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BEFORE THE DEPARTMENT OF WATER RESOURCE

OF THE STATE OF IDAHO

IN THE MATTER OF LICENSE NO. 37-07842 IN THE NAME OF THE IDAHO WATER RESOURCES BOARD	)))))	PETITION FOR HEARING, AND PETITION FOR DECLARATORY RULING *(IC § 42-1701A(3); IDAPA 37.01.01.400; IDAPA 37.01.01 et seq.)*

COME NOW, Petitioners, William Arkoosh, the Estate of Vernon Ravenscroft, Koyle Hydro, Inc., Koosh, Inc., and Shorock Hydro, Inc., by and through their attorney, Joseph F. James, of Brown & James, and hereby petitions to the Idaho Department of Water Resources (hereinafter "Department") for a hearing on its order dated 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, and further state and represent as follows:

1. Petitioners 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. William Arkoosh is the owner of WR No. 37-7943 and Permit No. 37-21297. The Estate of Vernon Ravenscroft is the owner of WR No. 37-7857, WR No. 37-7865, and WR No. 37-7922. Koyle Hydro, Inc. is the owner of WR No. 37-7889, and WR No. 37-

7916. Koosh, Inc. is the owner of WR No. 37-8096, and WR No. 37-8251. Shorock Hydro, Inc. is the owner of WR No. 37-7863,WR No. 37-7911, Permit No. 37-8113, and Permit No. 37-8262.

2. This petition is brought pursuant to Idaho Code § 42-1701 A(3) and the Department of Water Resources Rules of Procedure, IDAPA 37.01.01.400; IDAPA 37.01.01.*et seq* . In filing this petition for hearing and petition for declaratory ruling, Petitioners reserve the right to file with a District Court an original action or actions to contest the Departments action.

3. Petitioners reserve the right to amend the grounds for relief set forth herein. Petitioners set forth their initial grounds and facts in support of this petition as follows:

(a) 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. The application denoted the point of diversion as the SW¼ of SE¼ of Section 24, Township 4 S, Range 19 E, located within Lincoln County. However, neither the Little Wood nor the Big Wood Rivers flow though Section 24, Township 4 S, Range 19 E, Lincoln County. The application proposed diverting the water through the use of the Dietrich and Richfield canal systems. The Dietrich canal diverts from the Little Wood River in Section 25, Township 4 S, Range 19 E, Lincoln County.

(b) The application was incomplete as to the description of the proposed place of use, but did include a drawing indicating that the water would be diverted from the Little Wood River through the Dietrich Canal to a recharge site southeast of Richfield, Idaho. The published notice of application for water right clarified that the possible recharge sites were located within Sections 15, 16, 21, 22 and 28, Township 5 S, Range 19 E, Lincoln County.

(c) The application indicated that five years were required for completion of the works and application of the water for recharge. The 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. A request for extension of time was submitted on June 1, 1987, which was returned by the Department to the applicant on July 16, 1987, for additional information. The Department approved the request for extension on October 4, 1989, extending the completion and proof of beneficial use deadline to June 1, 1992.

(d) 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 of beneficial use was not timely submitted and the Department sent a lapsed notice on June 5, 1992.

(e) The Department received proof of beneficial use on June 15, 1992 which indicated that a total of 300 cfs of surface water had been diverted from the Snake River. The Department returned the proof of beneficial use form to the applicants on June 15, 1992, stating that the proof was unacceptable, informing the permit holder that the permit was still lapsed, and informing the permit holder that the priority date would be penalized one day for every day that the proof was not submitted. 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.

(f) The Department informed the permit holders that they could not continue licencing until it received the original proof of beneficial use form. On July 23, 1992, the Department again provided notice that they could not process the permit without an original proof of beneficial use form. On July 27, 1992, the Department received the original proof of beneficial use form. However, the form had been altered with Permit No. 37-07842 being redacted and Permit No. 01-0705 added by interlineation.

(g) Permit No. 01-07054 is a permit to divert water from the Snake River through the Milner-Gooding Canal for purposes of recharge northwest of Shoshone, Idaho.

(h) The proof of beneficial use, again, indicated a total of 300 cfs of ground water had been diverted from the Snake River. The beneficial use field report also denoted the source as the Snake River, provided a point of diversion different from the application, as well as different place of use. The beneficial field report also denoted that the water was diverted through the Milner-Gooding Canal and not the Dietrich Canal.

(i) The Department initially 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. On further review, the Department determined that the beneficial use field report was not acceptable, and informed applicants.

(j) The applicants provided an amended beneficial use field report on October 19, 1993. The Department determined that the amended beneficial use field report was still not acceptable and returned it to the applicants on October 21,

1993. 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. 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. The field report indicated a diversion point distinct from application for Permit No. 37- 07842.

(k) The Department entered a reinstatement order, regarding both Permit No. 01-07054 and Permit No. 37-07842, on December 1, 1993. Though 546 days had passed from the time the permit had lapsed until receipt of a Proof of Beneficial Use acceptable to the Department, it failed to further advance the priority date in recognition of the continuing lapse.

(l) In correspondence dated January 7, 1999, Dan McFadden, Chairman of the Lower Snake River Aquifer Recharge District, offered to assign Permit No. 01-07054 and Permit No. 37-07842 to the Idaho Water Resources Board.

(m) In its review conducted in order to advise the Idaho Water Resources Board, the Department indicated that both Permit No. 01-07054 and Permit No. 37-07842 had filed proof of beneficial use for diversion rate of 300 cfs each. This indication was incorrect. The Proof of Beneficial Use form, as well as the Beneficial Use Field Report indicated a combined total of 300 cfs, with the water coming from the Snake River via the Milner-Gooding Canal.

(n) On March 19, 1999, the Idaho Water Resources Board agreed to accept assignment of Permit No. 37-07842.

(o) A Memo to the Department's file dated October 1999, indicates that recharge under Permit No. 01-07054 from the Snake River through the Milner-Gooding Canal could be confirmed and that a license had been prepared for signature. However, regarding Permit No. 37-07842, the Department determined that there did not appear to be any application toward beneficial use. The Department's file indicates, based on the Department's conversation with Dan McFadden of the Lower Snake River Aquifer Recharge District, that no ground water recharge had ever taken place from the Little Wood River via the Dietrich Canal. The Department's file indicates, pursuant to a conversation with Paul Castelin of the Technical Services Bureau, no recharge from the Little Wood or Big Wood River had taken place prior to October 1999. The Department's internal review in October1999 concluded that there had been no beneficial use to date and that the permit should be routed for extension or reinstatement processing. 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.

(p) Though the Department's file contained a proof of beneficial use form and beneficial use field report, which had not been withdrawn, and though the "undeveloped" portion of any permit reverts to the State of Idaho upon lapse, the Idaho Water Resources Board adopted a resolution asking the Director to extend the proof date regarding the "undeveloped" portion of the permit. An order was entered on April 3, 2000 extending the proof date for the permit until June 1, 2004.

(q) On August 25, 2004, the Idaho Water Resources Board again requested an extension of time to submit proof of beneficial use resulting in another extension to June 1, 2009. In April, 2006, Idaho Water Resources Board applied to lease Permit No. 37-07842 to the Water Supply Bank in the amount of 800 cfs.

(r) On June 1, 2009, the Idaho Water Resources Board filed a request for extension of time in which to submit proof of beneficial use. The request described work that had been completed regarding diversion of water from the Milner-Gooding Canal for purposes of recharge northwest of Shoshone, Idaho. The request for extension did not describe any work that had been completed for the development of Permit No. 37-07842. Further, the request did not set forth a showing that the additional time was needed based upon the status of the plans, authorization, construction fund appropriations, construction, or any arrangements which are found to be requisite to completion of construction as required by Idaho Code § 42-204(4). On September 2, 2010, the Department approved the request for extension of time and extended the time within which to submit proof to June 1, 2014.

(s) A Petition for Hearing, and Petition for Declaratory Ruling was filed on September 22, 2010. Said petition challenged the September 2, 2010 action of the Department, in approving an extension of time to submit proof of beneficial use for permit no 37-7842, and requested the Department examine the extent of beneficial use occurring during the development period . The present petition is brought by the same water right holders, or their successors in interest, as the September 22, 2010 petition.

(t) That on November 30, 2011, James Cefalo, hearing officer for the Department, issued his recommended order wherein he concluded the Department erred in issuing its September 2, 2012 order for an extension of time in which to submit proof of beneficial use and granted Petitioner's Motion for Summary Judgment. The hearing officer further indicated that

"[t]he 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 period, the proper venue to raise arguments regarding the true extent of beneficial use would be within the licensing process." The interim Director of the Idaho Department of Water Resources adopted the Recommended Order as a Final Order on February 28, 2012.

(u) As part of the licensing process, Department conducted a review of Permit No. 37-7842. A Memorandum dated October 29, 2014 by Michele Edl, of the Department, indicates that even though the proof of beneficial use submitted to the Department asserted that recharge occurred North of Shoshone, Ms. Edl concluded that little, if any, of the source water for that event could be attributed to the Big or Little Wood Rivers and that the water came from the Snake River through the Gooding Milner Canal. Thereafter, the Department focused on the potential recharge through diverting Little Wood water through the Dietrich Canal to a site adjacent to said canal. However, this site was developed for purposes of flood control many years prior to the formation of the Lower Snake Aquifer Recharge District or the filing of application for permit 37-7842.

(v) That the proposed place of use adjacent to the Dietrich Canal is owned by the Bureau of Land Management and the only agreement in place for use of the site, either during the developmental period or presently, is for flood control. Also, the proposed recharge site adjacent to the Dietrich Canal was, neither at the time of the development period nor presently, an approved managed aquifer recharge site.

(w) Records for the Big Wood Canal Company merely indicate that excess water was channeled into the Dietrich Canal during the developmental period. However, no records indicate that water was actually diverted from the pre-existing diversion off the Dietrich Canal to the proposed Dietrich recharge site. Further, there is no indication that water was ever diverted through the Dietrich Canal pursuant to permit number 37-7842, rather than for simple flood control.

(x) The Department issued its Notice of Issuance of License Number 37-7842 on July 14, 2017. The license provides for the diversion at a rate of 250 cfs, at a total diversion volume of 13,900 af from the Little Wood River for the purposes of ground water recharge with a priority date of August 25, 1980.

WHEREFORE, Petitioners request that:

1. That the Department fix a time and place for hearing;

2. Notice to be given as required by law;

3. The Department issue its ruling on the applicability of Idaho statutes, administrative rules and administrative orders on the subject permit;

4. That the Department issue its ruling determining that water under Permit No. 37-07842 was not put to beneficial use in the prescribed period and lapsed;

5. That the Department issue its ruling that the priority date of Permit No. 37-07842 was not accurately advanced following lapse and restatement;

6. For such other relief as the Department deems just in the premises.

DATED this 1st day of August, 2017.

BROWN & JAMES

By: 
Joseph F. James

CERTIFICATE OF SERVICE

I certify that on August 1, 2017, I mailed a true and correct copy, postage prepaid, of the foregoing Petition for Hearing, and Petition for Declaratory Ruling, to the persons listed below:

State of Idaho
Idaho Water Resource Board
P.O Box 83720
Boise, ID 83720-0098

Water District #37
Kevin Lakey
107 W. 1st
Shoshone, ID 83352

Dana Wilkins