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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. NO. 36-7999 (Devils Corral LLC)	)	**REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Protestant Committee for Idaho's High Desert (CIHD) and Intervenor-Protestant Idaho Conservation League (ICL) file this reply brief, as allowed under I.R.C.P 56(b)(2), in support of the *CIHD And ICL Joint Motion For Summary Judgment And Motion For Stay*, asking the Idaho Department of Water Resources (Department or IDWR) to dismiss Application for Permit No. 36-7999 (the Application) or, alternatively, to re-advertise the Application and advance its priority date.

Devils Corral's Opposition to the summary judgment motion, dated March 13, 2018, does not raise any issues of material fact, making summary judgment appropriate.

ARGUMENT

I. DEVILS CORRAL IS TRYING TO GAME THE SYSTEM, AND THE APPLICATION MUST BE DISMISSED, OR RE-ADVERTISED.

Devils Corral argues it is not "gaming the system"; however, that is precisely what it is doing. Devils Corral seeks a water right for a new project that hardly bears any resemblance to Erkins' original proposal from 1981. As one would expect for a new project, and as IDWR has suggested to Devils Corral multiple times, Devils Corral can submit a new application or can amend the 1981 Application. But instead, Devils Corral insists on pushing forward with the old Application to avoid advertising it, advancing the priority date, and other legal implications. IDWR should reject Devils Corral's attempt to circumvent these requirements.

A. IDWR Should Exercise Its Discretion Under I.C. § 42-204 To Void The Application Or Treat It As A New Application.

In its *Opposition*, Devils Corral admits that IDWR can void the Application and/or treat it as a new application but argues that IDWR should use its discretion to allow the Application to proceed. Devils Corral points to Director Spackman's May 3, 2017 letter agreeing to resume processing the Application. While I.C. § 42-204 gives IDWR discretion to void an application and to extend deadlines (*see* first paragraph of I.C. § 42-204), the Department's discretion is not unlimited. The Director must find "good cause" (I.C. § 42-204) and must determine others will be not be injured by the delay, the delay is not for speculative purposes, and the public interest of the people of Idaho will not be harmed by the delay (IDAPA 37.03.08.40.01.d). Director Spackman never made these findings in his letter.

Neither Erkins nor Devils Corral can show good cause for these extreme failures, and allowing such an old application to proceed is not in the public interest, may injure people with water rights junior to 1981, and allows speculation. IDWR first requested additional information from Erkins in September 1981, but instead of responding within 30 days as required in I.C. § 42-204, only now—around 37 years later—has this information arguably been provided. Additionally, the most recent request to interrupt processing was granted by IDWR nearly 28 years ago; yet IDAPA 37.03.08.40.01.d allows only 6 month suspensions.

Given the extreme delays by the applicants here, IDWR should void the Application, or at a minimum should treat it as a new application, under I.C. § 42-204. Simply allowing the Application to proceed under these circumstances would be an abuse of discretion.

B. Devils Corral Improperly Relies On The Exceptions In I.C. § 42-204(1).

Devils Corral argues that the litigation exception found in I.C. § 42-204(1) excuses Erkins' and Devils Corral's failures to diligently pursue the Application for decades. However, I.C. § 42-204(1) does not apply to the Application, because those exceptions apply only after a permit has been granted.

The first paragraph of I.C. § 42-204 concerns applications for permit like the one at issue here. That paragraph includes the requirements that the applicant respond to IDWR's information requests within 30 days and make written requests to suspend processing applications. The first paragraph also gives IDWR discretion to extend deadlines instead of voiding the application or treating it as a new application, if the applicant makes such a request and if the Department finds good cause.

The second paragraph of I.C. § 42-204—which Devils Corral omitted in its *Opposition*—concerns the next phase in the process after the applicant has already been granted a permit and includes timelines relevant to the process for obtaining a license. Subsection 42-204(1) follows a

colon at the end of the second paragraph of § 42-204 indicating that it is a subsection of the second paragraph—not a subsection of the first paragraph or both paragraphs. Furthermore, subsection 42-204(1) says it applies "[i]n cases where the applicant is prevented from proceeding with his work." Proceeding with work refers to the work to put the water to beneficial use as required for obtaining a license after already having been granted a permit.

Thus, the litigation exception in subsection 42-204(1) simply does not apply.

Even if subsection 42-204(1) did apply to applications for permit (and not just after a permit has been granted), the requirements of the subsection have not been met. For § 42-404(1) to apply, not only must there be litigation which might bring title into question, but the applicant must be "prevented from proceeding with his work" due to the litigation. And even then, IDWR must be "convinced that said applicant is proceeding diligently and in good faith" before excusing the applicant's failures.

Here, Devils Corral has not shown that the lawsuits it points to in its *Opposition* actually "prevented" Erkins and Devils Corral from proceeding with their work over the last 28 years. Erkins made many excuses in his correspondence with IDWR for why he kept failing to provide information and move forward with the Application, but none of Erkins' excuses mentioned the litigation Devils Corral now points to. And Devils Corral never explains why or how the litigation it has been involved in somehow prevented it from pursuing the Application since 2002. In fact, undercutting its own point, Devils Corral points out that similar lawsuits are still underway now. If this newer litigation is not preventing Devils Corral from pursuing the Application now, why did earlier litigation prevent Devils Corral from pursuing the Application from 2002 all the way to 2017?

The litigation exception under I.C. § 42-204(1) allowing for extra time does not apply, and IDWR can exercise its discretion to void the Application or treat it as a new application. Additionally, for the same reasons, the litigation Devils Corral points to does not excuse its and Erkins' failure to pursue the Application with reasonable diligence, and IDWR should find the Application speculative under I.C. § 42-203A(5) and dismiss it.

II. IDWR Cannot Satisfy Its Statutory Duty To Evaluate The Local Public Interest Without First Re-advertising The Application.

Devils Corral argues that CIHD and ICL's argument that the Application must be re-advertised is not "legal." To the contrary, Idaho Code requires IDWR to evaluate whether the Application is in the local public interest. I.C. § 42-203A(5)(e). Advertising an application, and receiving protests, is critical to evaluating the local public interest. Relying on an advertisement from 28 years ago simply cannot be expected to serve this purpose, and without reasonably current advertising, IDWR cannot comply with its legal duty under I.C. § 42-203A(5)(e) to evaluate whether the Application is in the local public interest.

Devils Corral also argues that CIHD and ICL fully represent the local public interest. However, CIHD and ICL represent only their respective members regarding a subset of environmental values. CIHD and ICL do not represent the diverse interests of the full local population.[1] To comply with its duty to evaluate the local public interest, IDWR must re-advertise the Application.

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[1] In footnote 17 of its *Opposition*, Devils Corral suggests that CIHD and ICL are not appropriate entities to make this argument since it is members of the public who have been deprived of recent advertising of the Application. Devils Corral cites no authority to show why its point matters.

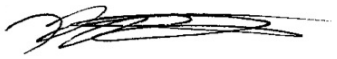
Furthermore, Devils Corral is wrong in stating CIHD and ICL and their members have no stake in re-advertising. CIHD and ICL have a stake in the proper administration of water rights in Idaho. Public notice, such as advertising water rights, is critical to CIHD and ICL's ability to participate and ensure environmental values are represented in such matters. CIHD and ICL are particularly interested in the consideration of the local public interest in water right applications,

CONCLUSION

For the foregoing reasons, the Department should grant summary judgment in favor of CIHD and ICL and should dismiss Devils Corral's Application, or re-advertise the Application and advance its priority date.

Dated: this 20th day of March, 2018.

Respectfully Submitted,



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and as explained above, believe that reasonably recent advertising of a water right is crucial to considering the local public interest.

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of March, 2018, true and correct copies of the foregoing *REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT* was served upon the following individuals by the means indicated:

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