

**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)
_____)

**RECOMMENDED
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 if an applicant fails to provide information requested by the Hearing Officer.

On August 23, 2002, an *Order* was issued in this matter requiring that Mark L. and/or Joanne Luper, DBA Epicenter Aquaculture (“Applicants”) submit to the Idaho Department of Water Resources (IDWR) within 72 hours of the date upon when the mediation of the disputes between the parties before Daniel C. Hurlbutt was concluded, final resolution of a Lease Agreement dispute indicating that the Applicants had 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 transfer of Water Right No. 5647, or to otherwise advise IDWR that all issues involved in the current proceedings before IDWR had been resolved. That mediation arose out of a district court case Applicants filed to declare their interest in the Lease Agreement which purports to give

them the real property interest supporting their applications. Lupher v. Morganroth et.al., Custer County case no. CV-2000-101.

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 IDWR soon, possibly within ten days of the conference.

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

Because of Applicants failure to respond to the information inquiry in the *Order* the Hearing Officer gave them *Notice of Proposed Default Order* 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 opposing the proposed default in the *Petition* was 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 an equal lack of diligence on both the part of the Applicants and the Protestant in resolving the Lease Agreement dispute that has been apparent since October 1999. But 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.

Initially, even though declining to issue a default order, the Hearing Officer noted that a default would not 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.

In April 2004 the Hearing Officer stated:

There appears to be little reason, however, to force the Luper's to lose their filing fee. 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.

Based upon this language this matter was stayed on April 9, 2004.

On January 27, 2006, that district court action was dismissed for inactivity. Exhibit A to this *Recommended Default Order*. There now appears to be no activity by Applicants to resolve the Lease Agreement dispute.

The Hearing Officer has determined that he will revisit the *Notice of Proposed Default Order*. It now appears that even the loss of priority was insufficient incentive to force the Applicant's to finally resolve the Lease Agreement dispute. Because Applicants had already lost the priority of their water right application, the only harm in entering a default order in this matter will be the loss of the Applicant's filing fees. The loss of those fees is appropriate when IDWR has been left with open-ended Applications and the costs of processing this contested case. As with the district court, at some point a resolution must be diligently pursued in good faith by the Applicants. That has not occurred in this matter.

RECOMMENDED ORDER

Based upon the failure of Mark L. and/or Joanne Luper, DBA Epicenter Aquaculture to respond to the information inquiry requesting that they 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 (67067) it is **ORDERED** that Application for Permit Nos. 72-07577 and 72-07578 and Application for Transfer of Water Right No. 5647 (67067) are **DENIED**.

PROCEDURAL RIGHTS

This is the Recommended Decision and Order of the Hearing Officer. It will not become final without action of the Director of the Idaho Department of Water Resources. Any party may file a petition for reconsideration of this recommended order with the Hearing Officer within fourteen (14) days of the service date of this order. The Hearing Officer will dispose of any petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. *See* Section 67-5243(3) Idaho Code.

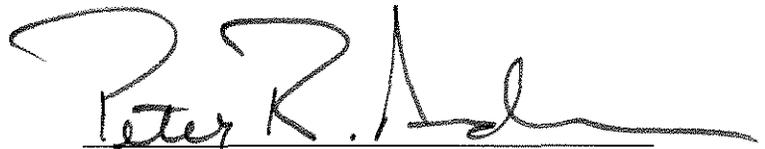
Within fourteen (14) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of this recommended order and file briefs in support of the party's position with the Director or Director's designee on any issue in the proceeding. If no

party files exceptions to the recommended order with the Director or Director's designee, the Director or Director's designee will issue a final order within fifty-six (56) days after:

- i. The last day a timely petition for reconsideration could have been filed with the hearing officer;
- ii. The service date of a denial of a petition for reconsideration by the hearing officer; or
- iii. The failure within twenty-one (21) days to grant or deny a petition for reconsideration by the hearing officer.

Written briefs in support of or taking exceptions to this recommended order shall be filed with the Director or Director's designee. Opposing parties shall have fourteen (14) days to respond. The Director or Director's designee may schedule oral argument in the matter before issuing a final order. The Director or Director's designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

Dated this 3rd day of November 2006.

A handwritten signature in black ink, appearing to read "Peter R. Anderson", written over a horizontal line.

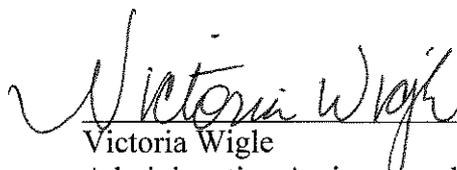
PETER R. ANDERSON
HEARING OFFICER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of November 2006, I delivered the foregoing **RECOMMENDED 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
Administrative Assistant to the Director
Idaho Department of Water Resources

DISTRICT COURT
CLUSTER COUNTY
IDAHO

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

2006 JAN 30 PM 12:01

MARK LUPHER and JO ANNE W.
LUPHER, husband and wife,

Plaintiffs,

vs.

LOIS VON MORGANROTH, successor in
Interest to INGRAM WARM SPRINGS
RANCH; LOIS, INC., an unknown entity;
L&M ANGUS RANCH, INC., an unknown
Entity; JOHN DOES 1-15; JANE DOES
1-15; CORPORATIONS A-Z; LIMITED
PARTNERSHIP 20-25; LOIS, LLC 40-50;
And their heirs, successors and assigns,

Defendants.

LOIS VON MORGANROTH,

Counterclaimant,

vs.

MARK LUPHER and JO ANNE W.
LUPHER, husband and wife, d/b/a Epicenter
Aquaculture,

Counterdefendants.

RECEIVED

OCT 04 2006

DEPT. OF WATER RESOURCES
SOUTHERN REGION CIV 2000-101

RECEIVED
JAN 31 2006
BY: _____

ORDER DISMISSING CASE

WHEREAS the above-captioned matter has been inactive for a period greater than six (6) months; and

WHEREAS the Clerk of Court served a notice of pending dismissal on December 13, 2005; and

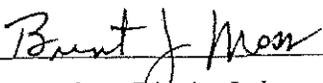
WHEREAS the Court has received an Affidavit in Support of Retention on Calendar from Robert E. Williams, Esq. in response to said notice, and the court having reviewed the affidavit and finding that good cause does not exist for the retention of the above-captioned matter;

COPY

NOW, THEREFORE, the court hereby dismisses the above-captioned matter, without prejudice, pursuant to I.R.C.P. 40(c).

So Ordered.

DATED this 27 day of January, 2006.



Brent J. Moss, District Judge

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Order was this
30th day of January, 2006, served upon the individuals as indicated:

Bruce Smith
Moore Smith
225 N 9th, Ste 420
Boise, ID 83702

[] U.S. Mail, postage prepaid

Robert E. Williams, Esq.
117 South Adams Street
P.O. Box 168
Jerome, ID 83338

U.S. Mail, postage prepaid

Clerk of the Court

By: 1st Linda Aunpkin