BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 67067 (formerly known as 5647) and APPLICATIONS FOR PERMIT NOS. 72-07577 and 72-07578 IN THE NAME OF MARK L. and/or JOANNE LUPHER, dba EPICENTER AQUACULTURE	)	**ORDER ON NOTICE OF PROPOSED DEFAULT ORDER**

IDAPA 37.01.01.700 provides, in part, that:

> If an applicant ...fails to respond to a written information inquiry, the presiding officer may serve upon all parties a notice of a proposed default order denying the application ....

(Emphasis added). This language provides the Hearing Officer grounds for denying the applications that are the subject of this proceeding if the Applicants fail to provide information requested by the Hearing Officer.

On August 23, 2002, an *Order* issued in this matter which provided:

> IT IS HEREBY ORDERED, AND THIS DOES ORDER, That the Order on Show Cause Hearing, dated April 12, 2002, be amended to provide that Applicants shall submit to the Idaho Department of Water Resources (IDWR) within 72 hours of the date upon which mediation disputes of the parties before Daniel C. Hurlbutt is concluded, final resolution of the lease agreement dispute indicating that the Applicants have a clear legal interest in the place of use to which Permit No. 72-07577 and No. 72-07578 would be appurtenant and that Applicants have legal authority for tranfer of Water Right No. 5647, or to otherwise advise IDWR that all issues involved in the current proceedings before IDWR have been resolved.

At a March 14, 2003, status conference the parties to this matter indicated that following mediation on October 16, 2002, the Lease Agreement dispute had not been resolved, but that resolution appeared likely, and that a settlement agreement would be provided to the Idaho Department of Water Resources ("IDWR") soon, possibly within ten days of the conference.

Both parties have now indicated in status reports filed with IDWR that final resolution of the Lease Agreement dispute has not been reached.

Because of Applicants Mark L. and/or Joanne Lupher's, DBA Epicenter Aquaculture failure to respond to the information inquiry in the *Order,* the Hearing Officer gave them notice on March 19, 2004, that a default was proposed to be entered for their failure to respond.

Applicants filed a *Petition in Opposition to Issuance of Proposed Default Order* on April 5, 2004. The primary factual basis asserted in the *Petition* opposing the proposed default is that the failure to submit a final resolution of the lease agreement dispute is equally the responsibility of the Protestant. The exhibits attached to the Applicants' *Petition* support factual assertion in one sense—they demonstrate a lack of diligence on both the part of the Applicants and the Protestant in resolving the Lease Agreement dispute. Beyond that, however, the *Petition* shows no attempt by the Protestant to frustrate diligent resolution of the Lease Agreement dispute. The duty to exercise reasonable diligence in this administrative proceeding lies with the Applicant. In Application for Permit Nos. 72-07577 and 72-07578 the Applicants' indicated that they would complete these appropriations by October 2000. They are now 4½ years late.

Applicants' are not correct that a default would be a harsh result in this matter. The only harm they would suffer by the dismissal of Transfer No. 67067 would be the loss of their filing fee. They could simply re-file this application for transfer upon resolution of the Lease Agreement dispute. The dismissal of Application for Permit Nos. 72-07577 and 72-07578 would result in the loss of both filing fees and priority.

There appears to be little reason, however, to force the Lupher's to lose their filing fees. Leaving these applications in IDWR's records would not appear to entail much cost to IDWR. Allowing the Applicants' to maintain their priority, however, does lessen their incentive to diligently resolve the Lease Agreement dispute and damages the ability of more diligent water appropriators to put water to beneficial use without being subject to the priorities of derelict applicants. I.C. §42-204 provides a means to resolve this problem by providing that the priority of the right initiated by an application shall be determined by the date of receipt of needed information.

ORDER

Based upon the foregoing it is **ORDERED** that Application for Permit Nos. 72-07577 and No. 72-07578 and Transfer of Water Right No. 67067 are **STAYED** until Mark L. and/or Joanne Lupher, DBA Epicenter Aquaculture submit to IDWR final resolution of the Lease Agreement dispute indicating that the Applicants have a clear legal interest in the place of use to which the Permit Nos. 72-07577 and 72-07578 would be appurtenant, and legal authority for Transfer of Water Rights No. 5647. It is further **ORDERED** that priority of the water rights initiated by Application for Permit Nos. 72-07577 and 72-07578 shall be the date IDWR receives final resolution of the Lease

Agreement dispute indicating that the Applicants have a clear legal interest in the place of use to which Permit Nos. 72-07577 and 72-07578 would be appurtenant.

Dated this 9th day of April 2004.

PETER R. ANDERSON
HEARING OFFICER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of April 2004, I delivered the foregoing **ORDER ON NOTICE OF PROPOSED DEFAULT ORDER** by U.S. mail, postage prepaid and properly addressed to the following:

Bruce M. Smith
MOORE SMITH BUXTON & TURCKE, CHTD
225 North 9th Street, Suite 420
Boise, Idaho 83702

ROBERT E WILLIAMS
FREDERICKSEN WILLIAMS & MESSERVY
PO BOX 168
JEROME ID 83338

Victoria Wigle

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources