Section 32, T09S, R18E
Lot 6 Section 32, T09S, R18E

Proposed Uses: 48 cfs for fish propagation
48 cfs for hydropower

Total Quantity: 48 cfs

Place of Use (fish propagation and hydropower) :
SWNE, SENE, Lot 1 and Lot 6, Section 32, T09S, R18E

4. On December 28, 2017 the Department mailed a formal request to DC for additional information about the Application as required by Rule 40.05.c of the Department's Water Appropriation Rules (IDAPA 37.03.08). The letter also requested that a completed "Affidavit for Water Rights to be used for Power Purposes" be submitted pursuant to Sections 42-205 and 42-206, Idaho Code. As authorized by Rule 40.05.b, the request included a requirement for the information to be submitted within 30 days or the process to void the Application would be initiated.

5. On January 29, 2018, DC timely filed additional information in response to the Department's request and as required by Rule 40.05 of the Department's Water Appropriation Rules (IDAPA 37.03.08) and pursuant to Sections 42-205 and 42-206, Idaho Code. The additional information provided by DC included a Devil's Corral Project Report (Report). The Report describes specific details of the proposed development that are substantially different than what is proposed in the Application as amended in 1989.

STANDARD OF REVIEW

The Department's Rules of Procedure (IDAPA 37.01.01) do not explicitly authorize motions for summary judgment. The rules do, however, authorize the filing of pre-hearing motions, which would arguably include motions for summary judgment. IDAPA 37.01.01.565. Although the Idaho Rules of Civil Procedure generally do not apply to contested cases before the Department (IDAPA 37.01.01.052), the Department relies on the standards set forth in Rule 56 of the Idaho Rules of Civil Procedure and the associated case law as a guide for addressing motions for summary judgment. A motion for summary judgment may be granted if a hearing officer determines that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56.

RELEVANT LEGAL PROVISIONS

Rule 35.01 of the Department's Water Appropriation Rules states: "The department will correspond with the applicant concerning applications which have been accepted for filing by the department which require clarification or correction of the information required by Rule Subsection 035.03 [Requirements for Applications to Be Acceptable for Filing]." IDAPA 37.03.08.35.01.e. "Failure to submit the additional or corrected information is cause for the Director to void the department's records of the application." IDAPA 37.03.08.35.01.f.

Rule 35.03(b) states:

The following information shall be shown on an application for permit form and submitted together with the statutory fee to an office of the department before the application for permit may be accepted for filing by the department.

...

- ii. The name of the water source sought to be appropriated shall be listed. For surface water sources, the source of water shall be identified by the official geographic name listed on the U.S. Geological Survey Quadrangle map, or if no official name has been given, by the name in local common usage. If the source has not been named, it can be described as “unnamed,” but the system or river to which it is tributary shall be identified. For groundwater sources, the source shall be listed as “groundwater.” Only one source shall be listed on an application unless the application is for a single system which will have more than one source.
- iii: The location of the point(s) of diversion and the place of use shall be described to the nearest forty (40) acre subdivision or U.S. Government Lot of the Public Land Survey System. The location of springs shall be described to the nearest ten (10) acre tract.
- iv. The quantity of water to be diverted shall be listed as a rate of flow in cubic feet per second and/or as a volume to be stored in acre-feet per year for each purpose of use requested.
- v. Impoundment (storage) applications shall show the maximum acre-feet requirement per year which shall not exceed the storage capacity of the impoundment structure unless the application describes a plan of operation for filling the reservoir more than once per year.
- vi. Every offstream storage impoundment application shall show a maximum rate of diversion to storage as well as the total storage volume.
- ...
- xi. A map or plat of sufficient scale (not less than two (2) inches equal to one (1) mile) to show the project proposed shall be included. The map or plat shall agree with the legal descriptions and other information shown on the application.

Rule 35.04 states: “Applications for permit shall be amended whenever significant changes to the place, period or nature of the intended use, method or location of diversion or proposed use or uses of the water or other substantial changes from that shown on the pending application are intended.” IDAPA 37.03.08.35.04.a. “An amendment which increases the rate of diversion, increases the volume of water diverted per year or the volume of water depleted, lengthens the period of use, or adds an additional purpose of use shall result in the priority of the application for permit being changed to the date the amended application is received by the department.” IDAPA 37.03.08.35.04.c. “An application for permit may be amended by endorsement by the applicant or his agent on the original application for permit form which endorsement shall be initialed and dated.” IDAPA 37.03.08.35.04.d. “An amended application shall be accompanied by the additional fee required by Section 42-221A, Idaho Code, if the total rate of diversion or total volume of storage requested is increased and by the fee required by Section 42-221F, Idaho Code, for readvertising if notice of the original application has been published.” IDAPA 37.03.08.35.04.e.

The Moratorium “includes applications filed on all public water sources within the Eastern Snake River Plain Area and all tributaries thereto.” *Moratorium* at 2. “The [M]oratorium applies to all applications proposing a consumptive use of water filed after the date of the order and to all applications filed prior to the entry of the order for which approval has not been given, except as herein provided.” *Id.* at 3. “The [M]oratorium does not apply to any application proposing a non-consumptive use of water as the term is used in Section 42-605A, Idaho Code.” *Id.* at 6. “The [M]oratorium does not prevent the Director from reviewing for approval on a case-by-case basis an application which otherwise would not be approved under terms of this moratorium if a) Protection and furtherance of the public interest as determined by the director, requires consideration and approval of the application irrespective of the general drought related moratorium; or b) The Director determines that the development and use of the water pursuant to an application will have no effect on prior surface and ground water rights because of its location, insignificant consumption of water or mitigation provided by the applicant to offset injury to other rights.” *Id.* at 9.

ANALYSIS

1. The Application pending before the Department does not reflect the current project described by DC.

The Application as amended in 1989 proposes to divert water from Devil’s Corral Springs, tributary to Snake River. The Report submitted by DC describes diversions of water from Devil’s Corral Creek or Devil’s Corral Springs². The Report also refers to the Upper Spring, the Upper Lake, and the West Channel and the South Channel of Devil’s Corral Creek³. Use of local source names is acceptable, but Rule 35.03 requires that “[t]he name of the water source sought to be appropriated shall be listed.” IDAPA 37.03.08.35.03.b.ii. The Report does not clearly identify if diversions will occur from Devil’s Corral Creek, Devil’s Corral Spring, both sources, or another source.

Four points of diversion in four separate tracts are listed on the Application. DC’s proposed project appears to utilize three or more points of diversion all located in SENE and/or NESE Section 32, T09S, R18E⁴. The Report describes one pumped diversion⁵, one intake to an offstream pond channel, and one intake for hydropower⁶. These diversions seem to be clustered near the upper reaches of Devil’s Corral Creek in one or two tracts, not spread out among four separate tracts. Rule 35.03 requires that *each* point of diversion be identified by forty (40) acre tract or government lot, and that springs be identified by ten (10) acre tract. IDAPA 37.03.08.35.03.b.iii.

The Application identifies multiple fish ponds with five-foot high dams and a total capacity of 1.25 acre-feet for fish propagation use, and does not include storage or diversion to

² Devil’s Corral Creek and Devil’s Corral Springs do not appear as source names on U.S. Geological Survey maps, but may be common local names for these sources.

³ Report at DC0002. The Report contains no pagination and page numbers cited here are bates numbers assigned and referred to by Ann Vonde in *Affidavit of Ann Y. Vonde* (February 13, 2018) Exhibit A.

⁴ The Report is not clear how many points of diversion will be utilized or precisely where they are located.

⁵ Report at DC0012.

⁶ *Id.* at DC0015.

storage as proposed beneficial uses. The Report describes a series of four constructed off-stream ponds, each with a surface area of up to 1 acre and each “6 to 8 feet deep”, which would collectively impound up to 30 acre-feet of water.⁷ The Report also describes a pumping station and up to 15 acre-feet of pumped diversions to storage to increase the water level in the Upper Lake at Devil’s Corral “back to its historic high water mark”⁸. This component of the project is not described in the Application.

The Report contradicts numerous elements of the Application, and describes additional beneficial uses and an impounded volume of water which is 43.75 acre-feet *more* than identified in the Application. The Report proposes substantial changes from the Application which add water uses and increase diverted volumes of water.

2. The “24-Hour Rule” does not apply.

Based on the historic flow rate available in Devil’s Corral Creek and the estimated project diversion rates, DC concludes that a storage component is not necessary under the Department’s “24-hour rule”.⁹ The Department’s 2013 Administrator’s Memorandum on Utilization of the 24-Hour Fill Allowance for Impoundments advises that the “24-hour rule” must not be used when the pond or impoundment is the end use of the water. DC’s proposal for increased storage in Devil’s Corral Upper Lake and impoundment of flows in a series of cascading ponds is for the express purpose of rearing or maintaining populations of game fish.¹⁰ The “24-hour rule” does not apply. All storage elements of the project must be described on the Application. Rule 35.03 requires that diversion and impoundment of water for beneficial use be described on an application as the volume of water, in acre-feet, required to fill or re-fill reservoirs or ponds, and that off-stream storage also include an element of diversion to storage which shall be represented as a rate of flow in cubic feet per second (cfs). IDAPA 37.03.08.35.03.b.iv, v, and vi.

3. Project maps are not sufficient.

The Application map is lacking in detail and does not match the elements of the Application. Maps submitted by DC as part of the Report also do not clearly and comprehensively identify the points of diversion or the places of use as required by Rule 35.03. Public Land Survey lines are not superimposed on the project maps and the project maps are presented in various scales. It is not possible to determine with any confidence the exact location of the project elements. Multiple diversions appear to be present within a single Government Lot or tract, but this is not clear based solely on the project description. Rule 35.03 requires that a single map of appropriate scale and containing sufficient detail be included with the Application. IDAPA 37.03.08.35.03.b.

⁷ Report at DC0018.

⁸ *Id.* at DC0012.

⁹ DC *Opposition* at 3.

¹⁰ Report at DC0005, DC0013, and DC0015.

4. The project contains consumptive elements.

DC's Report plainly states that consumptive evaporative and seepage losses are inherent in DC's proposed aquaculture facilities, and that losses are directly related to the storage of water. The Report acknowledges that "calculations of potential evaporative losses attributable to the fish propagation facilities can be made, [but] Devils Corral has not made them at this time."¹¹ With respect to seepage losses, the Report describes "an expected, but undetermined amount of recharge to the *underlying* [sic] aquifer" and concludes that "[m]ore complete and accurate calculation will be required to accurately off-set potential consumptive losses."¹²

The Department must assess the consumptive use of water proposed by each application filed in the Moratorium area. There is no language in the Moratorium which exempts fish propagation facilities from Moratorium restrictions.

5. The Application must be amended and additional information submitted.

Rule 35.04 requires amendment of an application whenever there are significant and substantial changes to the elements of the proposal as shown on the application. IDAPA 37.03.08.35.04.a. Rule 35.01 requires that an applicant submit additional clarifying information as requested by the Department. IDAPA 37.03.08.35.01.e.

The Application pending before the Department does not reflect the project described by DC in its Rule 40.05 responses. There are numerous project details in the Report which differ from the present elements on the Application, or which are not even included on the Application. This is indeed significant and would preclude further processing. DC must amend its Application to reflect the current proposed development before a hearing is conducted for the contested case. The amended Application must include all project elements and standard maps as required by the Water Appropriation Rules. The necessary changes comprise an increase in water use and additional purposes of use and will result in readvertisement, and the priority of the application being advanced. IDAPA 37.03.08.35.04.c and e.

CONCLUSIONS OF LAW

Pursuant to Rules 35.01 and 35.04 of the Department's Water Appropriation Rules, the Department should require DC to submit information required by Rule 35 and amend the Application to coincide with the project as currently proposed. IDFG and CIHD and ICL's requests for the Department to require amendment of the Application should be granted.

Because the alternative relief sought by IDFG and CIHD and ICL will be granted, their motions to dismiss will not be addressed.

¹¹ Report at DC0018.

¹² *Id* at DC0013.

ORDER

IT IS HEREBY ORDERED that the alternative relief sought by IDFG and CIHD and ICL is GRANTED.

IT IS FURTHER ORDERED that DC shall amend the Application to reflect the current proposed development. The amended Application shall contain appropriate elements of storage and diversion to storage as specified in IDAPA 37.03.08.35.03.b.iv, v, and vi, and shall include a project map consistent with requirements of IDAPA 37.03.08.35.03.b.xi and additional fees as required by IDAPA 37.03.08.35.04.e. The amended Application shall be filed with the Department on or before July 13, 2018. The Department will advance the Application priority date pursuant to IDAPA 37.03.08.35.04.c, and readvertise the Application. This contested case will continue after an amended Application is filed by DC and readvertised by the Department.

Dated this 13th day of June, 2018



Cindy Yenter
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of June, 2018 true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed to the following:

Document Served: Application for Permit 36-7999 Order Regarding Motions for Summary Judgment and Requiring Amendment

DEVILS CORRAL LLC
148 SEMINOLE CIR
JEROME ID 83338

MICHEAEL CREAMER
GIVENS PURSLEY LLP
PO BOX 2720
BOISE ID 83701-2720

STATE OF IDAHO
DEPT OF FISH & GAME
324 S 417 E STE 1
JEROME ID 83338

ANN VONDE
OFFICE OF THE ATTORNEY GENERAL
PO BOX 83720
BOISE ID 83720-0010

COMMITTEE FOR IDAHO'S HIGH DESERT
STEVEN JAKUBOWICS
908 N 21ST ST
BOISE ID 83702

BRYAN HURLBUTT
ADVOCATES FOR THE WEST
PO BOX 1612
BOISE ID 83701-1612

MARIE CALLAWAY KELLNER
IDAHO CONSERVATION LEAGUE
PO BOX 844
BOISE ID 83701-0844



Denise Maline
Administrative Assistant