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DEPARTMENT OF
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCE
OF THE STATE OF IDAHO

IN THE MATTER OF PERMIT NO.)	MEMORANDUM IN OPPOSITION TO
37-07842 IN THE NAME OF THE)	IWRB'S MOTION FOR SUMMARY
IDAHO WATER RESOURCES)	JUDGMENT
BOARD)	
_____)	

COME NOW, the Petitioners, by and through Joseph F. James, of James Law Office, PLLC, their attorneys of record, and respectfully submit this Memorandum in Opposition to IWRB's Motion for Summary Judgment.

I
INTRODUCTORY SUMMARY

A. Summary of Facts:

An application was filed on July 2, 1980 seeking a permit to divert 800 cfs from the Little Wood and Big Wood Rivers for purposes of ground water recharge. (Application for Permit 37-07842). The application indicated that five years was required for completion of the works and application of the water for recharge. (Application for Permit 37-07842).

The subject application sought a permit to divert water from the Little Wood River through the Dietrich Canal for purposes of recharge southeast of Richfield. (Application for Permit 37-

07842). The applicants filed another application on the same day seeking to divert water from the Snake River through the Milner-Gooding Canal for purposes of recharge northwest of Shoshone, Idaho. (Application for Permit 37-07842). This other application was ultimately assigned Permit No. 01-07054.

The subject application was approved on June 2, 1982, under Permit No. 37-07842, with a completion and submission of beneficial use deadline of June 1, 1987. (Application for Permit 37-07842). A request for extension of time was submitted on June 1, 1987. (Request for Extension 6-1-87). Ultimately, the Department approved the request for extension on October 4, 1989, extending the completion and proof of beneficial use deadline to June 1, 1992. (Request for Extension 6-1-87).

The Department sent a notice of proof of beneficial use due on March 31, 1992, providing notice that proof of beneficial use had to be submitted no later than June 1, 1992. (Proof Due Notice 3-31-92). Proof of beneficial use was not timely submitted and the Department sent a lapsed notice on June 5, 1992. (Lapse Notice 6-5-92). The Department received proof of beneficial use on or about June 15, 1992. (IDWR/Gustafson ltr 6-15-92). The Department returned the proof of beneficial use form to the applicants on June 15, 1992, stating that the proof was unacceptable. *Id.* On July 9, 1992, the Department received a beneficial use field report regarding the permit, but did not receive the original proof of beneficial use form. (IDWR/Gustafson ltr 7-9-92).

On July 27, 1992, the Department received the original proof of beneficial use form. (Proof Beneficial Use 37-07842). The form listed both Permit No. 37-07842 and Permit No. 01-07054. *Id.* The proof of beneficial use indicated a total of 300 cfs of ground water had been diverted from

the Snake River. *Id.* The beneficial use field report denoted the source as the Snake River, provided a point of diversion different from the application, as well as different place of use. *Id.* The beneficial use field report also denoted that the water was diverted through the Milner-Gooding Canal and not the Dietrich Canal. (Field Report 37-07842). The Department accepted the amended proof of beneficial use and beneficial use field report. The Department entered its order reinstating the permit and advancing the priority date to August 25, 1990 on the 29th day of July, 1992. (Order of Reinstatement 7-29-92).

On further review, the Department determined that the beneficial use field report was not acceptable. The applicants provided an amended beneficial use field report on October 19, 1993. (IDWR/Saxton ltr 10-21-93). The Department determined that the amended beneficial use field report was still not acceptable and returned it to the applicants on October 21, 1993. *Id.* On November 29, 1993, the Department received another amended beneficial field report denoting both Permit No. 01-07054 and Permit No. 37-07842 with a total diversion of 300 cfs. (Amended Field Report 37-07847). This time the beneficial use field report indicated the source as the Snake River/Big Wood River but did not include the Little Wood River. *Id.* Again, the total diversion rate was stated at 300 cfs. *Id.* The Department entered a reinstatement order regarding both permits on December 1, 1993. (Reinstatement Order).

On March 19, 1999, the Idaho Water Resources Board agreed to accept assignment of the permits. (IDWR/Hass ltr 3-22-99). A Memo to the file in October 1999 indicated that recharge under Permit No. 01-07054 from the Snake River through the Milner-Gooding Canal could be confirmed and the license for that has been prepared for signature. (Memo to File 10-7-95). However, regarding Permit No. 37-07842 there did not appear to be any application toward

beneficial use. Based on the Department's conversation with Dan McFadden of the Lower Snake River Aquifer Recharge District, no ground water recharge had ever taken place from the Little Wood River via the Dietrich Canal. *Id.* Also, based on the Department's conversation with Paul Castelin of the Technical Services Bureau, no recharge from the Little Wood or Big Wood River had taken place. *Id.* The Department concluded that there has been no beneficial use to date and that the permit should be routed for extension or reinstatement processing. *Id.* This conclusion was further supported by the correspondence from the Big Wood Canal Company and American Falls Reservoir District #2 of November 1999, which clarified that all recharge water from 1986 through 1995 was Snake River water delivered via the Milner-Gooding Canal. (Oneida ltr 11-99).

Though the Department's file contains a proof of beneficial use form and beneficial use field report, which has not been withdrawn, the Idaho Water Resources Board adopted a resolution asking the Director to extend the proof date regarding the "undeveloped" portion of the permit. (WRB Resolution 3-21-00). An order was entered on April 3, 2000 extending the proof date for the permit until June 1, 2004. (IDWR 4-3-00). On August 25, 2004, the Idaho Water Resources Board again requested for an extension of time to submit proof of beneficial use resulting in another extension to June 1, 2009. (Request for Extension 8-25-04). On June 1, 2009, the Department received another request for extension of time to submit proof of beneficial use. (Request for Extension 6-1-09). On March 19, 2010, while the request for extension of time was pending, the Director indicated "[It] does not appear the beneficial use of water for recharge purposes has occurred under this permit to date, despite the confusion in the record on this issue." (IDWR/Spackman ltr 3-19-10). The request for extension was granted on the 2nd day of

September 2010 and the time within which to submit proof of beneficial use was extended to June 1, 2014. (Request for Extension 6-1-09). Petitioners previously filed a Petition for Hearing, and Petition for Declaratory Ruling on September 22, 2010. Said petition was brought pursuant to I.C. §42-1701A(3) and on the basis that Petitioners were aggrieved by the action of the Director. (Petition 09-22-10, p.2)

The Petitioners are holders of Permits and Water Rights for hydropower purposes on the Little Wood River or Malad River downstream from the point of diversion for WR No. 37-07842. (Arkoosh Aff. Para. 5). The diversion of water pursuant to WR No. 37-07842 upstream from the points of use for Petitioners' water permits and rights will result in less water being available to Petitioners for the generation of power. (Arkoosh Aff. Para. 6). The hydropower facilities owned or operated by the Petitioners generate income for the Petitioners. (Arkoosh Aff. Para. 7). The reduction of water being available to Petitioners for the generation of power will result in a significant loss of income to Petitioners. (Arkoosh Aff. Para. 8). The action of the Department in providing the Notice of Issuance of License No. 37-7842, without having a hearing and determination that that the law concerning the establishment of a water right has not been fully complied with will cause significant financial injury upon the Petitioners, and will directly affect Petitioner's pecuniary interests and Petitioner's water rights.

B. Course of Proceedings:

The Idaho Department of Water Resources entered its Order on July 14, 2017, providing Notice of Issuance of License No. 37-7842. Petitioner's filed a Petition for Hearing and Petition for Declaratory Ruling on August 1, 2017. Concurrently with a Motion to Allow Amendment to Pleadings, Petitioners filed their First Amended Petition for Hearing and Petition for Declaratory

Ruling on September 8, 2017. On October 22, 2017, the IWRB submitted a Motion to Dismiss Petition for Declaratory Ruling and Memorandum in Support of Motion to Dismiss Petition for Declaratory Ruling. On December 21, 2017, the Director of the Idaho Department of Water Resources entered his Order Re: Prehearing Motion which granted Petitioner's Motion to Allow Amendment to the Pleadings 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 I.C. §42-1701A(3) and denying IWRB's Motion to Dismiss Petition for Hearing. Said order also denied Petitioner's Motion to Allow Amendment to the Pleadings in respect to clarifying the declaratory ruling Petitioners seek and granted IWRB's Motion to Dismiss Petition for Declaratory Ruling. On May 29, 2018, IWRB filed its Motion for Summary Judgment along with its Memorandum in Support.

II LEGAL STANDARD

A. Motion for Summary Judgment:

Pending motions for summary judgment are controlled by I.D.A.P.A 37.01.01 - Rules of Procedure of the Idaho Department of Water Resources. The Department's Rules of Procedure do not adopt the standard set forth in Rule 56 of the Idaho Rules of Civil Procedure. See I.D.A.P.A. 37.01.01.052. However, it is anticipated, like those proceedings governed by I.R.C.P. 56, summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See I.R.C.P 56(c).

III ARGUMENT

A. Petitioners Have Standing To Proceed On Their First Amended Petition For Hearing, And Petition For Declaratory Ruling.

The Idaho Code provides:

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action.

I.C. § 42-1701A(3). As noted by IWRB, The Idaho Supreme Courts has Stated that:

Broadly speaking, a party or person is aggrieved by a decision when, and only when, it operates directly and injuriously upon his personal, pecuniary, or property rights. The mere fact that a person may be hurt in his feelings, or be disappointed over a certain result, or be subjected to inconvenience, annoyance or discomfort, or even expense, does not constitute him a party 'aggrieved,' since he *must be aggrieved in a legal sense*. To render a party aggrieved by an order, so as to entitle him to appeal therefrom, the right invaded must be immediate not merely some possible, remote consequence, or mere possibility arising from some unknown and future contingency... The test as to whether a party is aggrieved or not is: Would the party have had the thing if the erroneous judgment had not been entered? If the answer be yea, his is a party aggrieved.

Application of Fernan Lake Village, 80 Idaho 412,415,331 P.2d 278, 279-280 (1958)

The IWRB relies heavily on the hearing officer's decision denying Idaho Power's request for hearing, in the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irrigation District, American Falls Reservoir District, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company, for the proposition that the Petitioners cannot be aggrieved, and therefor lack standing. However, said matter does not provide binding precedent. Further,

the present matter is distinct.

Idaho Power filed a Motion for Hearing in the Surface Water Coalition's delivery call. Idaho Power's water rights were not included in the Surface Water Coalition delivery call. The present matter doesn't address a delivery call, but rather seeks a hearing on the Director's Notice of Intent to Issue Water License No. 37-7842. The Petitioners primarily contend that water was not put to beneficial use in the prescribed period and all requirements of the law were not satisfied.

The Petitioners are holders of Permits and Water Rights for hydropower purposes on the Little Wood River or Malad River downstream from the point of diversion for WR No. 37-07842. (Arkoosh Aff. Para. 5). The diversion of water pursuant to WR No. 37-07842 upstream from the points of use for Petitioners' water permits and rights will result in less water being available to Petitioners for the generation of power. (Arkoosh Aff. Para. 6). The hydropower facilities owned or operated by the Petitioners generate income for the Petitioners. (Arkoosh Aff. Para. 7). The reduction of water being available to Petitioners for the generation of power will result in a significant loss of income to Petitioners. (Arkoosh Aff. Para. 8). The action of the Department in providing the Notice of Issuance of License No. 37-7842, without having a hearing and determination that the law concerning the establishment of a water right has not been fully complied with will cause significant financial injury upon the Petitioners, and will directly affect Petitioner's pecuniary interests and Petitioner's water rights. Petitioners have standing to request a hearing pursuant to I.C. § 42-1701A(3).

B. The IWRB Cannot Seek Re-Evaluation of the Department's Prior Decisions Recognizing Petitioner's Standing.

IWRB's challenge to Petitioner's standing constitutes an impermissible collateral attack on previous Department actions. On September 22, 2010, Petitioners filed a Petition for Hearing,

and Petition for Declaratory Ruling, as an aggrieved party, pursuant to I.C. §42-1701A(3). The Department commenced a contested case proceeding. The Hearing Officer recognized the Petitioners standing and issued his Recommended Order Granting Petitioner's Motion for Summary Judgment and Rescinding Extension of Time on November 30, 2011. The Director issued his final order adopting the recommended order on February 28, 2012. In his recommended order, the Hearing Officer stated:

The Department will investigate the extent of beneficial use occurring prior to June 1, 1992 as part of the licensing process. If IWRB or the Petitioners disagree with the Department's determination of beneficial use occurring within the authorized development, the proper venue to raise arguments regarding the true extent of the beneficial use would be within the licensing process. The IWRB had 15 days from the receipt of actual notice of the Department's actions to request a hearing and further contest the action pursuant to I.C. §42-1701A(3).

Petitioners have standing to proceed on their First Amended Petition for Hearing, and Petition for Declaratory Ruling.

IV CONCLUSION

For the reasons stated herein, Petitioners respectfully requests that the Director enter his order denying IWRB's motion for summary judgment.

DATED this 12th day of June, 2018.

JAMES LAW OFFICE, PLLC

By:


Joseph F. James

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of June, 2018, I served a true and correct copy of the foregoing document upon the following persons in the manner indicated:

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