BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF LICENSE NO. 37-07842 IN THE NAME OF THE IDAHO WATER RESOURCE BOARD	**ORDER RE: PREHEARING MOTIONS**

BACKGROUND

On August 1, 2017, William Arkoosh, the Estate of Vernon Ravenscroft, Koyle Hydro, Inc., Koosh, Inc., and Shorock Hydro ("Petitioners"), filed a *Petition for Hearing, and Petition for Declaratory Ruling* ("Petition"). The Petitioners request that the Idaho Department of Water Resources ("Department") hold a hearing on its order issued in the above-captioned matter on September 2, 2010, "granting an extension of time to submit proof of beneficial use, and for its ruling on the applicability of Idaho statutes, administrative rules and administrative orders on the subject permit . . . ." *Petition* at 1.

On August 14, 2017, the Director of the Department ("Director") issued a *Notice of Status Conference* to discuss the Petition on September 20, 2017.

On August 22, 2017, the Idaho Water Resource Board ("Board") submitted to the Department a *Motion to Dismiss Petition for Hearing*, and a *Memorandum in Support of Motion to Dismiss Petition for Hearing* ("Hearing Memo"). The Board asserts the petition for hearing should be dismissed as untimely because the Petition was filed more than fifteen days after the Petitioners received written or actual notice of the September 2, 2010, order. *Hearing Memo* at 6.

On August 22, 2017, the Board also submitted a *Motion to Dismiss Petition for Declaratory Ruling* and *Memorandum in Support of Motion to Dismiss Petition for Declaratory Ruling* ("Declaratory Ruling Memo"). The Board asserts the petition for declaratory ruling should be dismissed because it does not state "any specifics regarding which statute, rule, or order it seeks a ruling on" or "the specific declaratory ruling that the Petitioners are seeking and the facts upon which the Petition is based." *Declaratory Ruling Memo* at 5. Alternatively, the Board asserts the Petitioners should amend the Petition "to more clearly define the relief sought." *Id.* at 4.

On September 11, 2017, the Department received *Petitioner's Motion to Allow Amendment to the Pleadings* ("Motion to Amend") and a *First Amended Petition for Hearing, and Petition for Declaratory Ruling* ("Amended Petition").

In the Motion to Amend, the Petitioners ask the Director to allow them to amend the Petition pursuant to the Department's Rule of Procedure 305 (IDAPA 37.01.01.305), asserting the Petition "incorrectly identified the order for which a hearing was being requested." *Motion to Amend* at 1. The Petitioners state"[t]he actual order for which the Petitioners are requesting a hearing is the Notice of Issuance of License No. 37-7842, issued on July 14, 2017 ["July 2017 Order"]." *Id.* The Petitioners also state the Petition "was filed within fifteen days of Petitioners receiving notice of the [July 2017 Order]." *Id.* at 2. The Petitioners assert the Amended Petition "corrects the initial petition and sets forth the correct order for which a hearing is sought." *Id.* at 2. The Petitioners also request the Director allow them to amend the Petition to "provide greater clarification as to the declaratory ruling which Petitioners seek" as set forth in the Amended Petition. *Id.*

On September 25, 2017, the Department received *IWRB's Response to Petitioners' Motion to Allow Amendments to the Pleadings* ("Board's Response"). The Board "does not object to the Motion to Amend with regard to changing the order referenced to the [July 2017 Order] so as to cure the timeliness issue raised in the [*Motion to Dismiss Petition for Hearing*]." *Board's Response* at 4. However, the Board asserts the Petitioners' request to amend the Petition to clarify the declaratory ruling the Petitioners seek should be denied and the Board's *Motion to Dismiss Petition for Declaratory Ruling* should be granted. *Id.* at 17-18.

ANALYSIS

The Department's Rule of Procedure 565 allows the presiding officer to "consider and decide prehearing motions with or without oral argument or hearing." IDAPA 37.01.01.565. The Director does not require oral argument or hearing to decide the prehearing motions filed by the Petitioners and the Board in this matter.

A. The Director Will Grant the Petitioners' Request to Correct the Petition and Deny the Board's *Motion to Dismiss Petition for Hearing*.

The Department's Rule of Procedure 305 authorizes the presiding officer to "allow any pleading to be amended or corrected or any omission to be supplied." IDAPA 37.01.01.305. Rule 305 states that "[p]leadings will be liberally construed, and defects that do not affect the substantial rights of the parties will be disregarded." *Id.*

Pursuant to Rule 305, the Director will grant the Petitioners unopposed request to amend the Petition to state the Petitioners seek a hearing on the July 2017 Order, not the September 2, 2010, order. The Petitioners' intent to seek a hearing on the July 2017 Order and not the September 2010 order is evidenced by the Petitioners' filing of the Petition within fifteen days of receiving written notice of the July 2017 Order in compliance with Idaho Code § 42-1701A(3) and the Petitioners' reference to the July 2017 Order in the Petition.

Because the Petition was filed within fifteen days after the Petitioners received written notice of the July 2017 Order, the Petition was timely filed pursuant to Idaho Code § 42-1701A(3). The Director will grant the Petitioners' request for hearing on the July 2017 Order as set forth in the Amended Petition and issue a separate notice of prehearing conference. Further, because the Director will allow the Petitioners to amend the Petition to correct the reference to the order upon which the Petitioners seek a hearing, and because the Petitioners' request for

hearing on the July 2017 Order pursuant to Idaho Code § 42-1701A(3) is timely, the Director will deny the Board's *Motion to Dismiss Petition for Hearing*.

B. The Director Will Deny the Petitioners' Request to Clarify the Petition and Grant the Board's *Motion to Dismiss Petition for Declaratory Ruling*.

The Department's Rule of Procedure 400 allows any person to petition the Department "for a declaratory ruling on the applicability of a statute, rule or order administered by the agency." IDAPA 37.01.01.400. A petition for declaratory ruling must "[s]tate the declaratory ruling that the petitioner seeks" and must "[i]ndicate the statute, order, rule, or other controlling law, and the factual allegations upon which the petitioner relies to support the petition." *Id.* Actions for declaratory relief "may not be used to avoid the consequences of failing to comply with statutory procedural requirements." *Ag Air, Inc. v. Idaho State Tax Comm'n*, 132 Idaho 345, 348, 972 P.2d 313, 316 (1999). Actions for declaratory relief "are not intended as a substitute for a statutory procedure and such administrative remedies must be exhausted." *V-1 Oil Co. v. Bannock Cty.*, 97 Idaho 807, 810, 554 P.2d 1304, 1307 (1976). "[T]he proper method of contesting an agency or judicial decision is by appeal" and "an order or judgment may not later be collaterally attacked by means of" an action for declaratory relief. *Carter v. State, Dep't of Health & Welfare*, 103 Idaho 701, 702, 652 P.2d 649, 650 (1982). However, orders issued by an administrative agency in excess of the agency's statutory authority are void and subject to collateral attack at any time. *Wernecke v. St. Maries Joint Sch. Dist. No. 401*, 147 Idaho 277, 286, 207 P.3d 1008, 1017 (2009).

The Petitioners assert the Amended Petition "provides greater clarification" regarding "the declaratory ruling which Petitioners seek." *Motion to Amend* at 2. The Amended Petition states the Petitioners seek three declaratory rulings: 1) "a declaratory ruling as to the applicability of Idaho Code § 42-202 to the evidence before the Department regarding License No. 37-07843 and seek the Director's determination that the subject application was deficient," 2) "a declaratory ruling as to the applicability of Idaho Code § 42-217 and Idaho Code § 42-219 to the evidence before the Department regarding License No. 37-07842 and seek the Director's determination that water was not put to beneficial use in the time period allowed under the permit," and 3) "a declaratory ruling as to the applicability of Idaho Code § 42-218a to the evidence before the Department regarding License No. 37-07842 and seek the Director's determination that the priority date for License No. 37-07842 was not accurately advanced following lapse and restatement." *Amended Petition* at 7-8. For reasons explained below, the Director will deny the Petitioners request to amend the Petition for the three declaratory rulings the Petitioners seek and grant the Board's *Motion to Dismiss Petition for Declaratory Ruling*.

1. <u>The Petitioners' request for a determination that Application for Permit No. 37-7842 was deficient is an impermissible collateral attack on the Department's June 2, 1982, order approving Application for Permit No. 37-7842</u>.

The Petitioners request "a declaratory ruling as to the applicability of Idaho Code § 42-202 to the evidence before the Department regarding License No. 37-07842 and seek the Director's determination that the subject application was deficient." *Amended Petition* at 7. Idaho Code § 42-202 addresses what information and fees must accompany an application for permit to appropriate waters of the state of Idaho submitted to the Department. Idaho Code § 42-

203A requires the Department publish notice of an application to appropriate waters of Idaho and allows any person to file a written protest to the application with the Director within the time period specified in the notice. Idaho Code § 42-203A(4) states "in the event that no protest is filed, then the [Director] may forthwith approve the application, providing the same in all respects conforms with the requirements of this chapter, and with the regulations of the [Department]."

Application for Permit No. 37-7842 was filed with the Department on June 30, 1980. No protests were filed. Consistent with its statutory authority, the Department issued an order approving Application for Permit No. 37-7842 on June 2, 1982. The Department's order approving the application determined that the application conformed with the requirements of Idaho Code § 42-202. The Petitioners had fifteen days from the "receipt of actual notice" of the June 2, 1982, order approving Application for Permit No. 37-7842 to file "a written petition stating the grounds for contesting" the order "and requesting a hearing." Idaho Code § 42-1701A(3). The record in this matter demonstrates the Petitioners received actual notice of the June 2, 1982, order approving Application for Permit No. 37-7842 by September 21, 2010, at the latest.[1] The Petitioners did not file a written petition with the Department contesting the June 2, 1982, order within fifteen days of September 21, 2010, and therefore did not exhaust their administrative remedies as set forth in Idaho Code § 42-1701A(3). The Petitioners' attempt to challenge the Department's June 2, 1982, order approving Application for Permit No. 37-7842 through a petition for declaratory ruling constitutes an impermissible collateral attack on the order. *See Ag Air, Inc.*, 132 Idaho at 348, 972 P.2d at 316; *Carter*, 103 Idaho at 702, 652 P.2d at 650; *V-1 Oil Co.*, 97 Idaho at 810, 554 P.2d at 1307.

2. <u>The Petitioners' challenge to the July 2017 Order's determination of the amount of water beneficially applied during the development period of Permit No. 37-7842 may not be pursued through a petition for declaratory ruling</u>.

The Petitioners request "a declaratory ruling as to the applicability of Idaho Code § 42-217 and Idaho Code § 42-219 to the evidence before the Department regarding License No. 37-07842 and seek the Director's determination that water was not put to beneficial use in the time period allowed under the permit." *Amended Petition* at 7.

Idaho Code § 42-217 requires a permit holder to submit proof of application to beneficial use to the Department "[o]n or before the date set for the beneficial use of waters" and delineates what information the proof must include. Idaho Code § 42-217 also requires that, "upon receipt of such proof and the fee as required in section 42-221, Idaho Code" the Department "shall examine, or cause to be examined . . . [t]he place where such water is diverted and used" and "[t]he capacities of the ditches or canals or other means by which such water is conducted to such place of use, and the quantity of water which has been beneficially applied for irrigation or other purposes." Idaho Code § 42-217 requires the Department or "person making such examination" under the Department's direction "shall prepare and file a report of the investigation."

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[1] The Petitioners filed a *Petition for Hearing, and Petition for Declaratory Ruling* with the Department dated September 21, 2010, which references the June 2, 1982, order approving Application for Permit No. 37-7842.

Idaho Code § 42-219 addresses the Department's issuance of a license following submission of proof of beneficial use and requires the Department "carefully examine" all of the evidence related to "final proof." If the Department "is satisfied" that "the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended," the Department "shall issue to such user or users a license confirming such use" which states "the purpose for which such water is used and the quantity of water which may be used, which in no case shall be an amount in excess of the amount that has been beneficially applied."

The Petitioners' requests for "a declaratory ruling as to the applicability of Idaho Code § 42-217 and Idaho Code § 42-219 to the evidence before the Department regarding License No. 37-07842" and a "determination that water was not put to beneficial use in the time period allowed under the permit" constitute a challenge to the July 2017 Order's determination of the amount of water beneficially applied during the development period of Permit No. 37-7842. The appropriate method for challenging this determination is a request for hearing regarding the July 2017 Order pursuant to Idaho Code § 42-1701A(3), not a petition for declaratory ruling. *See V-1 Oil Co.*, 97 Idaho at 810, 554 P.2d at 1307 (Actions for declaratory relief "are not intended as a substitute for a statutory procedure and such administrative remedies must be exhausted.").

As discussed above, the Director will allow the Petitioners to amend the Petition as set forth in the Amended Petition to request a hearing on the July 2017 Order pursuant to Idaho Code § 42-1701A(3). The Petitioners have, therefore, timely requested a hearing on the July 2017 Order pursuant to Idaho Code § 42-1701A(3), and may pursue their challenge to the July 2017 Order's determination of the amount of water beneficially applied during the development period of Permit No. 37-7842 through that administrative remedy.

3. <u>The Petitioners' request for a determination that the priority date for License No. 37-7842 was not accurately advanced is an impermissible collateral attack on the Department's December 1, 1993 *Reinstatement Order*.</u>

The Petitioners request "a declaratory ruling as to the applicability of Idaho Code § 42-218a to the evidence before the Department regarding License No. 37-07842 and seek the Director's determination that the priority date for License No. 37-07842 was not accurately advanced following lapse and restatement." *Id.* at 8.

Idaho Code § 42-218a addresses lapse and reinstatement of a permit when a permit holder fails to timely submit proof of beneficial use. The Department's June 2, 1982, order approving Application for Permit No. 37-7842, set June 1, 1987, as the date for proof of beneficial use for Permit No. 37-7842. On October 4, 1989, the Department extended the time to submit proof of beneficial use to June 1, 1992. Proof of beneficial use was not submitted to the Department by June 1, 1992, and Permit No. 37-7842 lapsed in accordance with Idaho Code § 42-218a.

On July 27, 1992, the permit holder submitted proof of beneficial use to the Department regarding Permit No. 37-7842. On December 1, 1993, the Department issued a *Reinstatement*

Order reinstating Permit No. 37-7842 with an advanced priority date "to August 25, 1980" pursuant to Idaho Code § 42-218a.

The December 1, 1993 *Reinstatement Order* constitutes the Department's determination that the priority date of Permit No. 37-7842 should be August 25, 1980, in accordance with Idaho Code § 42-218a. The Petitioners did not challenge this determination as required by Idaho Code § 42-1701A(3). The record in this matter demonstrates the Petitioners received actual notice of the December 1, 1993 *Reinstatement Order* by September 21, 2010, at the latest.[2] The Petitioners did not file a written petition with the Department contesting the December 1, 1993 *Reinstatement Order* within fifteen days of September 21, 2010, and therefore did not exhaust their administrative remedies as set forth in Idaho Code § 42-1701A(3). The Petitioners' attempt to challenge the Department's December 1, 1993 *Reinstatement Order* through a petition for declaratory ruling constitutes an impermissible collateral attack on the order. *See Ag Air, Inc.*, 132 Idaho at 348, 972 P.2d at 316; *Carter*, 103 Idaho at 702, 652 P.2d at 650; *V-1 Oil Co.*, 97 Idaho at 810, 554 P.2d at 1307.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the *Petitioner's Motion to Allow Amendment to the Pleadings* is GRANTED with respect to identifying the July 14, 2017 Notice of Issuance of License No. 37-7842 as the order upon which the Petitioners request a hearing pursuant to Idaho Code § 42-1701A(3). The Director will issue a separate notice of prehearing conference.

IT IS FURTHER ORDERED that the Board's *Motion to Dismiss Petition for Hearing* is DENIED.

IT IS FURTHER ORDERED that the *Petitioner's Motion to Allow Amendment to the Pleadings* is DENIED with respect to the request to clarify the declaratory ruling Petitioners seek.

IT IS FURTHER ORDERED that the Board's *Motion to Dismiss Petition for Declaratory Ruling* is GRANTED.

Dated this 21st day of December 2017.

GARY SPACKMAN
Director

[2] The Petitioners filed a *Petition for Hearing, and Petition for Declaratory Ruling* with the Department dated September 21, 2010, which references the December 1, 1993 *Reinstatement Order*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of December 2017, I served a true and correct copy of the foregoing document on the following by the method(s) indicated.

JOSEPH F JAMES BROWN & JAMES 125 FIFTH AVENUE WEST GOODING ID 83330 joe@brownjameslaw.com dana@brownjameslaw.com	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
ANN Y VONDE DEPUTY ATTORNEY GENERAL IDAHO WATER RESOURCE BOARD STATE OF IDAHO PO BOX 83720 BOISE ID 83720-0010	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
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Kimi White

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