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RECEIVED

Nov 15, 2023

DEPARTMENT OF
WATER RESOURCES

Attorneys for Recharge Development Corporation

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF DETERMINATION
OF EXTENT OF BENEFICIAL USE
MADE UNDER CITY OF GOODING
RECHARGE WATER RIGHT PERMIT
NO. 37-23059 DURING CALENDAR
YEAR 2022.

**PETITION REQUESTING INITIATION
OF A CONTESTED CASE, REQUEST
FOR HEARING, AND REQUEST FOR
ORDER AUTHORIZING DISCOVERY**

The Recharge Development Corporation (hereafter “RDC”) by and through its counsel of record, Skyler C. Johns, hereby petitions the Director of the Idaho Department of Water Resources (hereafter “Director” or “Department”) to initiate a contested case for the above-captioned matter, to set a hearing for this matter, and to issue an order authorizing discovery for the following reasons:

**I.
Overview**

RDC provides ground water recharge throughout Idaho. Water Permit No. 37-23059 (hereafter “Permit”) is owned by the City of Gooding and authorizes the diversion of water from the Little Wood River for the purpose of aquifer recharge at the Gooding Bypass Channel (hereafter “GBC”). As the operator of the GBC Recharge Site, pursuant to written agreement with

the City of Gooding, RDC has an interest in the volume of recharge credit accounted for and recognized as a result of water recharged at the site.

On June 7, 2023, the Department determined the volume of water recharged as “Recharge Credit for RDC” to be 117.7-acre feet for calendar year 2022 at the GBC Recharge Site. RDC asked the Department to re-evaluate its original determination of a portion of the total volume of water recharged under the Permit during calendar year 2022. On October 31, 2023, Brian Ragan of the Water Distribution Section of the Department sent an email to RDC which made the following determinations:

The Department’s re-evaluation yields an updated volume of 573-acre feet of water recharged and attributable to the “Recharge credit for RDC” for 2022. **This updated volume is the cumulative sum contained in the 2022 IGWA report of the “Recharge Credit for RDC” volumes on those days during 2022 on which permit 37-23059 was in priority and the conditions of the permit were met.**

...

The second topic to discuss is the request from RDC that the Department recognize or acknowledge recharge that may have occurred between October 31, 2022, and February 15, 2023, when all flow from the Little Wood River was diverted into the Gooding Bypass Channel to allow for bridge and trestle repairs downstream. **The Department has determined the diversion of all flow from the Little Wood River into the Gooding Bypass Channel during this timeframe occurred without authorization. The Department cannot recognize or acknowledge the use of water that is not authorized or in conformance with the elements and conditions of a valid water right or permit.**

A copy of this email is attached hereto and labeled as Attachment “A”. This communication from Mr. Ragan to RDC is hereafter referred to as the “Determination”.

The Determination does not reflect the actual ground water recharge conducted by RDC during the 2022 calendar year. As such, the Determination impairs the rights of RDC and potentially other private recharge organizations to receive credit from the Department for ground water recharge. Not only does this determination incorrectly state the material facts, it misapplies

the provisions of law governing the appropriation and beneficial use of water in Idaho and the statutory authorities of the Department. RDC maintains that it properly measured and put the water present in the GBC to an authorized beneficial use in accordance with provisions of the Permit, and the Department, therefore, committed error by not recognizing and acknowledging the recharge performed by RDC during the calendar year of 2022.

II. Petition Requesting Initiation of a Contested Case

Pursuant to IDAPA 37.01.01, RDC requests the Director initiate a contested case for the above-captioned matter and issue an order deciding the issues identified in section V of this Petition. This Petition requests the designation of a contested case and a hearing in order to fully preserve its rights in this matter.

RDC is interested in having the matter resolved in the most expeditious manner available. In that regard, the Director has discretion under the Department's Rules of Procedures to begin consideration of the matter with either formal or informal proceedings. *See e.g.*, IDAPA 37.01.01.100. Therefore, RDC respectfully requests that informal proceedings be used first to resolve the issues presented in this contested case.

III. Request for Hearing

Pursuant to Idaho Code § 42-1701A(3), RDC also requests a hearing to contest the Determination made on October 31, 2023. As set forth above, the Determination prohibited RDC from receiving credit from the Department for ground water recharge performed pursuant to the Permit during calendar year 2022. RDC has been aggrieved by the action of Department, and RDC has not previously been afforded an opportunity for a hearing on the matter. As such, RDC is entitled to present evidence and legal argument to the Director in opposition to the determination

regarding water right permit no. 37-23059. Therefore, RDC respectfully requests a hearing be set by the Director to address the issues in this matter.

**IV.
Request for Order Authorizing Discovery**

Pursuant to IDAPA 37.01.01.520-21, RDC requests an order authorizing discovery in this matter. There is certain information held by third parties that is material to deciding the issues presented in this matter and critical for RDC's opposition to the Determination. Therefore, RDC respectfully requests an order authorizing discovery in this matter.

**V.
Issues for Hearing**

RDC has identified the following issues for the hearing.

- a) Whether the Determination was based upon substantial and competent evidence.
- b) Whether the Determination was based upon the applicable law, including, but not limited to, laws governing the appropriation and beneficial use of water in Idaho and the statutory authorities of the Department.
- c) Whether the diversion of flow from the Little Wood River into the GBC during calendar year 2022 was authorized.
- d) Whether the Department and its Director have statutory authority to negate or refuse to recognize the beneficial use for water placed in the canal.
- e) Whether the recharge conducted by RDC on the GBC was authorized.
- f) Whether RDC properly put water present in the GBC to an authorized beneficial use in accordance with provisions of the Permit.

- g) Whether RDC's beneficial use of the water was in accordance with the prior appropriation doctrine.
- h) Whether the Department has authority to invalidate water recharged to the aquifer regardless of how the water was diverted into the GBC.

RDC reserves the right to identify additional issues as they may be revealed through the course of these proceedings.

**VI.
CONCLUSION**

For the reasons set forth above, RDC respectfully requests the Director initiate a contested case for this matter (preferably informal proceedings) and/or schedule a hearing for the matter. RDC also requests the Director issue an order authorizing discovery in this matter.

Respectfully submitted this the 15th day of November 2023.

DATED: November 15, 2023

OLSEN TAGGART PLLC

/s/ Skyler C. Johns

SKYLER C. JOHNS

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November 2023, I served the foregoing document on the persons below via email as indicated:

Matthew Weaver, Director
Garrick Baxter, Deputy Attorney General
IDAHO DEPT. OF WATER RESOURCES
P.O. Box 83720
Boise, Idaho 83720-0098
file@idwr.idaho.gov
matthew.weaver@idwr.idaho.gov
garrick.baxter@idwr.idaho.gov

/s/ Michelle J. Castro
Michelle J. Castro

From: Ragan, Brian <Brian.Ragan@idwr.idaho.gov>

Sent: Tuesday, October 31, 2023 1:58 PM

To: Dave Tuthill <dave@idahowaterengineering.com>

Cc: keithesplinh2o@gmail.com; tj@racineolson.com; Jaxon Higgs <jaxon@waterwellconsultants.com>; ernie@idahowaterengineering.com; Hal Anderson <hal@idahowaterengineering.com>; Larry Bybee <lbybee@goodingidaho.org>; Sunny Healey (watermanager@wd37.org) <watermanager@wd37.org>; Jim Brock <jjim@idahowaterengineering.com>; PEP Farms <pepfarmsprimo@gmail.com>; Phil Rassier <pjem76@msn.com>; Kent Foster <kwf1941@gmail.com>; Ken Neely <knneely@gmail.com>

Subject: RE: Idaho Ground Water Appropriator's 2022 Progress Report to Surface Water Coalition Steering Committee

Dave,

The Department was asked by the Recharge Development Corporation (“RDC”) to re-evaluate its original determination of a portion of the total volume of water recharged under water permit 37-23059 during calendar year 2022. The initial evaluation was conducted by the Department between April and July 1, 2023, as part of its review of the Idaho Ground Water Appropriator’s (“IGWA”) 2022 Annual Progress report submitted to the Surface Water Coalition. Water permit 37-23059 is owned by the City of Gooding and authorizes the diversion of water from the Little Wood River for the purpose of aquifer recharge at the Gooding Bypass Channel (“GBC”). The volume of recharge water subject to re-evaluation is 6,802 acre feet and is described as that portion remaining after deducting the allowable recharge volume credited to the City of Gooding. This recharge volume to be re-evaluated, labeled as “Recharge Credit for RDC”, is reported as entry 1.3 of IGWA’s 2022 Recharge Report spreadsheet and in pages 23 through 35 of their supplemental recharge PDF document. This volume of 6,802 acre feet was assigned to the Aberdeen-American Falls Ground Water District in the 2022 IGWA report.

On June 7, 2023, the Department originally determined the volume of water recharged as “Recharge Credit for RDC” to be 117.7 acre feet in 2022. The Department used GBC inflow data collected by Water District 37 at station 85 and GBC outflow data collected by RDC to calculate at this volume. On September 11, 2023, RDC submitted supplemental information describing the measuring devices and data collection hardware installed at the GBC inflow and outflow locations. RDC installed these measuring devices and operates them to collect data more frequently (15-minute intervals) than data collected by Water District 37 (multi-day intervals). The Department found it reasonable during this re-evaluation to use the GBC inflow and outflow measurement data collected by RDC after considering the supplemental information from September 11. **The Department’s re-evaluation yields an updated volume of 573 acre feet of water recharged and attributable to the “Recharge credit for RDC” for 2022.** This updated volume is the cumulative sum contained in the 2022 IGWA report of the “Recharge Credit for RDC” volumes on those days during 2022 on which permit 37-23059 was in priority and the conditions of the permit were met.

The second topic to discuss is the request from RDC that the Department recognize or acknowledge recharge that may have occurred between October 31, 2022, and February 15, 2023, when all flow from the Little Wood River was diverted into the Gooding Bypass Channel to allow for bridge and trestle repairs downstream. **The Department has determined the diversion of all flow from the Little Wood River into the Gooding Bypass Channel during this timeframe occurred without authorization. The Department cannot recognize or acknowledge the use of water that is not authorized or in conformance with the elements and conditions of a valid water right or permit.**

Regards,
Brian Ragan
IDWR Water Distribution Section
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ATTACHMENT A
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