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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)**

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**MEMORANDUM IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT**

Protestant Committee for Idaho's High Desert (CIHD) and Intervenor-Protestant Idaho Conservation League (ICL) file this memorandum in support of the accompanying *CIHD And ICL Joint Motion For Summary Judgment And Motion For Stay*. CIHD and ICL ask the Idaho Department of Water Resources (Department or IDWR) to dismiss Permit to Appropriate Water No. 36-999 (the Application) or, alternatively, to re-advertise the Application and advance its priority date.

The Application was filed in 1981, was last advertised in 1990, and was never diligently pursued by the original applicant or by Devils Corral LLC (Devils Corral), which claims to have acquired the Application in 2002. Now—16 years since Devils Corral acquired the Application and decades since it was last advertised—Devils Corral is trying to revive the old Application to obtain an old water right for a new project. The Idaho Code and IDWR Rules include protections that preclude water right applicants from gaming the system like this, and as set forth below, IDWR should grant summary judgment and should dismiss or re-advertise the Application.

STATEMENT OF UNDISPUTED FACTS¹

In 1981, Robert A. and Bernardine M. Erkins (“Erkins”) filed the Application with IDWR for 48 cfs for fish propagation, 48 cfs for hydropower, and 4 cfs for irrigation from Devils Corral Springs.² The Application states that Erkins would construct fish ponds (on or off channel) using concrete and rocks to build a 5 foot tall storage dam with an active reservoir capacity of 1 acre foot and total capacity of 1 1/4 acre feet. *Id.*

By letter dated September 1, 1981, IDWR requested additional information from Erkins, including plans for the power plant and fish facility, and financial and other information.³ By letter dated September 30, 1981, IDWR again asked for the missing information and informed Erkins the Department would hold the application for an additional 60 days.⁴

¹ The undisputed facts are based on documents in IDWR’s electronic record for the Application, all of which are available at: <http://www.idwr.idaho.gov/apps/ExtSearch/RelatedDocs.asp?Basin=36&Sequence=7999&SplitSuffix=>. Footnote citations in this Statement of Undisputed Facts to these documents use IDWR’s “Document Name” and “Sort Date” from the electronic record website.

² *Application for Permit + Attachment* (Aug. 31, 1981).

³ *Letter Requesting Additional Information* (Sep. 1, 1981).

⁴ *2d Request for Additional Information* (Sep. 30, 1981).

Erkins responded by letter dated November 2, 1981, providing limited information.⁵ By letter dated March 31, 1982, IDWR notified Erkins that the Department had completed a preliminary review of the Application and would withhold final action on the Application pending approval by the Federal Energy Commission (FERC).⁶ In the letter, IDWR stated: “The continued validity of this application is contingent on your proceeding with due diligence toward obtaining an approval or an exemption from FERC.” *Id.* (emphasis added). IDWR asked Erkins to keep the Department informed of progress. *Id.*

Over a year later, by letter dated April 20, 1983, IDWR wrote notifying Erkins that the Department had not received any such correspondence and reminded Erkins that the continued validity of the Application depends on the Erkins’ due diligence.⁷ Erkins responded to IDWR around May 25, 1983, providing documentation of a February 1983 call with an engineering company, but providing no other information and no information regarding correspondence with FERC.⁸

A July 5, 1984 IDWR internal memo regarding the Application indicates that Erkins stated on June 1, 1983, that an agreement he had with the Idaho Water Resources Board (“Board”) precluded work on any project.⁹ In the memo, IDWR disagreed and said the agreement with the Board (regarding Applications 36-7872 and 36-7196) does not waive Erkins’ requirement to proceed diligently toward development of the Application. *Id.* IDWR’s memo added, “it appears that the applicant has done very little toward development.” *Id.*

⁵ *Letter + Additional Information Attachments* (Nov. 6, 1981).

⁶ *Letter Regarding FERC License* (Mar. 31, 1982).

⁷ *Letter Regarding FERC + PUC Authorizations* (Apr. 20, 1983).

⁸ *Letter Outlining Application Progress* (Jun. 1, 1983).

⁹ *Review Memorandum* (Jul. 5, 1984).

IDWR wrote Erkins again on July 10, 1984, stating “[b]ecause more than a year has passed since we have received information about the proposed project, we again ask that you provide us with a summary of your efforts toward obtaining said approvals.”¹⁰ IDWR also notified Erkins that the agreement with the Board “does not remove the requirement to proceed diligently toward obtaining the necessary FERC approvals required under this application.” *Id.* IDWR requested that Erkins provide the missing information by July 30, 1984, for the Application to remain in good standing. *Id.*

On or around February 14, 1986, Erkins assigned the Application to Idaho First National Bank.¹¹ IDWR’s electronic records for the Application do not indicate that Idaho First National Bank ever pursued FERC approval or otherwise diligently pursued the Application.

IDWR continued to correspond with Erkins. By letter dated November 12, 1987, IDWR wrote Erkins explaining that the Department had not been issuing permits during the Swan Falls controversy, but stated: “Assuming the department again is back in the permit issuing business, there are several considerations in connection with your pending application which need to be addressed to prevent voiding of the application.”¹² IDWR again asked Erkins for proof of diligent pursuit of hydropower approvals, such as applications to FERC or the Idaho PUC, or alternatively to remove hydropower from the application. *Id.*

When Erkins failed to respond, IDWR wrote to them by letter dated January 12, 1988, reminding Erkins of the Department’s November 1987 letter. *Id.* Once again, IDWR asked Erkins to provide information showing they were seeking FERC approval or that preliminary plans for the use have been prepared. *Id.* IDWR warned: “If you do not provide the requested

¹⁰ *Letter Requesting Current Application Progress* (Jul. 10, 1984).

¹¹ *Assignment of Application for Permit (Erkins to Idaho Nat. Bank)* (Feb. 27, 1986).

¹² *Two Letters Requesting Proof of Diligent Progress* (Jan. 12, 1988).

information within thirty (30) days to show diligent pursuit of the proposed hydropower use, the department will assume the proposed power use is speculative in nature and by order will remove the use as a valid use from the pending application.” *Id.*

More than 30 days later, by letter dated March 22, 1988, Erkins wrote back, acknowledging he had “failed to answer your earlier letter” and blaming that failure on an “ongoing hold up” with BLM.¹³ Erkins enclosed a few documents: an incomplete draft form for Request for Interconnection Cogenerator or Small Power Producer; a 1982 news article about the 1981 agreement with the Board; a copy of the 1981 agreement; and an undated application to BLM for a right-of-way for the road to Devils Corral; and a few items of follow-up correspondence between Erkins and BLM from 1983 to 1986. *Id.* These documents did not include any FERC applications or power plant plans. *Id.*

On May 24, 1989, IDWR sent what appears to be a generic letter to Erkins saying due to the Swan Falls litigation the application may have been delayed, and IDWR was revisiting the application.¹⁴ IDWR asked whether the Applicant is still interested in the project; asked the extent of development, if any, that has occurred; and enclosed two forms for the Erkins to complete. *Id.* Erkins responded by letter dated June 10, 1989, indicating they did not want to relinquish the Application, and stating the project “is still held up by lack of agreement between BLM and the Erkins on a road improvement program” on BLM land north of the Erkins’ Devils Corral property.¹⁵

By letter dated September 26, 1989, IDWR wrote Erkins to propose splitting the Application into two parts to separate the hydropower use from the other two uses (irrigation and

¹³ *Letter + Various Correspondence to Agencies* (Mar. 30, 1988).

¹⁴ *Swan Falls Processing Letter* (May 24, 1989).

¹⁵ *Trust Water Questionnaire* (Jun. 12, 1989).

fish propagation), so as to “allow you to pursue immediate completion of the irrigation and fish propagation uses under one permit while allowing you the opportunity to file additional extension requests for the hydropower use under a separate permit.”¹⁶ IDWR asked for a response within 30 days. *Id.*

By letter dated November 22, 1989, IDWR wrote Erkins stating that Erkins failed to timely respond to the September 26 offer to split the application, and that, upon further review, IDWR had determined the proposed split could not be accomplished after all because of the presumptions the irrigation component would have to overcome.¹⁷ To that end, IDWR recommended deleting the irrigation component. *Id.*

On December 6, 1989, Erkins responded, asking the Department to delete the irrigation component of the Application.¹⁸ Erkins did not, however, follow IDWR’s advice to split the fish propagation component from the hydropower component. *Id.*

In December 1989, IDWR advertised the Application, and protests were filed, including by CIHD and IDFG.¹⁹

By letter dated March 1, 1990, IDWR wrote Erkins again requesting additional information, including engineering and construction plans and financial and other information.²⁰ IDWR offered to hold the Application for 30 days, but said Erkins must within that time provide the requested information or indicate how much time is needed before proceeding further. *Id.*

¹⁶ *Letter to Applicant Regarding Lack of Agency Approvals* (Sep. 26, 1989).

¹⁷ *Letter Regarding Proposed Irrigation Use* (Nov. 22, 1989).

¹⁸ *Letter Requesting Deletion of Irrigation Use from Application* (Dec. 7, 1989).

¹⁹ *Letter to Application Regarding Statewide Advertising* (Dec. 22, 1989).

²⁰ *Protest Acknowledgment Letter to Applicant + Hydropower and Fish Propagation Requirements* (Mar. 1, 1990).

Instead of providing the requested information, Erkins wrote IDWR by letter dated March 22, 1990, requesting that they be allowed to apply first to FERC.²¹ Erkins stated in the letter: “[i]f we are unable to obtain that permit or exemption [from FERC], then we of course will not need to obtain a permit from your office for water rights to generate electrical power. Since both the power plant and the fish hatchery plan are tied together, we could then delete power generation from our proposal and seek a water right for the fish hatchery only.” *Id.*

By letter dated April 13, 1990, IDWR responded, granting Erkins’ request and stating the Department “will correspond with you periodically to determine the status of the application and will set the matter of the water right application for hearing when the FERC process is completed.”²² That same day, IDWR wrote to the protestants, stating the Department would not proceed with hearing until a determination is made by FERC.²³

Three and a half years passed without correspondence between the Erkins and IDWR. By letter dated November 19, 1993, IDWR wrote Erkins regarding an inquiry he made about placing water in the Water Supply Bank.²⁴ IDWR explained that Erkins had not yet received a water right. *Id.* Nothing in this letter indicated IDWR had received any information over the prior three and a half years showing Erkins was diligently pursuing FERC approval. *Id.*

By letter dated January 21, 1994, Erkins acknowledged a January 19, 1994 letter sent to them by IDWR stating that the Department had reviewed its files and pointing out that Erkins assigned the Application to the bank in 1986 and might not even own the Application at this

²¹ *Letter Requesting Hold in Processing* (Mar. 26, 1990).

²² *Letter Granting Delay in Processing* (Apr. 13, 1990).

²³ *Protestant Acknowledgment Letters to Protestants* (Apr. 13, 1990).

²⁴ *Letter Regarding Water Supply Bank Inquiry* (Nov. 19, 1993).

point.²⁵ IDWR explained that Erkins “need[s] to proceed with the proper filings” and could amend the Application (if he owns it) or could submit a new water right application.²⁶

On September 16, 1994, Idaho First National Bank assigned the Application back to Erkins.²⁷

Around this same time, Erkins attempted to sell a portion of the not-yet-issued water right to the Bureau of Reclamation (BOR).²⁸ By letter dated January 31, 1994, the BOR informed Erkins that it was not interested in purchasing the water right. *Id.*

IDWR’s electronic files for the Application do not include any correspondence with, or other information from the Erkins, for the next three years. A September 25, 1997 IDWR memo indicated that an appraiser working for Erkins contacted the Department to learn about the Application.²⁹ Then again, many years passed without anything in IDWR’s electronic files for the Application.

A May 15, 2002 IDWR memo indicates that a Glen Van Der Giessen visited the Department to inquire about the Application.³⁰ IDWR called Van Der Giessen and notified him that the Application would have to be changed to the current owner’s name, protests would need to be resolved, and all necessary information would have to be submitted to the Department. *Id.*

On December 20, 2002, IDWR Deputy Attorney General John Homan wrote to attorney Larry Sirhall providing observations about the status of water rights at Devil’s Corral and an opinion to the value of the 1981 Agreement with the Water Resources Board.³¹ Mr. Homan

²⁵ *Letter + Release of Mortgage + Release of Lis Pendens* (Jan. 24, 1994).

²⁶ *Cover Letter + 3 Pages of IDWR Correspondence* (Aug. 25, 1994).

²⁷ *Assignment of Application for Permit (Idaho First Nat. Bank to Erkins)* (Sep. 16, 1994).

²⁸ *Letter to Erkins and Devil’s Corral from Bureau of Reclamation* (Jan. 31, 1994).

²⁹ *Conversation Memorandum* (Sep. 25, 1997).

³⁰ *Conversation Memorandum* (May 15, 2002).

³¹ *Letter Regarding Status of Water Application* (Dec. 20, 2002).

concluded: “[t]he only value to the 1981 Agreement appears to be that it contains certain promises from the Idaho Water Resource Board not to protest future water permit filings on Devil’s Corral Springs or requests for extensions of time from Erkins or his successors. Any value to the 1981 Agreement would appear minimal at best.” *Id.*

On March 5, 2004, IDWR received a Notice of Change in Water Right Ownership, to change water right application 36-7999’s owner from Erkins to Devil’s Corral.³² The Notice states that Devils Corral acquired ownership of the Application over two years earlier on February 11, 2002. *Id.*

After Devils Corral submitted this Notice, six years passed without any records in IDWR’s electronic record for the Application. One document appears in 2010—a June 2, 2010, letter from Mr. Homan to Armand Eckert responding to Mr. Eckert’s questions about the 1981 Agreement with the Water Resources Board.³³

After this, another six years passed without any records in IDWR’s electronic record for the Application.

In October 2016, IDWR received Devils Corral’s development strategy booklet.³⁴ The booklet depicts a housing development on the canyon rim above Devils Corral Springs, as well as a waterslide and ponds in Devils Corral. *Id.*

By letter dated January 27, 2017, an engineering firm wrote IDWR requesting comments on the Devil’s Corral Rezone Request to Jerome County.³⁵ George Panagiotou made the rezone request for 200 acres of privately owned property, seeking to rezone A-1 agricultural land and

³² *Change of Ownership for for (sic) App. for Permit* (Mar. 5, 2004).

³³ *Letter from AG’s Office Regarding 1981 Water Rights Agreement* (Jun. 2, 2010).

³⁴ *Development Strategy Booklet Submitted by Devil’s Corral* (Oct. 31, 2016).

³⁵ *Letter Soliciting Comments Regarding Devil’s Coaral Rezone and Development Project* (Feb. 2, 2017).

preservation land to A-2 land above the canyon and Commercial General in the canyon. *Id.*

IDWR responded by letter dated February 2, 2017, stating the Department has no position on the rezone but that the concepts proposed in the rezone likely require a water right application, or applications.³⁶

In April 2017, IDWR received a copy of an April 5, 2017 memo from Don Campbell to George Panagiotou, reporting Mr. Campbell's progress regarding the Application. Mr. Campbell's memo stated: "Our goal is to utilize all existing water resources, lakes, ponds, and stream of Devil's Corral Springs for the purposes of a fee fishing aquaculture business, recreation, wildlife, and aesthetics. To also utilize a portion of Devil's Corral Springs for the purpose of generating electric power through a hydro-electric plant."³⁷

On May 3, 2017, IDWR Director Gary Spackman wrote to Mr. Panagiotou, indicating IDWR would begin processing the Application.³⁸ However, Mr. Spackman warned that Devils Corral's proposal included elements not listed in the Application and, unlike the Application, included consumptive uses. *Id.* Director Spackman notified Devils Corral that IDWR required additional information, including the information required by Rule 40.05c. *Id.* Director Spackman also indicated "fee fishing" "may qualify as fish propagation" but warned "you need to submit more detailed plans to IDWR to satisfy [the] Rules." *Id.*

By letter dated August 1, 2017, Devil's Corral wrote IDWR requesting the Department move the Application forward.³⁹

³⁶ *IDWR Response Letter Regarding Devil's Corral Rezone and Development Project* (Feb. 2, 2017).

³⁷ *Copy of Letter Regarding Status of Held Water Right Application and Future Processing, etc.* (Apr. 11, 2017).

³⁸ *Letter to Applicant Regarding Future Processing of Held Application, etc.* (May 3, 2017).

³⁹ *Request to Move Forward with Processing Application for Permit* (Aug. 2, 2017).

IDWR responded by letter dated August 24, 2017, acknowledging Devils Corral's request to process the Application, notifying Devils Corral that additional information requested by IDWR (and required under its Rules for hydropower projects and for water rights greater than 5.0 cfs) had still not been provided, and again asking Devils Corral to submit the additional information.⁴⁰

Months later, on December 1, 2017, Devils Corral e-mailed IDWR to a two-page letter providing a written description of some aspects of Devils Corral's proposal.⁴¹

IDWR, by letter dated December 28, 2017, wrote Devils Corral to once again request the additional information, which Devils Corral still had not provided.⁴²

By letter dated January 29, 2018, Devils Corral submitted an information packet to IDWR.⁴³ This submittal was made around 36 years after the Application was first submitted; around 28 years after the Application was advertised; around 16 years after Devils Corral acquired the Application; and around 5 months after the Department asked for it in response to Devils Corral's August 1, 2017 request to process the Application.

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⁴⁰ *Letter Requesting Additional Information (Rule 40 Info)* (Aug. 24, 2017).

⁴¹ *Information Letter from Don Campbell on Behalf of Devil's Corral* (Dec. 1, 2017).

⁴² *Letter Requesting Additional Information (Rule 40 info) Second Request* (Dec. 28, 2017).

⁴³ *Rule 40 Information & Residency / Power Affidavit from Applicant* (Jan. 29, 2018).

STANDARD OF REVIEW

Under Rule 56 of the Idaho Rules of Civil Procedure, summary judgment must be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” IRCP 56(a).⁴⁴ The moving party bears the burden of proving the absence of genuine issues of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865 (1960). The non-moving party’s case must be based on more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue of material fact. *R.G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 410 (1990).

ARGUMENT

I. THE APPLICATION MUST BE DISMISSED.

IDWR should grant summary judgment and dismiss the Application. Letting newcomer Devils Corral revive the old Application—which neither Devils Corral nor prior holders of the Application diligently pursued for decades—will allow Devils Corral to jump in line in front of other water users who have lawfully applied for and/or acquired water rights since 1981. IDWR Rules and the Idaho Code include safeguards to prevent such abuses, and provide multiple grounds upon which IDWR must dismiss the Application. First, Devils Corral and prior holders of the Application failed to request and receive IDWR approval for suspending processing the Application for the last 28 years. Second, Devils Corral and prior holders of the Application failed—on numerous occasions over decades—to timely respond to IDWR information requests. Third, the Application is speculative, as proven by the decades-long failure of Devils Corral and earlier holders of the Application to diligently pursue the Application.

⁴⁴ While IDWR Rules do not specifically set forth a process for filing motions for summary judgment, IDWR has found summary judgment to be appropriate in situations where material facts are not in dispute in a hearing before the agency. *See, e.g., In the Matter of Permit No. 37-7842, Recommended Order Granting Petitioners’ Motion for Summary Judgment* (Nov. 30, 2011).

A. Application Processing Was Not Properly Suspended For The Last 28 Years.

Under IDWR Rules, an applicant may request in writing to interrupt processing an application for “a period not to exceed six (6) months.” IDAPA 37.03.08. 40.01.d. The Director “may approve the request unless he determines that others will be injured by the delay or that the applicant seeks the delay for the purpose of speculation, or that the public interest of the people of Idaho will not be served by the delay.” *Id.* “The Director . . . may renew the approval upon written request.” *Id.*

By letter dated March 22, 1990, the original applicant Erkins wrote IDWR requesting time to “apply first to FERC” regarding the hydropower component of the permit. In that letter, Mr. Erkins explained that if he was unable to obtain FERC approval for the hydropower component, he intended then to “delete power generation from the proposal and seek a water right for the fish hatchery only.”

IDWR granted Erkins’ request to suspend processing by letter dated April 13, 1990. That was nearly 28 years ago.

There is no evidence in IDWR’s electronic record of Erkins, Devils Corral, or any other holder of the Application making a timely written request to IDWR to renew the request to interrupt processing the Application since March 1990—and no evidence of around 56 such requests that would have been required to lawfully interrupt processing the Application every six months for the last 28 years under IDAPA 37.03.08. 40.01.d.⁴⁵

⁴⁵ Even if such requests were made, IDWR is not required to grant the suspensions; rather, the Department “may” do so. But the record does not indicate IDWR ever granted another suspension. Furthermore, IDWR cannot grant a suspension if “others will be injured by the delay or that the applicant seeks the delay for the purpose of speculation, or that the public interest of the people of Idaho will not be served by the delay.” IDAPA 37.03.08. 40.01.d. IDWR never evaluated these factors.

Because Devils Corral and prior holders of the Application failed to properly request and receive IDWR approvals required to suspend processing the Application for the last 28 years, as required under IDAPA 37.03.08. 40.01.d., IDWR must dismiss the Application.

B. The Applicants Failed to Provide Timely And Adequate Information To IDWR Over Decades.

When IDWR requests additional information and the applicant fails to provide the information within 30 days, Idaho Code and IDWR rules authorize the Department to void the application. I.C. § 42-204; IDAPA 37.03.08.40.05.b. Here, prior holders of the Application and Devils Corral failed multiple times and over decades to respond to IDWR information requests, and IDWR should dismiss the Application.

IDWR's electronic record for the Application shows that the Department first requested additional information, including plans for the power plant and fish facility and financial and other information, by letter dated September 1, 1981 to Mr. Erkins. IDWR again requested information by letter dated March 1, 1990 to Mr. Erkins. This request was repeated in further correspondence over the years; yet the requested information was never provided. More recently, by letter dated May 3, 2017 to Devils Corral, IDWR again requested additional information necessary to process the Application. IDWR repeated this request by letter on August 24, 2017, and again on December 28, 2017.

The Applicant is still working on providing such information to this day. On or around January 29, 2018, Devils Corral submitted a response, including some of the requested information. But IDWR has not yet determined whether this information is adequate. And even if Devils Corral's new information is adequate now, the information is more than 36 years late. IDWR first requested basic information in 1981, and repeated its request numerous times over the ensuing decades. Failing to void and dismiss an application, and instead allowing it to

proceed, when the applicant failed to provide basic information for decades, flies in the face of these requirements. Accordingly, IDWR should void and dismiss the Application.

C. The Application Is Speculative And Must Be Dismissed.

IDWR may deny an application to appropriate water where “it appears . . . that such application . . . is made for delay or speculative purposes.” I.C. § 42-203A(5). Speculation is defined as “an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence.” IDAPA 37.03.08.045.01.c.

At hearing, CIHD intends to argue Devils Corral’s new proposal described in the project description recently submitted to IDWR is speculative. For purposes of this summary judgment motion, however, CIHD and ICL’s speculation argument is limited to the facts that Devils Corral and prior holders of the Application failed to pursue the Application with reasonable diligence from 1981 up to 2017.

Through correspondence in the 1980s and 1990s, IDWR made clear to the Erkins that they needed to show diligence toward pursuing the Application. Instead of diligently pursuing the Application, Erkins assigned it to a bank in 1986. The bank held the Application for the next eight years, and IDWR’s records do not indicate that the bank took any steps toward pursuing the Application. During this period, IDWR’s records include some correspondence with Erkins, but this correspondence does not show diligence on the Erkins’ part either. After the Bank assigned the Application back to Erkins in 1994, IDWR’s record is devoid of any information indicating that Erkins worked diligently to pursue the Application for another eight years.

During this same time, even though they did not yet hold an actual water right, in 1993 or 1994, the Erkins attempted to sell a portion of the water right application to the Bureau of Reclamation.

Notably, when IDWR granted Erkins' request to suspend processing the Application in 1990, the stated reason was so Erkins could pursue FERC approval. However, IDWR's records do not include any documents indicating Erkins ever prepared or submitted an application or other request for permission from FERC.

Erkins' failure to diligently pursue the Application was clear by the end of the 1990s, and IDWR should therefore dismiss the Application.

Next, Devil's Corral acquired the Application in 2002, but based on IDWR's record, Devils Corral did nothing to pursue the Application for about 15 years. During this period, Devils Corral too failed to diligently pursue the Application, and IDWR should dismiss the Application as speculative.

That the Application is speculative based on the Applicants' failures to diligently pursue it over decades is further supported by Idaho's laws and rules regarding completion, proof of beneficial use, and forfeiture of water rights. For example, upon approving a water right application, IDWR must require actual construction work and application of the water to full beneficial use shall be complete within five years or less. I.C. § 42-204. Similarly, an appropriator who fails to apply the water right beneficially for a period of five consecutive years loses all rights to use such water, regardless of intent. I.C. § 42-222(2); *Dovel v. Dobson*, 122 Idaho 59, 62 (1992). It would be absurd if water rights cannot be granted unless to applicants who will not complete the project in five years, and if water rights are forfeited after five years of nonuse, but if applicants are free to stall the application process for five years—or in this case, for decades—without consequence.

The water right sought in the Application is thus speculative and must be dismissed. Even if Devils Corral's new proposal described in its January 29 project description is not

speculative, Devils Corral new plan cannot save the Application. Using the old Application to pursue its new project allows Devils Corral to circumvent the prior appropriations doctrine and other established principles underpinning IDWR's management of water resources in Idaho and cannot be tolerated by the Department.

II. ALTERNATIVELY, IDWR MUST RE-ADVERTISE THE APPLICATION AND ADVANCE THE PRIORITY DATE.

If IDWR does not dismiss the Application, it must re-advertise the Application and advance its priority date to January 29, 2018 or later. As set forth below, the Application must be re-advertised and/or the priority date must be advanced for each of the following reasons: (1) Idaho Code requires treating the application as a "new application" based on the recently supplied information provided by Devils Corral; and (2) IDWR cannot meet its statutory duty to evaluate whether the Application is in the local public interest without re-advertising such an old Application.

A. I.C. § 42-204 Requires Treating The Application As A "New Application" Submitted On January 29, 2018, Or Later.

When IDWR requests that an applicant provide additional information needed to process a water right application, if the applicant submits the requested information more than 30 days later, Idaho Code requires IDWR to treat the application as a "new application", with limited exceptions, and requires IDWR to advance the priority date of application. Idaho Code section 42-204 provides:

If the corrected application is returned or the information is supplied after thirty (30) days, such corrected application shall be treated in all respects as a new application, and the priority of the right initiated shall be determined by the date of receipt, in the office of the department, of the corrected application or additional information; provided, that upon request, and good cause appearing therefor, the director of the department of water resources may grant an extension of time within which to return the corrected application or supply needed information.

Here, IDWR requested additional information numerous times in years past, including by letters dated Sept. 1, 1981; Sept. 30, 1981; Mar. 31, 1982; Apr. 20, 1983; Jul. 10, 1984; Nov. 12, 1987; Jan. 12, 1988; Sept. 26, 1989; Mar. 1, 1990; Jan. 19, 1994; May 3, 2017; and Aug. 24, 2017.

However, only recently—on January 29, 2018—did Devils Corral provide what might arguably⁴⁶ be adequate information responding to IDWR’s numerous requests. Even if Devils Corral has now submitted sufficient information, the information was provided 36 years after IDWR’s first request; around 28 years after IDWR’s requests at the time the Application was re-advertised 1989; and 158 days after IDWR made its most recent request directly to Devils Corral. Because the information has been supplied more than 30 days later, IDWR “shall” treat this as a new application in all respects. *See* I.C. § 42-204. IDWR, therefore, must re-advertise the Application and advance the priority date as if this were a new application.

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

Additionally, IDWR must re-advertise the Application in order to comply with the Department’s statutory duty to evaluate whether the Application is in the local public interest. I.C. § 42-203A(5)(e). The local public interest is defined as the interests of people who live in the area directly affected by a proposed water use have in the effects of such use on the public water resources. I.C. § 42-202B(3). Without re-advertising the Application after a 28-year lapse, IDWR cannot properly consider the local public interest.

At the most basic level, determining whether an application is in the local public interest requires IDWR to notify local residents and provide them the opportunity to protest. When the Application was most recently advertised in 1990, approximately 15,138 people lived in Jerome

⁴⁶ IDWR has not yet made a determination that Devils Corral’s January 29, 2018 information response is adequate.

County and 53,580 lived in Twin Falls, County.⁴⁷ These counties' populations have grown since then. As of July 2016, 22,934 people lived in Jerome County⁴⁸, and 83,514 lived in Twin Falls County.⁴⁹ Therefore, *at a minimum*, approximately one-third of the people who live in the immediate area never received public notice of this proposed use because they were not yet born or did not yet live in the area. The number of newborns and newcomers since 1990 is actually higher, however, because the numbers above only account for the total increase in the population and do not account for new people who were born or moved in and replaced people who died or moved out.

Additionally, even for local residents who have been in area since 1990, re-advertising the Application is necessary because their interests may have changed over the decades. For example, a six-year-old in 1990, who likely had little interest in the Application, would now be thirty-four years old and could have grown up fishing in the Devils Corral Spring or could now own a farm or other business that uses a water right nearby. This is just one example highlighting the impropriety of relying on such stale public notice.

Furthermore, what is in the local public interest has changed based on significant development in Idaho water management over the last 28 years, particularly on the Eastern Snake Plain. For example, the 1993 Moratorium on new consumptive water rights⁵⁰ on the Eastern Snake Plain was adopted.⁵¹ Since 1990, Idaho has transitioned to a system of conjunctive water management in the area of this applied for use. Both the State of Idaho and

⁴⁷ Affidavit of Marie Callaway Kellner ("Kellner Affidavit"), Exh. A.

⁴⁸ *Id.* at Exh. B.

⁴⁹ *Id.* at Exh. C.

⁵⁰ The Rule 40 information provided by the Applicant on January 29, 2018, indicates that this proposal includes multiple ponds. Ponds are *per se* consumptive, making this a consumptive water right.

⁵¹ Kellner Affidavit, Exh. D.

existing water users have put millions of dollars and significant time have into water management on the Eastern Snake Plain and in the Snake River, including, but not limited to: creation and implementation of the Eastern Snake Plain Comprehensive Aquifer Management Plan;⁵² extensive managed aquifer recharge infrastructure; and the Surface Water Coalition-Idaho Groundwater User Association 2015 agreement.⁵³ As a result of these major developments water rights administration and use, the lay of the land has changed dramatically since 1990 and new and different types of local public interests are not represented by this decades-old advertisement.

While the existing parties in this matter are capable of addressing their own areas of concern, a full analysis of the local public interest cannot be made without providing current residents and water right holders in the local area the opportunity to engage. By processing the Application after a 28-year lapse without re-advertising it, IDWR is depriving the local public from this opportunity. Furthermore, IDWR cannot adhere to its statutory duty under I.C. § 42-203A(5)(e) to ensure that the requested water right is in the local public interest without providing this opportunity. For these reasons, IDWR must re-advertise the Application before further processing.

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.

⁵² *Id.* at Exh. E.

⁵³ *Id.* at Exh. F.

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Respectfully Submitted,



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