

**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

Docket No. P-DR-2017-002

**ORDER DENYING MOTION
TO DISMISS PETITION FOR
HEARING**

BACKGROUND

On September 8, 2017, William Arkoosh, the Estate of Vernon Ravenscroft, Koyle Hydro, Inc., Koosh, Inc., and Shorock Hydro (“Petitioners”) filed with the Idaho Department of Water Resources (“Department”) a petition for hearing pursuant to Idaho Code § 42-1701A(3) on the Department’s July 14, 2017, order issuing License No. 37-7842 (“July 2017 Order”). *First Amended Petition for Hearing, and Petition for Declaratory Ruling* (“Amended Petition”) at 1. License No. 37-7842 authorizes the Idaho Water Resource Board (“IWRB”) to divert water for ground water recharge from the Little Wood River at a rate of 250 cfs with a total diversion volume of 13,900 acre-feet and an August 25, 1980, priority date. *Id.* at 6.

In the Amended Petition, the Petitioners assert they are “interested in this matter as owners of permits and water rights for hydropower purposes on the Little Wood River or Malad River downstream from the point of diversion for Permit No. 37-07842.” *Id.* at 1. William Arkoosh owns water right nos. 37-7943 and 37-21297; the Estate of Ravenscroft owns water right nos. 37-7857, 37-7865, and 37-7922; Koyle Hydro, Inc., owns water right nos. 37-7889 and 37-7916; Koosh, Inc., owns water right nos. 37-8096 and 37-8251; and Shorock Hydro, Inc., owns water right nos. 37-7863, 37-7911, 37-8113, and 37-8262. *Id.* at 1-2. The Petitioners assert “that water was not put to beneficial use in the time period allowed under [Permit No. 37-7842].” *Id.* at 7.

On December 21, 2017, the Director of the Department (“Director”) granted the Petitioners’ request for a hearing on the Department’s determination in the July 2017 Order of the amount of water beneficially applied during the development period of Permit No. 37-7842. *Order Re: Prehearing Motions* at 2-3, 5-6. The Director held a prehearing conference on February 23, 2018, and, consistent with discussions at the prehearing conference, issued an *Order Authorizing Discovery and Adopting Deadlines; Notice of Hearing* on March 7, 2018. The Director set a June 22, 2018, deadline for the parties to file prehearing motions.

On May 29, 2018, the IWRB filed a motion asking the Director to dismiss the Amended Petition. See *IWRB's Motion for Summary Judgement* ("Motion"). The IWRB also filed a memorandum ("IWRB Memorandum") and affidavit of Ann Y. Vonde ("Vonde Affidavit") in support of the motion. On June 12, 2018, the Petitioners filed a memorandum in opposition to the Motion ("Response") and an affidavit of William Arkoosh ("Arkoosh Affidavit").

ANALYSIS

As stated above, the Petitioners' request for hearing on the Department's determination in the July 2017 Order of the amount of water beneficially applied during the development period of Permit No. 37-7842 is pursuant to Idaho Code § 42-1701A(3). Idaho Code § 42-1701A(3) states that "any person aggrieved by any action of the director," including any action in issuing a license, "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."

The IWRB asserts the Amended Petition should be dismissed because the "Petitioners have not and cannot as a matter of law demonstrate they are 'aggrieved' by the issuance of the License for Water Right 37-7842." *IWRB Memorandum* at 1-2. In support of this assertion, the IWRB states: "Petitioners have failed to provide *any* evidence that 'its water rights will be directly affected by the outcome of this proceeding.'" *Id.* at 4-5 (emphasis in original). The IWRB also asserts the Petitioners' water rights listed in the Amended Petition "do not, as a matter of law, provide a basis for Petitioners to claim to be injuriously affected by the issuance of a License for Water Right 37-7842" because the Petitioners' "water rights are subordinate." *Id.* at 6-7.

Contrary to the IWRB's assertion, the Petitioners have submitted evidence in this matter that their water rights are directly affected by the Department's July 2017 Order. As the Petitioners assert in the Response, and as they did in the Amended Petition, the Petitioners hold water rights for hydropower purposes on the Little Wood River or Malad River downstream from the point of diversion for water right no. 37-7842. *Response* at 8; *Amended Petition* at 1. The Petitioners assert "[t]he diversion of water pursuant to WR No. 37-7842 upstream from points of use for Petitioners' water permits and rights will result in less water being available to Petitioners for the generation of power." *Response* at 8; *Arkoosh Affidavit* at 2. The Petitioners assert the Department's issuance of License No. 37-7842 as determined in the July 2017 Order directly affects their water rights. *Id.* The Petitioners are "aggrieved" by the Department's determination in the July 2017 Order of the amount of water beneficially applied during the development period of Permit No. 37-7842. Therefore, the Petitioners are entitled to the hearing they timely requested on the issue pursuant to Idaho Code § 42-1701A(3).

Further, the subordination condition on the Petitioners' water rights does not support the IWRB's position that the Amended Petition should be dismissed. Each right includes a condition stating the right:

[S]hall be junior and subordinate to all rights for the use of water other than hydropower, within the State of Idaho that are initiated later in time than the priority of this right and shall not give rise to any right or claim against any future rights for the use of water, other than hydropower, within the State of Idaho initiated later in time than the priority of this right.

See Vonde Affidavit at Exs. E-M. All of the Petitioners' water rights listed in the Amended Petition are junior to water right no. 37-7842's August 25, 1980, priority date. *See id.* Water right no. 37-7842 was *not* "initiated later in time than the priority of" the Petitioners' water rights. Accordingly, the subordination condition on the Petitioners' water rights does not preclude the Petitioners from raising a claim against water right no. 37-7842. The Director will deny the IWRB's Motion.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the IWRB's Motion requesting the Director dismiss the Amended Petition is DENIED.

DATED this 25th day of June 2018.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of June 2018, 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
ann.vonde@ag.idaho.gov

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

BRIAN PATTON
IDAHO WATER RESOURCE BOARD
322 EAST FRONT STREET
PO BOX 83720
BOISE ID 83720-0098
brian.patton@idwr.idaho.gov

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email

KEVIN LAKEY
WATER DISTRICT #37
107 W 1ST
SHOSHONE ID 83352
watermanager@cableone.net

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile
- Email


Kimi White