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BEFORE THE DEPARTMENT OF WATER RESOURCE  
OF THE STATE OF IDAHO

IN THE MATTER OF PERMIT NO. )  
37-07842 IN THE NAME OF THE )  
IDAHO WATER RESOURCES )  
BOARD )  
\_\_\_\_\_ )

PETITIONERS' INTITIAL POST-  
HEARING MEMORANDUM

COME NOW, Petitioners, by and through their attorney of record, Joseph F. James, of James Law Office, PLLC, and respectfully submit Petitioners' Initial Post-Hearing Memorandum.

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. (IDWR Ex. 3). 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. *Id.* The application proposed diverting the water through the use of the Dietrich and Richfield canal systems. *Id.* It should be noted that neither the Little

Wood nor the Big Wood Rivers flow through Section 24, Township 4 S, Range 19 E. The Department recognized these errors during an early review and made a note to the file indicating that the point of diversion on the application was in error, and that the only apparent source of water would be the Little Wood River. (IWRB Ex 108 - Appendix H). The applicants never sought to amend their application.

The application was incomplete as to the description of the proposed place of use. (IDWR Ex. 3). 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. *Id.* The water license ultimately issued, set forth a different place of use within Section 2, Township 5 S, Range 19 E, and Section 35, Township 4 S, Range 19 E, Lincoln County. (IDWR Ex. 1).

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. (IDWR Ex. 3). A request for extension of time was submitted on June 1, 1987. (Request for Extension 6-1-87). The request was returned by the Department to the applicant on July 16, 1987, for additional information. (IDWR./Saxton ltr 7-16-87). 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). The Department informed the permit holders that they could not continue licensing until it received the original proof of beneficial use form. *Id.* On July 23, 1992, the Department again provided notice that they could not process the permit without an original proof of beneficial use form. (IDWR/Gustafson ltr 7-23-92).

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 permit, as well as different place of use. (Initial Field Report 37-07842). The beneficial use field report also denoted that the water was diverted through the Milner-Gooding Canal and not the Dietrich Canal. *Id.* 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 29<sup>th</sup> 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. (IDWR Ex. 5). 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.* Also, the field report indicated a diversion point distinct from application for permit. *Id.* Again, the total diversion rate was stated at 300 cfs. *Id.* The Department entered another reinstatement order regarding both permits on December 1, 1993. (Reinstatement Order).

On August 25, 2004, the Permit Holder filed a Request for Extension of Time to Submit Proof of Beneficial Use. (2004 Request for Extension of Time). The Department approved the request on August 26, 2004. On June 1, 2009, the Permit Holder filed a Request for Extension of Time to Submit Proof of Beneficial Use ("2009 Request for Extension of Time"). On September 2, 2010, the Department approved the Request for Extension of Time. On September 22, 2010, a Petition for Hearing, and Petition for Declaratory Ruling was filed by William Arkoosh, the Estate of Vernon Ravenscroft, Koyle Hydro, Inc., Notch Butte Hydro Company, Inc., and Shorock Hydro, Inc. The Petition asserted, in part, that the Department erred in approving the 2009 Request for Extension of Time.

The Department initiated a contested case proceeding. As a result of the contested case, the Department issued its order rescinding its order granting an extension of time within which to submit proof of beneficial and directing that an investigation of Permit 37-7842 be conducted for licensing purposes.

On or about October 29, 2014, Michelle Edl, from the department, completed her license review memo. (IDWR Ex. 2) Ms. Edl determined during her review that any water arriving at the Shoshone recharge site in April or May of 1986 was from the Snake River. *Id.* She went on to state that:

Based on the engineering plans, the site visit and the flow data provided, I have concluded that the examiner confirmed a recharge event at the Shoshone recharge site but that little if any of the source water for that event could be attributed to the Big or Little Wood Rivers. The water came from the Snake River through the Milner-Gooding Canal.

*Id.* Edl ultimately recommended a license be issued on a potential recharge occurring outside the proof of beneficial use submitted by the permit holder. *Id.*

**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. Petitioners files a Motion to Allow Amendment to Pleadings, Petitioners and 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. On June 25, 2018, the Director issued his Order Denying the Motion to Dismiss Petition for Hearing. On July 5, 2018, the Director issued his Order Amending Deadline; Order Establishing Burdens of Proof; Notice of Status Conference; Amended Notice of Hearing. The matter proceeding to hearing on November 1<sup>st</sup> through November 2<sup>nd</sup>, 2018.

## II LEGAL STANDARD

Upon acceptance of proof of beneficial use, the Department is required to conduct an examination to determine if 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. I.C. § 42-219(1). "In the event that the Department shall find that the application is not fully complied with the law and the condition of the permit, any issuance of license for that portion of the use which is in accordance with the permit, or may refuse issuance of a license and void the permit." I.C. § 42-219(8). Provisions of law are generally defined as the state or federal constitution, any state or federal statute, or rule, or decision of the court. See I.D.A.P.A. 37.01.01.18.

## III ARGUMENT

### **A. The Proof of Beneficial Use Submitted by the Permit Holder Does Not Show Water Was Put To Beneficial Use In The Prescribed Period.**

The Idaho Code provides that "[o]n or before the date set for the beneficial use of water

appropriated under the provisions of this chapter, permit holder shall submit a statement that he has used such water for the beneficial purpose allowed by the permit." I.C. § 42-217.

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 permit, as well as different place of use. (Initial Field Report 37-07842). The beneficial use field report also denoted that the water was diverted through the Milner-Gooding Canal and not the Dietrich Canal. *Id.* The Department accepted the amended proof of beneficial use and beneficial use field report.

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. (IDWR Ex. 5). 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.* Also, the field report indicated a diversion point distinct from application for permit. *Id.* Again, the total diversion rate was stated at 300 cfs. *Id.*

During her license review, Ms. Edl determined that any water arriving at the Shoshone recharge site in April or May of 1986 was from the Snake River. (IDWR Ex. 2). She went on to

state that:

Based on the engineering plans, the site visit and the flow data provided, I have concluded that the examiner confirmed a recharge event at the Shoshone recharge site but that little if any of the source water for that event could be attributed to the Big or Little Wood Rivers. The water came from the Snake River through the Milner-Gooding Canal.

*Id.* The only statement regarding beneficial use that is close in time to the developmental period is the permit holder's Proof of Beneficial Use. During the hearing, no one was able to testify regarding personal knowledge as to the circumstances existing during the recharge event set forth in the permit holder's Proof of Beneficial Use. It appears that that the Proof of Beneficial Use is insufficient to prove application of water to beneficial use. Accordingly, Respondent has failed to meet its burden

**B. The License Review to be Conducted By The Department Is Limited To The Proof of Beneficial Use Submitted by the Permit Holder.**

The burden is on the permit holder to submit proof as to the full extent water was put to beneficial use pursuant to a permit. As noted above, "[o]n or before the date set for the beneficial use of water appropriated under the provisions of this chapter, permit holder shall submit a statement that he has used such water for the beneficial purpose allowed by the permit." *Id.* Such proof of beneficial use must be submitted upon the forms furnished by the Department. *Id.* It is the responsibility of the holder of the permit, or its authorized representative, to submit the proof of beneficial use and to provide for the timely submission of the completed field report acceptable to the Director. I.D.A.P.A. 37.03.02.025.02. When the proof of beneficial use, field report, and drawings are filed by the water right examiner on behalf of the permit holder, evidence of authority must be filed with the Department. I.D.A.P.A 37.03.02.025.01.



The license review conducted by the Department is limited to the proof of beneficial use submitted by the permit holder. "Upon receipt by the Department of Water Resources of all evidence in relation **to such final proof**, it shall be the duty of the Department to carefully examine the same, and 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." I.C. § 42-219(1), (emphasis added).

As noted above, proof of beneficial use must be submitted upon the forms furnished by the Department. The forms utilized by the permit holder in this matter provided the following:

The Idaho Department of Water Resources considers this form a statement that the permit holder(s) has/have completed all development that will occur under this permit and that water has been applied according to the provisions of the permit for the beneficial use(s) described below.

(Proof of Beneficial Use 07/27/92). Further, The Permit holder acknowledged that the information contained in the Proof of Beneficial Use form represented the full extent that the permit was developed and any undeveloped portion was relinquished to the state. *Id.*

In the present matter, it is improper to go beyond the Proof of Beneficial Use submitted by the permit holder.

**C. The License Review to be Conducted by The Department Is Limited to The Diversion Of Water Authorized by The Permit.**

An application for a permit to divert water must set forth all facts necessary to show the location, nature and amount of use of water and specifically must set forth the source of the water supply, location of the point of diversion, a description of the ditch, channel, or other diversion work. I.C. § 42-202(1). See also, I.D.A.P.A.37.03.08.03. The Idaho Code provides that "on or

before the date set for the beneficial use of waters appropriated under the provisions of this chapter the permit holder shall submit a statement that he has used such water for the beneficial purpose allowed by the permit.” I.C. § 42-217. The subject permit allows for a point of diversion as the SW ¼ of the SE ¼ of Section 24 Township 4S, Range 19 E, located within Lincoln County. *Id.* The permit authorized the diversion of water through the use of the Dietrich and Richfield canal systems. *Id.* Neither the Little Wood nor Big Wood rivers flow through Section 24, Township 4S, Range 19E, Lincoln County. The Dietrich Canal diverts water from the Little Wood River.

The permit was incomplete as to the description of the proposed place of use. (IDWR Ex. 3). 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. *Id.* The water license ultimately issued, set forth a different place of use within Section 2, Township 5 S, Range 19 E, and Section 35, Township 4 S, Range 19 E, Lincoln County. (IDWR Ex. 1).

In the present matter, it is improper to grant a license based upon the application or use of water outside the diversions authorized by the permit.

**D. The Application of Water to a Beneficial Use Pursuant to a Permit Requires Action by The Permit Holder.**

The Idaho Code provides that “[o]n or before the date set for the beneficial use of water appropriated under the provisions of this chapter, permit holder shall submit a statement that **he has used such water for the beneficial purpose allowed by the permit.**” I.C. § 42-217, (emphasis added). The requirement is twofold. First there must be a diversion by the permit holder. Second, the diversion must be for the purpose allowed by the permit. In the present matter there has been no evidence provided that the permit holder took any action to divert water under


the permit. According, the permit holder has failed to meet its burden 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.

**IV  
CONCLUSION**

For the reasons stated herein, Petitioners respectfully requests that the Director enter his order rescinding its order of July 14, 2017, granting and providing notice of issuance of License No. 37-7842.

DATED this 7<sup>th</sup> day of December, 2018.

JAMES LAW OFFICE, PLLC

By:   
Joseph F. James

CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of December, 2018, I served a true and correct copy of the foregoing document upon the following persons in the manner indicated:

Idaho Department of Water Resources  
Gary Spackman, Director  
P.O. Box 83720  
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<input checked="" type="checkbox"/>	United States Mail, Postage Prepaid
<input type="checkbox"/>	Express overnight delivery
<input type="checkbox"/>	Hand delivered
<input type="checkbox"/>	Via facsimile transmission
<input checked="" type="checkbox"/>	Via Email
<input checked="" type="checkbox"/>	United States Mail, Postage Prepaid
<input type="checkbox"/>	Express overnight delivery
<input type="checkbox"/>	Hand delivered
<input type="checkbox"/>	Via facsimile transmission
<input checked="" type="checkbox"/>	Via Email

Dana Wilkins