



AGENDA

IDAHO WATER RESOURCE BOARD

Special Board Meeting No. 3-22

Friday, March 4, 2022

2:00 P.M. (MT)

Water Center

Conference Room 602 C & D / Online Zoom Meeting

322 E. Front St.

BOISE

Brad Little

Governor

Jeff Raybould

Chairman

St. Anthony

At Large

Roger W. Chase

Vice-Chairman

Pocatello

District 4

Jo Ann Cole-Hansen

Secretary

Lewiston

At Large

Dale Van Stone

Hope

District 1

Albert Barker

Boise

District 2

Dean Stevenson

Paul

District 3

Peter Van Der Meulen

Hailey

At Large

Brian Olmstead

Twin Falls

At Large

Board Members & the Public may participate via Zoom

[Click here to join our Zoom Meeting](#)

Dial in Option: 1(253) 215-8782

Meeting ID: 899 2236 6416 Passcode: 140572

1. Roll Call
2. Executive Session: Board will meet pursuant to Idaho Code § 74-206(1) subsection (f) to communicate with legal counsel regarding legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated. Topics: Big & Little Wood Recharge Applications. Closed to the public; no actions taken during executive session.
3. Big & Little Wood Recharge Applications*
4. Non-Action Items for Discussion
5. Next Meeting & Adjourn

* Action Item: A vote regarding this item may be made this meeting. Identifying an item as an action item on the agenda does not require a vote to be taken on the item.

Americans with Disabilities

The meeting will be held telephonically. If you require special accommodations to attend, participate in, or understand the meeting, please make advance arrangements by contacting Department staff by email jennifer.strange@idwr.idaho.gov or by phone at (208) 287-4800.

LAWRENCE G. WASDEN
Attorney General

DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division

ANN Y. VONDE (ISB #8406)
Deputy Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: 208-334-2400
Facsimile: 208-854-8072

Attorneys for the Idaho Water Resource Board

**BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF)	
APPLICATION FOR PERMIT)	
NOS. 37-23110 AND 37-23111 (Idaho)	JOINT STIPULATION AND
Water Resource Board))	MOTION FOR WITHDRAWAL OF
)	PROTESTS
)	
_____)	

Applicant Idaho Water Resource Board (“Applicant” or “IWRB”) and protestant United States Bureau of Land Management (“Protestant” or “BLM”), by and through their undersigned counsel of record and representatives, and pursuant to IDAPA 37.01.01.204, .260, .557 and .612, hereby stipulate to a settlement of Protestant’s protest to water right applications 37-23110 and 37-23111 (the “Applications”), the terms and conditions of which are set forth herein.

The IWRB has filed with BLM an application for a right-of-way addressing existing infrastructure within the places of use (“POUs”) for the Applications. This right-of-way application is acceptable to BLM for further processing and is attached as Exhibit 1. The parties agree that, by filing this application for a right-of-way across federal lands and by agreeing to the terms of this settlement stipulation, the IWRB is taking adequate steps towards a potential authorization to use federal lands within the POUs so as to allow BLM to hereby withdraw its protest, should this stipulation be approved by the Hearing Officer through an appropriate order.

After an order approving this stipulation, the parties agree that the Applications may proceed to permitting while the application for a right-of-way (Exhibit 1) is pending before BLM. Subsequently, before or after the Idaho Department of Water Resources (“IDWR” or the “Department”) issues permits based on the Applications, additional applications for rights-of-way may be filed by the IWRB with BLM for other lands included in the POUs, subject to all the provisions described below.

Applications and Permits to Have No Impact on BLM Land Management

Neither the Applications nor any subsequent permits issued by IDWR will inhibit the BLM’s ability to manage the federal lands included in the Applications’ POUs. This management by BLM may include granting rights-of-way to other parties or taking other actions which are incompatible with IWRB’s use of the federal lands within the POUs for “ground water recharge,” IWRB’s stated purpose in its Applications, or other purposes.

The parties agree that no waters sought under the Applications may be used on federal lands until authorized in writing by the BLM Authorized Officer. Nothing in this stipulation should be construed as a guarantee or promise, implied or inferred, that any rights-of-way will be granted by

BLM. The parties agree that BLM is under no obligation to preserve the federal land within the POUs for IWRB's future use; however, BLM agrees to treat IWRB right-of-way applications fairly in accordance with its regulations. Once the BLM grants a right-of-way, IWRB will be entitled to all the benefits and assume all the associated responsibilities of that grant, including the potential need to remove infrastructure upon expiration of the right-of-way grant (if appropriate under the law, regulations, and terms of the grant). The IWRB further recognizes that rights-of-way issued by BLM are for a term of years and that there is no guarantee that, at the expiration of that term, the IWRB will be granted an extension on those rights-of-way. BLM may also terminate or modify a right-of-way granted to IWRB in accordance with the terms of the grant and BLM's regulations.

Amendment of POUs Within Ten Years

The parties agree that the IWRB will, within ten years of the date of this agreement, request of IDWR that the POUs for the Applications or subsequent permits be amended to remove any federal land owned or managed by the BLM for which the BLM has not granted to the IWRB a finalized and completed right-of-way. The agreement to amend the POUs to remove federal land owned or managed by BLM within ten years of the date of this agreement does not limit the IWRB's authority under I.C. § 42-204(3)(e) to request to extend the proof of beneficial use of relevant permits or require that the permits be licensed within ten years. The parties agree that the federal lands removed from the POUs under this paragraph shall not be added to the POUs either prior to licensing or as part of the licensing process.

Removal of Any Unauthorized Federal Lands at Licensing

At whatever time IWRB seeks to obtain a water right license based upon permits associated

with the current Applications, the IWRB agrees that it shall remove any federal lands from the POUs except for lands where rights-of-ways have been granted to the IWRB by BLM and remain active at the time of licensing.

Notice from IWRB to BLM

The IWRB agrees to provide the BLM written notice of any administrative actions taken on the Applications or subsequent permits, including notice of IWRB's intent to seek an extension under I.C. § 42-204(3)(e) and IWRB's intent to file proof of beneficial use with IDWR. Such notice shall be provided with sufficient time, at least 60 days prior to any filing by IWRB, to allow the BLM to fully participate in any administrative proceeding pending or authorized to occur before IDWR.

Notice shall also be provided to BLM by IWRB of any preliminary or final order issuing licenses which may follow from the IWRB Applications. This notice shall be provided to BLM within two days of the order being issued.

In all instances, notice shall be made by the IWRB to the BLM's Idaho State Director via certified mail, return receipt requested, and shall include a copy of this settlement stipulation. Email communications to the Idaho State Director and relevant BLM staff are also encouraged but will not serve as a substitute for certified mail. Some additional notice requirements are noted in the permit conditions in association with particular events.

No Precedent Created

This stipulation has been reached through good faith negotiations for the purpose of resolving legal disputes, including pending litigation. The parties agree that no offers and/or

compromises made in the course thereof shall be construed as admissions against interest. This stipulation was entered into and executed voluntarily by all the parties in good faith.

The parties agree that this stipulation is made to settle the BLM's particular protest of these Applications only. The settlement stipulation has no value as legal precedent, and no presumption or expectation is made by the parties that its terms can be applicable to any future situation. This settlement stipulation comprises the entire agreement and no promise, inducement, or representation other than herein set forth has been made, offered, and/or agreed upon, and the terms of this stipulation are contractual and not merely a recital.

Conditions

The parties further agree that the following conditions shall be placed on any approved water permit associated with the Applications:

1. This right does not grant any right-of-way or easement across the land of another.
2. Prior to diversion and use of water under this approval, the right holder shall obtain authorization from the Bureau of Land Management to access the point of diversion or place of use or to convey water across federal land.
3. Places of use for groundwater recharge describing federal public lands within or underlying canals or discharges outside of the canals onto federal public land are not authorized, unless specifically authorized in writing by the Bureau of Land Management.
4. The Idaho State Director of the Bureau of Land Management shall be notified (through certified mail, return receipt requested) by the permit holder at least 60 days prior to any attempts by the permit holder to modify the places of use for this permit, seek an extension of the time to provide proof of beneficial use, or to license the right. The written notification shall include the relevant settlement agreement.
5. By March 15, 2032, the permit holder shall seek to modify the places of

use to exclude from them any federal lands where the Bureau of Land Management has not issued the permit holder a right-of-way grant. The permit holder shall notify the Idaho State Director of the Bureau of Land Management (through certified mail, return receipt requested) at least 60 days prior to filing its request for an amendment. The written notification shall include the relevant settlement agreement and a copy of the documents anticipated to be filed.

6. When the permit holder seeks to license this right, the statement of completion or other proof of beneficial use shall not be based on any federal lands for which the permit holder does not hold an active right-of-way grant from the Bureau of Land Management. The permit holder shall notify (through certified mail, return receipt requested) the Idaho State Director of the Bureau of Land Management at least 60 days prior to filing. The written notification shall include the relevant settlement agreement.
7. The permit holder shall notify (through certified mail, return receipt requested) the Idaho State Director of the Bureau of Land Management of any preliminary or final order issuing licenses associated with this permit. This notice shall be provided within two days of the order being issued and include the relevant settlement agreement.
8. The diversion and use of water described in the permit may be subject to additional conditions and limitations agreed to by the protestant (Bureau of Land Management) and the right holder under a separate agreement to which the Department is not a party. Because the Department is not a party, the Department is not responsible for enforcement of any aspect of the agreement not specifically addressed in other conditions herein. Enforcement of those portions of the agreement not specifically addressed in other conditions shall be the responsibility of the protestant and the water right holder.

Motion

The parties move the Department, pursuant to IDAPA 37.01.01.557, .612 for an order (“Order”) approving this Joint Stipulation to Resolve Protest; each party to bear its own costs, expenses, and attorney’s fees.

For the UNITED STATES BUREAU OF LAND MANAGEMENT

John Murdock
Attorney, Office of the Solicitor

Date: _____

For the IDAHO WATER RESOURCE BOARD

Ann Y. Vonde
Deputy Attorney General

Date:_____

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of February 2022, a true and correct copy of the foregoing was filed and/or served upon the following individual(s) by the means indicated:

Original To:

Peter Anderson Idaho Department of Water Resources PO Box 83720 Boise ID 83720-0098	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email: peter.anderson@idwr.idaho.gov <input type="checkbox"/> Facsimile: _____ <input type="checkbox"/> Statehouse Mail
--	--

Copies To:

John Murdock US Dept of Interior Office of the Solicitor Boise Field Office 960 S. Broadway Ave Ste. 400 Boise ID 83706-6240	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Email: john.murdock@sol.doi.gov <input type="checkbox"/> Facsimile: _____ <input type="checkbox"/> Statehouse Mail
---	---

ANN Y. VONDE
Deputy Attorney General

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)	
FOR PERMIT NOS. 37-23110 &)	ORDER DENYING MOTIONS FOR
37-23111 IN THE NAME OF:)	SUMMARY JUDGMENT AND DENYING
IDAHO WATER RESOURCE BOARD)	MOTION TO LIMIT ISSUES
)	FOR HEARING
)	

COURSE OF PROCEEDINGS

On April 17, 2018, the Idaho Water Resource Board (“IWRB”) filed Application to Appropriate Water No. 37-23110 and Application to Appropriate Water No. 37-23111 (together, the “Applications”) with the Idaho Department of Water Resources (“Department”). The Applications were amended on December 22, 2021, primarily to reduce the quantities requested. In Application No. 37-23110, as amended, the IWRB seeks a permit to divert 500 cfs from the Little Wood River downstream from its confluence with Silver Creek and use irrigation canals and off-canal sites to conduct aquifer recharge. In Application No. 37-23111, as amended, the IWRB seeks a permit to divert 650 cfs from the Wood River downstream of Magic Reservoir and use irrigation canals and off-canal sites to conduct aquifer recharge.

The United States Department of the Interior, Bureau of Land Management (“BLM”) filed substantially identical protests to the Applications on July 23, 2018 (together, the “BLM Protests”). The BLM Protests assert “(t)he applicants [IWRB] do not hold an approved ROW [Right-of-Way] to transport these new recharge water rights across and onto federally managed lands.” *BLM Protests*, at 1. To resolve its protests the BLM requested that the IWRB:

- 1.) Withdraw the application; or
- 2.) File applications for right-of-way to cover this permit application and add the following limiting conditions to the permit:
 - i) "Prior to diversion and use of water under this approval, the right holder shall obtain authorization necessary to access the point of diversion, or place of use, or to convey water across federal lands."
 - ii) "This right does not grant any right of-way or easement across the land of another."

BLM Protests, at 3.

On December 23, 2021, the IWRB filed the *IWRB Motion for Summary Judgment and Motion to Limit Issues for Hearing* (the “IWRB Motion”). In the IWRB Motion, the IWRB requests that the BLM Protests be dismissed, and the Applications be approved. Alternatively, the IWRB requests an order limiting the issues for hearing to those raised in the BLM Protests. The IWRB filed contemporaneously with the IWRB Motion a *Memorandum in Support of IWRB’s Motion for Summary Judgment*, the *Affidavit of Ann Y. Vonde*, and the *Affidavit of Wesley Hipke*.

On January 7, 2022, the BLM filed the *Bureau of Land Management’s Motion for Summary Judgment* (the “BLM Motion”). In the BLM Motion, the BLM requests that:

[T]he Hearing Officer enter a proposed or final order rejecting the applications made in the name of the Idaho Water Resource Board (Board) in this matter or, pursuant to its powers under Idaho Code § 42-203A(5), craft other relief that will ensure that the Board files, in good faith, an appropriate right-of-way application with BLM that does not include excess BLM lands unassociated with existing water recharge infrastructure that the Board seeks to use; that directs the Board to amend its applications and their places of use (POU s) before the Department to reflect the areas appropriately sought for use through the Board's new right-of-way application to BLM; and order such other conditions as may be appropriate.

BLM Motion at 1. The BLM filed contemporaneously with the BLM Motion the *Bureau of Land Management's Request to File a Brief in Support of its Motion for Summary Judgment*, the *Bureau of Land Management's Brief in Support of BLM's Motion for Summary Judgment*, the *Bureau of Land Management's Response to the IWRB Motion for Summary Judgment and Motion to Limit Issues for Hearing*, the *Declaration of Ken Anderson*, the *Declaration of Kurt Kirkpatrick*, the *Declaration of Codie Martin*, and the *Declaration of Fredric W. Price*.

On January 21, 2022, the IWRB filed the *IWRB's Response to BLM Motion for Summary Judgment*.

Having reviewed and considered the IWRB and BLM Motions, and the contemporaneous and responsive filings, the IWRB and BLM Motions for summary judgment will be denied, and the IWRB Motion to limit the issues for hearing will be denied.

STANDARD FOR DECISION

The IWRB Applications are considered pursuant to the same statutory provisions as all other water right applications:

The board shall, subject to the provisions of chapter 52, title 67, Idaho Code, have the following powers and duties:

* * *

(6) To file applications and obtain permits in the name of the board, to appropriate, store, or use the unappropriated waters of any body, stream, or other surface or underground source of water for specific water projects. Such filings and appropriations by the board, or any water rights owned or claimed by the board, shall be made in the same manner and subject to all of the state laws relating to appropriation of water, with the exception that the board will not be required to pay any fees required by the laws of this state for its appropriations. The filings and appropriations by the board shall be subject to contest or legal action the same as any other filing and appropriation, and such filings and appropriations shall not have priority over or affect existing prior water rights of any kind or nature; provided that the board shall have the right to file for water rights with appropriate officials of other states as trustee for project users, and to do all things necessary in connection therewith;

Idaho Code §42-1734.

The Department evaluates water right applications under Idaho Code § 42-203A, which states, in part, that:

(5) Such hearing shall be conducted in accordance with the provisions of section 42-1701A(1) and (2), Idaho Code. The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such: (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

The Department adopted rules setting forth the criteria for evaluating these factors. IDAPA 37.03.08.045. Water right applicants bear the ultimate burden of persuasion for the factors the Department must consider under Idaho Code §42-203A. IDAPA 37.03.08.40.04.

STANDARD FOR SUMMARY JUDGMENT

The Department's Rules of Procedure do not explicitly authorize filing motions for summary judgment. *See* IDAPA 37.01.01 *et seq.* The rules do, however, authorize the filing of pre-hearing motions, which reasonably include motions for summary judgment. *See* IDAPA 37.01.01.565. Although the Idaho Rules of Civil Procedure generally do not apply to contested cases before the Department (*see* IDAPA 37.01.01.052), the Department relies on the basic standards set forth in Rule 56 and the associated case law as a guide for addressing motions for summary judgment. The Department considers issuance of summary judgment in contested cases an extraordinary remedy in light of the statutory right to a hearing before the Department. *See In re Designating the E. Snake Plain Aquifer Ground Water Mgmt. Area*, No. AA-GWMA-2016-001, Order on Legal Issues 13 (Idaho Dep't of Water Res. Jan. 9, 2020).

A motion for summary judgment may be granted if a hearing officer determines that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* I.R.C.P. 56. The burden rests upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362, 365 (1969) The record will be liberally construed in favor of the party opposing the motion for summary judgment and the Department draws any reasonable inferences and conclusions in that party's favor. *Asarco Inc. v. State*, 138 Idaho 719, 722, 69 P.3d 139, 142 (2003).

ANALYSIS

The primary issue raised by both the IWRB and BLM Motions is whether the Applications were made in good faith, or were made for delay or speculative purposes under Idaho Code § 42-203A(5)(c). Rule 45.01.c of the Department's Water Appropriation Rules sets forth the criteria used to determine whether an application is filed in good faith and not for speculative purposes. An application is made in good faith when an applicant has "legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way." IDAPA 37.03.08.45.01.c.i. The issue being considered is whether the IWRB "has filed all applications for a right of way" to convey or apply water for recharge on land in federal ownership under the Applications.

IWRB Motion for Summary Judgment

The IWRB Motion requests three things:

1. An order dismissing the BLM's protests to the Applications; and
2. An order approving the Applications, or
3. An order limiting the issues for hearing to those raised by the BLM's protests.

IWRB Motion at 1-2 These requests will be considered separately.

1. IWRB Motion for Order Dismissing BLM's Protests.

The basis for the IWRB Motion to summarily dismiss the BLM's Protests is the IWRB's assertion that it has fulfilled the requirements of IDAPA 37.03.08.45.01.c.i. by filing the necessary application for a right of way across BLM land. The BLM counters that the IWRB has not filed the necessary right-of-way application and, in fact, has filed no application at all.

The Applications state regarding the proposed use that "[i]rrigation canals will be utilized to conduct recharge when not delivering irrigation water and used to deliver water to designated off-canal recharge sites." Applications at 4, line 12. The IWRB has evidence of having rights-of-way for much of the proposed places of use.¹ *Hipke Aff.*, at 2-3 The IWRB does not have rights-of-way over BLM land in areas of the place of use. *Kirkpatrick Dec.*, *Anderson Dec.*, Exs. 9 and 10.

The IWRB submitted to the BLM on December 13, 2021, a Standard Form 299 right-of-way application for "the Big Wood Canal Company service areas associated with the Richfield Canal system and the Dietrich Canal system plus selected portions of BLM-controlled land adjacent to the service areas and/or with existing canals related to the mentioned canal systems". *Hipke Aff.* at 2, Attachment A ("SF-299"). The copies of the SF-299 attached to the

¹ The Applications were amended on December 22, 2021, and now state that their proposed place of use is owned by the IWRB. *Applications* at 4, line 11.a. This is an obvious misstatement. The very basis for the IWRB and BLM Motions is that the place of use under the Applications is owned by entities other than the IWRB, and that the IWRB needs to demonstrate that it has appropriate rights-of-way to use the irrigation canals and off-channel recharge sites for recharge.

IWRB's *Affidavit of Wesley Hipke* and to the BLM's *Declaration of Ken Anderson* do not show a "Date Filed" in the appropriate box. *Hipke Aff.*, Attachment A, *Anderson Dec.*, Ex. 4.

The SF-299 was not signed by the IWRB, although the form specifically states "[a]pplication must be signed by the applicant or applicant's authorized representative." *Hipke Aff.*, Attachment A at 2-3. The items required to be included in the SF-299 are explicitly described by a BLM publication "Obtaining a Right of Way on Public Lands," and include a signature and date. *Anderson Dec.*, Ex. 12, p. 3. The BLM let the IWRB know on January 6, 2022, that the SF-299 did not follow the BLM's stated procedures for preparation and submittal of right of way applications, and that the BLM will not process it. *Martin Dec.*, Ex. 4. The BLM stated in its brief: "A right-of-way application is required to show good faith, but no valid right-of-way application has been filed with the BLM." *Bureau of Land Management's Response to the IWRB Motion for Summary Judgment and Motion to Limit Issues for Hearing* at 9.

The Department's Water Appropriation Rules state, in part, regarding the good faith criteria:

An application will be found to have been made in good faith if:

- i. The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way. Approval of applications involving Desert Land Entry or Carey Act filings will not be issued until the United States Department of Interior, Bureau of Land Management has issued a notice classifying the lands suitable for entry;

IDAPA 37.03.08.045.01.c.i. The act of filing right-of-way applications demonstrates that a water right applicant is proceeding to develop its proposed water project with reasonable diligence:

The criteria requiring that the Director evaluate whether an application is made in good faith or whether it is made for delay or speculative purposes requires an analysis of the intentions of the applicant with respect to the filing and diligent pursuit of application requirements. The judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project. Speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence.

IDAPA 37.03.03.045.01.c.

One of the substantive actions encompassed in the IWRB's proposed recharge project under the Applications is that the IWRB have a right-of-way over land in federal ownership. Without the right-of-way the proposed project will not proceed. Filing the incomplete SF-299 for that right-of-way—that BLM will not process—does not show diligent pursuit of the Applications' requirements by the IWRB.² To meet this criterion the IWRB must submit at hearing a right-

² The IWRB suggests that it may already have authorization to use certain portions of the irrigation canals crossing BLM land under 43 USCA § 390g-9(c)(3). *Memorandum in Support of IWRB's Motion for Summary Judgment*, at 6-7, fn. 2. If it proposes to proceed under that statute as an alternative

of-way application that the BLM indicates it will process and, presumably, result in issuance of a right-of-way to the IWRB. The IWRB's SF-299 is a futile gesture that will not result in the issuance of the necessary rights-of-way to the IWRB by the BLM, and does not satisfy the requirements of IDAPA 37.03.08.045.01.c.i. The IWRB Motion for an order Dismissing the BLM Protests will be denied.

2. IWRB Motion for Order Approving the Applications.

Because the IWRB Motion requesting that the BLM Protests be dismissed will be denied, the IWRB has failed to affirmatively establish that the Applications should be granted under the criteria of Idaho Code §42-203A(5)(c). Additionally, it is important to note that even if the IWRB Motion to dismiss the BLM's protest had been granted the Applications would not be approved pursuant to the IWRB Motion. Idaho Code §42-203A(5) requires the Department to consider all of the criteria for approval for "all applications whether protested or not protested." No evidence was submitted with either the IWRB Motion or BLM Motion regarding the criteria under subsections (a), (b), (e), (f), or (g) of Idaho Code §42-203A(5) for the intended use under the Applications.³ The second request in the IWRB Motion requesting approval of the Applications will be denied.

3. IWRB Motion to Limit Issues at Hearing

As discussed above, Idaho Code §42-203A(5) requires the Department to consider all of the criteria for approval for "all applications whether protested or not protested." The IWRB bears the burden of persuasion on those criteria and does so even if the BLM Protests are ultimately rejected. IDAPA 37.03.08.40.04. The time for submission of that evidence to the Department by the IWRB is the hearing set in this matter.⁴ *Second Amended Scheduling Order and Notice of Hearing*, at 1. The IWRB Motion to limit the issues at hearing to those raised in the BLM Protests will be denied.

BLM Motion for Summary Judgment

The BLM Motion for summary judgment requests the following:

1. An order rejecting the Applications; or
2. An order directing the IWRB to (1) file a new signed SF-299 that narrowly tailors and removes undeveloped BLM lands currently found in its recent SF-299 and corrects other significant deficiencies, (2) formally amend its water permit applications so that their POU's reflect the trimmed rights-of-way applied for through the new SF-299; and (3) includes the conditions contained in BLM's protest and to which the Board has already agreed.

theory, and relying on the IWRB's statement of the statutory requirements, the IWRB would generally need to make a showing at hearing that there is a reasonable probability that there is an existing authorization to transport water across public land administered by the BLM held by owner(s) of the canal which the IWRB proposes to use for conveyance or recharge, and that the proposed conveyance and recharge use does not expand or modify that existing authorization.

³ The IWRB satisfies the criteria established by Idaho Code §42-203A(5)(d) as a matter of law. *See* IDAPA 37.03.08.45.01.d.ii. and Idaho Code §42-1734(7).

⁴ If the IWRB and the BLM reach a settlement regarding the BLM Protests the Applications will be remanded to the Department's Southern Regional Office for informal processing. The IDAPA 37.03.08.40.05. submission requirements will still apply to the IWRB.

BLM Motion at 1-2, Bureau of Land Management's Brief in Support of BLM's Motion for Summary Judgment at 17-18. These requests will be considered separately.

1. BLM Motion for Order Dismissing IWRB's Applications.

a. The BLM's Assertion that the IWRB's SF-229 was not timely filed.

The BLM Motion requests the Department to dismiss the Applications based on BLM's assertion that an application for a right-of-way was not timely filed by the IWRB. *Bureau of Land Management's Brief in Support of BLM's Motion for Summary Judgment at 6-12.* The BLM argues based on the holding in *Lemmon v. Hardy*, 95 Idaho 778, 519 P.2d 1168 (1974) that a right-of-way application should have been filed contemporaneously with the filing of the Applications on April 17, 2018.⁵

The BLM's argument is mistaken. The facts of *Lemmon* are fairly simple and distinguishable from the Applications. The Idaho Supreme Court described them:

In the case at bar the land designated as the point of diversion and place of use in appellants' original application was private property not owned by the appellants and therefore no valid water right could be developed on it. Since no valid water right was possible, it can be concluded that the application was filed for speculative purposes, not for development of a water right.

* * *

... The appellants in this action had shown no means of acquiring the land stated in their original application.

Lemmon, 95 Idaho at 780-781, 519 P.2d at 1170-1171. The reason for the *Lemmon* requirement that a private water right permit applicant have a possessory interest in the private place of use at the time of application, is that the priority date of the applied-for water right is established by the date of permit application. Idaho Code § 42-219(4). Attempting to reserve a priority date by filing a permit application with no means of perfecting the water right, is speculation that could harm subsequent applicants. That is precisely what happened in *Lemmon*. A subsequent water right applicant who had legal access to their own proposed place of use would have been junior to the speculative application. *Lemmon*, 95 Idaho at 778, 519 P.2d at 1168. This result was disallowed.

The circumstances of a water right applicant who has means to obtain by eminent domain any needed private property, or who can obtain rights-of-way over property owned by the federal or state government, is very different. That applicant is not reserving a priority date with "with no means of acquiring the land stated in their original application." An applicant must simply show to the Department during the application process that they have taken administratively prescribed steps to exhibit their intent to acquire the necessary possessory interest or right of way to accomplish the proposed project. IDAPA 37.03.08.040.05.e.,

⁵ The BLM also cites *In the Matter of Applications for Permit No. 37-22682 And 37-22852 in the Name of Innovative Mitigation Solutions LLC*, Preliminary Order Rejecting Permit No. 37-22682 (October 6, 2015). That order is not recognized as a precedential order by the Department, but it is instructive as a straightforward application of the *Lemmon* decision to similar facts.

37.03.08.045.01.c. Whether an applicant has taken those steps at the time of filing the application is not significant.

During the water right application process the Department “find[s] and determine[s] from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied.” Idaho Code §42-203A(5) The Department’s Water Appropriation Rules establish the information requirements of the Department to enable it to make the necessary finding and determination regarding the intended water use. IDAPA 37.03.08.040.05.c. The information requirement includes submitting to the Department any necessary “applications for rights-of-way from federal or state agencies” for the proposed use relative to good faith, delay, or speculative purposes of the applicant. IDAPA 37.03.08.040.05.e.i.⁶

The time for submission of the IDAPA 37.03.08.040.05.c. information to the Department during the application process is set by rule:

For protested applications or protested permits being reprocessed, the information required by Subsection 040.05.c. may be requested by the Director to be submitted within thirty (30) days after notification by the Director, may be made a part of the record of the hearing held to consider the protest, or may be made available in accordance with any pre-hearing discovery procedures. Failure to submit the required information within the time period allowed will be cause for the Director to void an application or to advance the priority of a permit being reprocessed by the number of days that the information submittal is late.

IDAPA 37.03.08.040.05.b (emphasis added).

The IWRB’s right-of-way application plans and information was available to the BLM pursuant to this rule. The Department authorized discovery beginning on August 18 and ending on December 3, 2021. *Prehearing / Scheduling Order*, August 25, 2021, at 1-2.

Nothing in the Department’s records for the Applications reveals that BLM made a discovery request for the IWRB’s right-of-way plans. The BLM apparently declined to conduct discovery, but it now argues:

The Board's late actions, if allowed to stand, would cause BLM significant prejudice. BLM has been preparing its hearing strategy based on the simple theory that the Board was required to include a federal right-of-way application with its water permit application but failed to do so. This was the status-quo when the protest was filed.

Bureau of Land Management's Brief in Support of BLM's Motion for Summary Judgment, at 19. If the BLM wanted to pin down the IWRB regarding how it intended to obtain the necessary right-of-way for the proposed water use it could have done so at any time during the discovery period. Any prejudice to the BLM from purposefully choosing to ignore discovery as its hearing strategy was entirely self-inflicted. Nothing in the Department’s Rules prevents the IWRB from developing evidence supporting the Applications during and after the discovery period, so long as the information developed does not contradict or improperly

⁶ The wording of this sub-section is awkward, but when read in conjunction with IDAPA 37.03.08.045.01.c.i. this intention is clear.

supplement previously provided discover responses. BLM's failure to file discovery did not freeze evidence development.

Having failed to use discovery, the BLM's next opportunity to receive the IWRB's right-of-way information is on February 4, 2022, when the IWRB must present its exhibits to the BLM and the Department. *Second Amended Scheduling Order and Notice of Hearing*, January 4, 2022, at 2. The IWRB is free to file a right-of-way application with the BLM that is acceptable for processing until that date. The IWRB's information will then be made a part of the record of the hearing currently scheduled for February 9-10, 2022.

The BLM Motion for summary judgment based upon the timeliness of the filing of a right-of-way application will be denied.

b. The BLM's Assertion that the IWRB's SF-229 is deficient.

The second basis for the BLM Motion to dismiss the Applications is BLM's assertion that the Applications should be dismissed because the SF-299 is deficient. *Bureau of Land Management's Brief in Support of BLM's Motion for Summary Judgment* at 12-16. As discussed on pages 4-6 above, the SF-229 does not satisfy the requirement that the IWRB file the necessary application for a right-of-way across BLM land. IDAPA 37.03.08.45.01.c.i. The IWRB was free to test the sufficiency of the SF-229 by filing the IWRB Motion. The IWRB Motion does not, however, preclude the IWRB from filing a new right-of-way application with the BLM that is acceptable to the BLM for processing or pursuing a different plan.⁷ The BLM Motion for an order dismissing the Applications based upon deficiencies in the IWRB's SF-299 will be denied.

2. BLM Motion for an Order Requiring IWRB to Modify its SN-299 and Amend the Applications.

For the reasons stated on pages 4-6 above, the IWRB's SN-299 was not sufficient to establish that it is diligently pursuing the right-of-way it may need over BLM property for the proposed water use under the Applications. How the IWRB now proposes to obtain or confirm the necessary right-of-way for the Applications is its decision as applicant. The BLM must determine for itself whether any right-of-way application filed by the IWRB is sufficient for BLM processing. The Department will not intrude on either decision.

Any decision to amend the Applications also rests with the IWRB.

The IWRB agreed to the two conditions on the Applications requested in the BLM Protests. *Affidavit of Ann Y. Vonde*, at 2. When the BLM Protests related to the filing of right-of-way applications for the Applications is resolved the requested conditions will be considered.

The BLM Motion for an order requiring IWRB to modify its SN-299 and amend the Applications will be denied.

⁷ The hearing officer would entertain a motion to vacate the *Second Amended Scheduling Order and Notice of Hearing*, January 4, 2022, to give the IWRB and BLM time to craft a right-of-way application that the BLM will process. Developing rights-of-way for large public works projects, such as those contemplated by the Applications, can require meticulous attention to detail and be laborious. The *Right-of Way Manual* (Idaho Transportation Dept. August 2018) provides an illustrative example from a different context.

3. **BLM Request to File Brief in Support of BLM.**

The BLM filed the *Bureau of Land Management's Request to File a Brief in Support of its Motion for Summary Judgment*. The Department reviewed that brief, which was filed contemporaneously with the BLM Motion, and it aided in the preparation of this order. Finding good cause, the BLM request to file a brief in support of the BLM Motion should be granted.

ORDER

Based upon the foregoing:

1. The *IWRB Motion for Summary Judgment and Motion to Limit Issues for Hearing* is **DENIED**.
2. The *Bureau of Land Management's Motion for Summary Judgment* is **DENIED**.
3. The *Bureau of Land Management's Request to File a Brief in Support of its Motion for Summary Judgment* is **GRANTED**.

Pursuant to Rule 710 (IDAPA 37.01.01), this is an interlocutory order and may be reviewed by the Hearing Officer upon the petition of any party pursuant to Rule 711 (IDAPA 37.03.03.711).

Dated this 28th day of January, 2022



Peter Anderson
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2022, I served a true and correct copy of the foregoing ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT AND DENYING MOTION TO LIMIT ISSUES FOR HEARING., *via electronic mail*, to the person(s) listed below:

Documents Served: Order Denying Motions for Summary Judgment and Denying Motion to Limit Issues for Hearing, 37-23110 and 37-23111

IDAHO WATER RESOURCE BOARD
WESLEY HIPKE
PO BOX 83720
BOISE ID 83720-0098
wes.hipke@idwr.idaho.gov

ANN VONDE
OFFICE OF THE ATTORNEY GENERAL
PO BOX 83720
BOISE ID 83720-0010
ann.vonde@ag.idaho.gov

BUREAU OF LAND MANAGEMENT
JOHN MURDOCK, BOISE FIELD OFFICE
960 E BROADWAY AVE STE 400
BOISE ID 83706-6240
john.murdock@sol.doi.gov

A handwritten signature in blue ink that reads "Denise Maline". The signature is written in a cursive style and is positioned above a horizontal line.

Denise Maline
Administrative Assistant